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"Is" and "Ought" in Legal Philosophy

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DISCUSSION

'IS' AND 'OUGHT' IN LEGAL PHILOSOPHY

Legal philosophers also worry over the distinction between 'is' and 'ought'. Two "is-ought" issues currently prominent in legal philosophy are (1) whether legal rules belong to the "is" category or to the "ought" category, and (2) whether it is possible to distinguish between 'the law as it is' and 'the law as it ought to be'. The latter is an issue which some legal philosophers have recently debated in terms of several allegedly interchangeable dichotomies, e.g. 'law and morals', 'positive law and natural law', 'fact and value', 'description and evaluation', 'order and good order', and 'is and ought'.[1] Of course, these dichotomies are not really interchangeable. For example, there are both moral and non-moral uses of 'ought'. Throughout the ensuing discussion, I have chosen to focus on 'is and ought', and have addressed myself to the question whether 'the law as it is' and 'the law as it ought to be' are distinguishable.

To many, it may seem very odd that anyone should deny that 'the law as it is' can always be distinguished from 'the law as it ought to be'. Yet some legal philosophers, including Professor Lon Fuller of the Harvard Law School, have recently argued that, in some contexts, the distinction simply cannot be drawn. Although here I will not discuss in general what it would be like for the 'is' and the 'ought' to be distinguishable, I will state and try to refute several specific arguments that have been advanced to establish the indistinguishability of 'the law as it is' from 'the law as it ought to be'. The term 'law' in the foregoing quoted phrase might mean either 'legal system' or 'legal rule'. I shall consider both possibilities.

"There is a legal system in X." Disagreement over criteria for the use of 'legal system' is common, and I do not propose to define this notion. But most would agree that a municipal legal system consists in part of rules for controlling human behaviour. Thus, if someone were to say "There is a legal system in Bodia", we would normally understand him to be referring to a functioning system of rules, and we would expect to find in Bodia rules of social control of prospective operation that are intelligible and either known to the citizenry or available to them. We would also normally expect to find a scheme of sanctions for non-compliance. These features would not be all of the characteristic features of a legal system, but we need not enumerate the rest. If a person, A, were to accept such features

[1]See especial → L. L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart", *Harvard Law Review*, 71 (1958), pp. 630-672.

as some of the criteria for use of ' legal system ', and if, on a particular occasion, A were to say " There is a legal system in Bodia ", would not A be thereby implicitly acknowledging that what he has referred to as the legal system of Bodia is what it ought to be at least in the sense that it is to some extent serving its purpose, i.e. the control of human behaviour ? And would not this show that Bodia's legal system, " as it is ", is in this respect indistinguishable from " what it ought to be " ?[2]

A's assertion that Bodia has a legal system does imply that what he has called the legal system of Bodia is what it ought to be at least in the sense that it is to some extent serving its purpose, i.e. controlling human behaviour. But this is only to take note of a tautology, for to say that a system of rules for controlling behaviour *exists* is to say, in part, that this system is functioning to some extent as it *ought* to function if it is to serve its purpose, i.e. social control.[3] Moreover, it still remains possible to separate what, for lack of a more concise expression, might be called " is " and " ought " components of the " is " judgment that there is a legal system in Bodia. Thus, we may distinguish between : (1) the judgment that in Bodia there *is* a body of rules functioning in various ways, and (2) the judgment that in view of the purposes for which these rules exist, they are functioning as they *ought* to function. It may be, however, that we cannot readily specify precisely when we should say : " This system of rules is functioning so ineffectively that it should not be called a legal system " instead of, simply, " This legal system is not functioning effectively ". The difficulty here is common to the application of many general concepts. When is a stove simply not a stove rather than a malfunctioning one ? This difficulty should not, however, be thought of as standing in the way of a clear distinction between ' is ' and ' ought ' in particular cases.[4] Uncertainty with respect to where a line is to be drawn should not be confused with unclarity of that line *as drawn*. Moreover, in other contexts we do not hesitate to apply or withhold general terms because we are not certain precisely where the line should be drawn : we sometimes call men " tall " without being sure just how many inches constitute tallness, and we call men " bald " without being sure just how few hairs one must have to be bald. Why should we vary our practice where the term is ' law ' ?

Suppose it is said that a legal system cannot exist unless the " constitutional " rules for identifying the rules of the legal system are accepted by the vast majority of the citizenry. Assume further, that it is urged (1) that such acceptance can be forthcoming only if the constitutional rules are morally as they ought to be, and (2) that from this it follows that when A says " There is a legal system in Bodia ", A implicitly acknowledges that some part (the constitutional rules) of what A has referred to as the legal

[2]A version of this argument has recently been advanced by Fuller. *Ib.* at 644.

[3]E. Nagel, " Fact, Value, and Human Purpose ", *Natural Law Forum* 4 (1959), pp. 30-31.

[4]Fuller has argued that it does. *Supra*, n. 2.

system of Bodia is as it ought to be.[5] Again, this would not establish the indistinguishability of the existing legal system of Bodia from what it ought to be. First, I should point out that it is simply not true that public acceptance of the rules for identifying the rules of the system can be forthcoming only if those rules are somehow morally what they ought to be. Acceptance of such rules may be based on other factors such as fear of force, "calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do".[6] But secondly, even if it be conceded that such acceptance could only be based on the fact that such rules are morally what they ought to be, this would only mean that the "moral oughtness" of these rules is part of the definition of 'legal system' so that it becomes tautologous to say: "There is a legal system in Bodia having rules for identifying its rules that are morally as they ought to be". Moreover, it would still be possible to separate "is" from "ought" (in this limited sense of 'ought') conditions for use of the phrase 'There is a legal system in X'. Among the "is" conditions would be the existence of a system of rules of control and the fact of public acceptance of rules for identifying the rules of this system; among the "ought" conditions would be the judgment that such rules are morally what they ought to be.

Even if one or more of the foregoing arguments did establish some way or ways in which the legal system "as it is" could not be distinguished from the legal system "as it ought to be", it would still be open to me to distinguish between the law as it is and the law as it ought to be in other obvious ways. For example, I might say that although there *is* a system of law in Bodia, this system is not administered as it *ought* to be: the rules are unfairly or inconsistently applied.

"Y is a legal rule." When this phrase is ordinarily used, and used correctly, at least the following conditions are normally present: (1) a legal system is in operation, and (2) the rule referred to complies with authoritative criteria (or rules) for identifying the rules of the system. Now, if A says: "Y is a legal rule", does not A implicitly acknowledge that Y is a functioning rule? And does not this show that Y, as a functioning rule, cannot be distinguished from what it ought to be, i.e. a functioning legal rule? No. Accepted criteria for identifying legal rules in modern legal systems do not (though they could) include a requirement that the rule be functioning or enforced. In fact, the officials of a modern legal system might not be enforcing Y at all, or the citizenry might be disregarding it, but this would not make Y any the less a rule of law. True, A's statement 'Y is a legal rule' does implicitly commit A to the view that rule Y conforms to criteria to which it must conform if it is to be a legal rule. But this only shows that to say that Y is a legal rule is to say that Y is a rule that

[5]Of this, Fuller says: "Here, then, we must confess there is something that can be called a 'merger' of law and morality . . .". *Supra*, n. 1 at 639.

[6]H. L. A. Hart, *The Concept of Law* (1959), p. 198.

conforms to applicable criteria of legal validity, which is at best tautologous and trivial.

Assume that Y is a statutory rule. Many informed lawyers interpret statutes in light of their purpose. To illustrate : assume that a statute provides that an acceptance by mail of an offer to contract is effective upon mailing. P sends D an offer of wheat seed by mail and D accepts by mail, but shortly after depositing the letter of acceptance in the letter-box, D learns of another offer at a lower price, and accepts it. He then wires P that he does not accept P's offer, and this wire arrives before P receives D's letter of acceptance. When P does receive D's letter, he concludes that by the literal terms of the statute, his offer was validly accepted and a contract was then formed. However, P also asks a lawyer to advise him whether he has a contract with D. P might be told that the purpose of the statute is to protect the accepting party in a case in which he justifiably relies on what he thinks to be a contract at the time of mailing ; accordingly, the statute does not apply, for D did not rely. This advice would be based on what is sometimes called a " purposive " interpretation of rule Y. Does such interpretation somehow establish the indistinguishability of rule Y " as it is " from rule Y " as it ought to be " ? One might argue that to say what rule Y is, is in part to say what rule Y means, and in saying what rule Y means, one must say what rule Y ought to mean (in view of its purpose) ; hence, rule Y and what rule Y ought to be are in this sense indistinguishable.[7] But even if purposive interpretation be adopted, it is still open to me to distinguish between rule Y interpreted literally and rule Y as it ought to be interpreted in light of its purpose. Secondly, to say that rule Y is what it ought to be (as purposively interpreted) is to use the distinction between ' is ' and ' ought ', not to refute it.[8]

Assume that Y is a rule of case law : a court has just decided a novel case and applied Y in so doing. Assume also that the court's decision was based on an insufficient understanding of the facts, and that informed lawyers believe that when the case is re-argued on rehearing, the court, being a good court, will probably change its mind. With respect to the facts of the case, what is the law as of the time before the rehearing ? (Lawyers must often say what the law is in advance of an authoritative pronouncement.) If A says the law is not rule Y, but rule Z, the rule that the court is likely to apply on rehearing, and if A says that the court is likely to apply rule Z because, in view of the facts, Z is the only rule that ought to be applied, has A conceded that ' is ' and ' ought ' are here indistinguishable since the rule that is law, in A's judgment, is the rule that ought to be law ? No, again A is using the distinction rather than refusing to recognize it or blurring it. It is also a well-known fact that judgments as to what would be a good rule of law frequently *influence* not only predictions of what the rule of

[7]For a version of this argument, see *supra*, n. 1, at 661 *et. seq.*

[8]For other criticisms of this argument, see Nakhnikian, " Professor Fuller on Legal Rules and Purpose ", *Wayne L. Rev.* 2 (1956), p. 200.

law is, but also influence judicial formulations of the rule. Such judgments also play an important rôle in the *application* of legal rules.[9]

Assume that rule Y has a counterpart in Christian morality and that in Bodia Christian morality prevails. If A correctly identifies Y as a rule of law in Bodia, does A implicitly acknowledge that Y is what it ought to be because of its conformity to Christian morality, and if so, does this establish the indistinguishability of 'is' and 'ought'? Not at all. A may not accept Christian morality; moreover, even if A did accept Christian morality, for A to say that Y is a legal rule and to say that it is what it ought to be because it embodies Christian morality, again, would be to use and therefore to recognize rather than to refute the distinction.

But even if one or more of the foregoing arguments did establish some way or ways in which a legal rule, "as it is", could not be distinguished from what it ought to be, it would still be open to me to distinguish sharply between the 'is' and the 'ought' in other obvious ways. Thus, for example, I might say the legal rule is not well drafted and *ought* therefore to be redrafted. Or I might say the rule is not substantively sound and therefore *ought* to be repealed.

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[9]See L. Bagolini, "Value Judgments in Ethics and in Law", *The Philosophical Quarterly* 1 (1951), p. 431.