

LAW, MORALS, AND DEFEASIBILITY

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Summary

This paper gives a logical characterisation of the interrelation between law and morals. To this purpose it first outlines a logic for defeasible reasoning with rules and principles and illustrates the operation of this logic in the field of law. Then it offers a brief argument why law and morals are interrelated. The paper ends by showing how the logic for defeasible reasoning provides tools to logically characterise some aspects of the interrelation between law and morals.

1. Introduction

There are many interconnections between the law and morals. At many places, the law refers directly or indirectly to moral norms, while the contents of the law are often taken into account in the determination of what ought morally to be done. Given the historical debate between legal positivists and natural law theorists, it is a bit hazardous to re-open the discussion about the precise relationship between law and morals. Our aims are more modest. We simply assume that sometimes moral considerations play a role in legal reasoning and we attempt to give a logical analysis of two related ways in which moral considerations enter the legal picture, namely weighing of reasons based on principles and making exceptions to rules. These two ways are closely connected with an important characteristic of legal reasoning, namely its defeasibility.

Our paper is structured as follows. In the sections 2 and 3, we give a logical characterisation of two major elements of the law, that is legal principles and legal rules. In section 4, we focus on one aspect of rules and principles, namely the defeasibility of arguments based on their application. We also introduce a simple formalism that may clarify our discussion. In section 5 we briefly discuss practical reason and its relations to personal morality and the law. This discussion provides also grounds why the law and personal morality are interconnected. In section 6 we extend our logical framework a little to give logical characterisations of the interconnections between, practical reason, personal morality and the law.

2. Principles and contributing reasons

In this paper we will distinguish between rules and principles in a way that is closely related to the opinions of both Dworkin (1978) and Alexy (1979, 1985, this volume). In our view, rules apply in an all-or-nothing fashion, in the sense that if a rule is applied to a case, the conclusion of the rule gives the legal consequence for the case. Principles, on the contrary, only generate reasons that plead for actions that contribute as much as possible to goal states. Principles have a dimension of weight and reasons based on principles need to be weighed against reasons based on colliding principles, if there are any.

In this section we address the logic of principles and of contributing reasons. In the next section, rules and decisive reasons are given a similar treatment.

2.1. Contributing and decisive reasons

The notion of a reason is ambiguous in several senses. It is possible to distinguish between reasons why something is the case, that is *constitutive reasons*, reasons to *believe*, and reasons for *action*. For instance, the fact that Bill Gates owns so many billion dollars is the constitutive reason why he *is* the richest person in the world. The fact that X read in the newspaper that Bill Gates owns so many dollars is a reason for X *to believe* that Bill Gates is the richest

person in the world. The fact that Bill Gates is the richest person in the world is a reason for Y *to admire* or *hate* him.

One can also distinguish between *abstract reasons* and *concrete reasons*. In general it holds that being a murderer is a reason for being punishable. Being a murderer is an abstract reason; it does not concern a particular case of being a murderer, but is rather an abstract characteristic. It is not necessary that there are actual murderers to make being a murderer an abstract reason for being punishable. If we say that being a murderer is a reason for being punishable, we express the principle that murderers should be punished in different words.

If we say that the fact that John is a murderer is the reason why John should be punished, we are dealing with a concrete reason. Concrete reasons are (sets of) facts that actually obtain and that are relevant for the presence of some other fact. They are instantiations of abstract reasons. Only facts that actually obtain can be concrete reasons. It makes no sense to say that the fact that John is a murderer is the reason why John should be punished and at the same time deny that John is a murderer. In this paper we discuss reasons in the sense of concrete reasons.

A third distinction is between *contributing reasons* and *decisive reasons*. Decisive reasons determine their conclusions. If a decisive reason for a conclusion obtains, the conclusion must also obtain. For instance the facts that there are two horses and four cows and no other animals are together a decisive reason why there are six animals. This is purely a matter of mathematics, and it makes no sense to argue, on whatever grounds, that there are also reasons why there are not six animals. In general it makes no sense to weigh decisive reasons against other reasons, because colliding decisive reasons would make the facts inconsistent. If there are colliding contributing reasons, the decisive reason wins by definition, so there is no need for weighing.

Contributing reasons, on the contrary, do not determine their consequences by themselves. There can be contributing reasons that plead for and a against a particular conclusion. It is the set of *all* contributing reasons concerning a particular conclusion, both the reasons pro and con, that determines whether the conclusion holds. For instance, if somebody breaks the window of somebody else's house in order to save a child from the house that is burning, the question whether this behaviour is lawful depends on the relative weight of two contributing reasons. One reason is that the behaviour was an infringement of somebody else's property. This reason pleads *against* the lawfulness of the behaviour. The other reason is that the act was necessary to save a human life. This reason pleads *for* the lawfulness of the behaviour. Only on the balance of these reasons it can be determined whether the behaviour was lawful.

To avoid possible misunderstandings we must make two remarks. First, when we say that the lawfulness of the behaviour depends on the balance of the reasons, we do *not* mean to say that there is a common scale on which the reasons can be balanced. Balancing reasons can be a rational process, but often this is not the case. However, even when a judge cuts the knot and says that the behaviour was lawful without being able to provide additional reasons, we can say that for this judge the reasons for lawfulness apparently outweighed the reasons against lawfulness.

Second, it may be tempting to call contributing reasons *prima facie reasons* because they merely indicate the direction of the conclusion. We want to stress, however, that contributing reasons are real reasons, and not merely reasons at first sight. The conclusion of a contributing reason only follows *prima facie* from the presence of this reason. But this does not mean that the facts are only a *prima facie* reason. They are a full contributive reason, from which the conclusion only follows *prima facie*.

2.2. Principles

The most common form of principles is that of goals, or - in the terminology made famous by Robert Alexy (1979, 1985, this volume) - '*Optimierungsgebote*'. A goal is a state of affairs that is considered to be favourable. Often it can be realised in varying degrees, as is illustrated by the goal that there is no pollution. If this goal exists in a legal system, the fact that a measure contributes to it is a reason why this measure should be taken. Conversely, if a measure detracts from the goal, this is a reason why this measure should be avoided. The more a measure contributes to a goal, or the more important the goal, the stronger the reason. It should be noted that goals occur in legal systems under different names, such as 'principle', '(human) right', '(legally protected) interest', 'value', etc...

To understand how principles operate from a logical point of view, one can reconstruct them as having a condition part and a conclusion part. The condition part is then that some measure contributes to a desirable state, and the conclusion is that this measure should be taken. The negative counterpart is that if some measure detracts from this state, it should be avoided. Goals can also be negative, in the sense that some states are to be avoided. In that case measures that contribute to such a negative goal are to be avoided and measures that detract from it are to be taken.

For instance, a principle of a democratic state might be to have freedom of the press. This right of press freedom implies that measures that contribute to it are to be taken, and that measures that detract from it are to be avoided. A 'negative' principle is the principle that pollution is to be avoided. This principle can be reconstructed as the conditional that if some measure causes pollution, it is to be avoided, and if a measure diminishes pollution, it is to be taken.

The facts that satisfy the condition of such a principle are a contributing reason for the conclusion of this principle. As an example, we use the principle that there should be no pollution. Formalised as a conditional it runs that if some measure causes pollution, it is to be avoided. If in some case a measure, say granting a license for polluting industry, contributes to the amount of pollution, this is normally a contributing reason why the license should not be given. It does not generate a decisive reason. It is possible that there are reasons for granting the license, for instance economic ones, that outweigh the reason based on this principle to avoid pollution. Such conflicting reasons are not exceptions to the principle. The principle that pollution is to be avoided still generates a reason against granting the license, but this reason may be outweighed by other reasons.

It is, however, possible that there is an *exception* to the principle. If an exception against the principle occurs, the principle does not even generate a reason anymore. Then the principle is not applied, even though its conditions are satisfied. Exceptions to principles are less frequent than exceptions to rules. The most important, maybe even the only, kind of exception is that the same case is covered by a rule. If a rule applies in a case, it determines the consequences of the case. There is no need to balance contributing reasons, and principles therefore become irrelevant. However, we will argue in section 3 that a principle may generate a reason to make an exception to a rule. When this happens, the principle can still play a role.

3. Rules and decisive reasons

3.1. Why rules?

In their purest form, principles are one-sided in that they refer to only one aspect of the case to which they apply. For instance, the principle that one should not hold political prisoners generates a reason to release the leader of some secession movement. It does not take into account that this leader may cause much social upheaval, the prevention of which (another goal) may

provide a reason to keep this leader imprisoned. Both goals, the avoidance of political prisoners and the avoidance of social upheaval are one-sided in that they only refer to one side of the case. They generate colliding reasons, corresponding to different sides of the same case. In order to give a balanced judgement on the case as a whole, the contributing reasons generated by the different goals must be balanced.

Reasoning with principles leaves a lot of uncertainty, because of at least two grounds. The first ground is that if there are colliding reasons, it will often be unclear how these reasons are to be balanced. For sure, most persons will be able to cut the knot if necessary, but often it is hard to predict in advance how the relative weight of reasons for and against a conclusion will be.

The second ground is that it is often unclear what precisely are the reasons pleading for and against a conclusion in a particular case. Contributing reasons are based on principles, but it is equally well possible to argue that a principle exists because some facts are recognised as reasons, than the other way round. For instance, one may agree that if two persons do the same work, this is a contributing reason why their employer should pay these persons the same salary. If one recognises this reason, one will presumably also accept the principle that an employer should pay the same money for the same work. It is, however, more probably that one accepts this principle because one recognises the reason as a good one, than that one recognises the reason because one accepted the principle. In general it holds that people often agree about which facts are good reasons, without being able to enumerate the principles that would underlie these reasons. It is often in concrete cases that one finds out which principles one is willing to accept and which facts one recognises as good reasons.

So, next to unclarity about the relative weight of reasons, unclarity about which facts count as reasons is the second ground why reasoning with contributing reasons and principles leaves a lot of uncertainty. Since it is one of the purposes of the law to create clarity about what people may expect from each other, these sources of unclarity make that the building of the law should better not be erected on principles alone. In the law it must, at least usually, be clear which facts of a case are relevant for its legal consequences, and what is the relative weight of these factors. One of the functions of legal rules is to provide this clarity.

Legal rules attach legal consequences to cases of a particular type as specified in the rule conditions. By specifying to which case types legal consequences are to be attached, the law-giver implicitly decides which facts are relevant and how the reasons which these facts provide are to be balanced. By making this decision, the law-giver claims to have spoken the final word about the regulated types of cases. In principle, it is not possible anymore to identify other reasons in cases regulated by rules, or to give the reasons in these cases other relative weights.

3.2. Rules as decisive reasons

The different logical roles of rules and principles can be accounted for by assuming that rules *exclude* the application of principles, rather than by saying that rules *outweigh* principles¹. If the application of a rule excludes the application of a principle, there is no need for weighing anymore, because the principle does not generate a reason in this particular case. In other words, if the facts of a case satisfy the conditions of a rule, so that this rule is *applicable* to this case, an exception is raised to all principles that might identify facts of the case as reasons. Cases that have applicable rules are in principle not judged on the basis of principles.

Another way to approach the same issue is to state that legal rules generate *decisive reasons*. The facts of a case that make a rule applicable form, if the rule is applied, a decisive rea-

¹ See Raz 1975, Schauer 1991, and Hage 1997.

son for the rule's conclusion. Such a decisive reason needs not to be balanced against other reasons anymore.

The concept of *applicability* requires a brief comment. Trivially, a rule is applicable to cases indicated by its content. For example, the rule "whoever kills a person should be condemned to life in prison" is applicable to all cases in which someone killed a person. But applicability of a rule is also affected by less trivial factors, such as the scope of the legal order in time and space. Thus, the rule "whoever kills a person should be condemned to life in prison" may belong to the legal system of Urbania and then it is not applicable to killers who do not fall under Urbania's jurisdiction. The law of Banania can include another rule, instead, for example "whoever kills a person should be condemned to death".

Exceptions to the rule exclude its application. If there is an exception to a rule in a concrete case, the rule is not applied to that case. There may even be exceptions concerning a class of cases. For instance, the rule of Banania is not to be applied to mentally ill killers. In a plausible terminology, one may say that if there is an exception, the rule is not applied even if it is applicable. We do not present here any profound theory to justify this terminology.

The theory that rules generate decisive reasons implies that two rules with inconsistent conclusions cannot both apply. Take for instance the rules that murderers should be punished and that minors should not be punished. In case of a murderer who is also a minor, these two rules might generate decisive reasons both for the conclusion that the murderer should be punished and that he is not. Because decisive reasons guarantee the truth of their conclusions, and because somebody cannot both be punishable and not punishable, at least one of the decisive reasons cannot obtain, and therefore at least one of the two rules cannot apply. If two rules with logically incompatible conclusions are applicable in the sense that their conditions are satisfied, there must be an exception to at least one of them.

Another reason to make an exception is when there are other reasons not to apply the rule, which outweigh the applicability of the rule as a reason for application. What could such reasons be? Let us consider an example. To prevent tramps from disturbing the peaceful order of a railway station, a regulation is made that forbids people to sleep at the station. Should this regulation be applied to a person who, waiting on a retarded train, dozes away for a brief while? Presumably the railway lawgiver did not have this kind of situation in mind when he drafted this (too) broadly formulated rule. Maybe he balanced the goal to have peaceful order against the needs of tramps to have a warm place to sleep, and decided that the first interest outweighed the second. Had he thought of train passengers, he would presumably have made an exception for them. Should the rule be applied to cases to which it was presumably not meant to apply?

The question is maybe more complex than it seems at first sight. It might seem that a rule should not be applied to cases for which it was not meant. So an exception should be made to the rule in those cases in which it would lead to unwanted results.² However, if one allows this line of argument, one opens the way for everyone who wants a rule not to be applied to argue that it was not the intention of the lawgiver that the rule should be applied in cases like his. As a consequence, the sources of unclarity which the rule was to clear away, pop up again. This may be a greater loss than application of the rule to cases to which it was not meant to be applied. Therefore, if a rule is applicable to a case, the principle of legal security (legal certainty, *Rechtssicherheit*) provides a reason for applying the rule next to the rule's applicability itself. These two reasons have to be weighed against the reasons not to apply the rule, and the outcome of this weighing determines whether the rule should be applied and its legal consequence takes effect.

² We do not consider the possibility that the rule is interpreted in such a way that it is not applicable.

It turns out that there is also a balancing of reasons for and against application of a rule. If the outcome of this balancing is that the rule must be applied, then the conclusion of the rule follows indefeasibly. However, if the outcome is that the rule ought not to be applied, an exception to the rule is raised, with the effect that its conclusion does not follow.

Let us now consider the general question which facts may be reasons against the application of an applicable rule. The answer can be found by reconsidering why the application of a rule sets aside all contributing reasons. This happens because it is assumed that all relevant facts of the cases to which the rule is applicable have duly been accounted for in the rule conditions. If this assumption is correct, there is no need for having the principles and contributing reasons next to the rule that replaces them. *A contrario*, if this assumption is incorrect, if some relevant factor has not duly been taken into account, the presence of this factor may be a reason not to apply the rule. As a contributing reason it must still be weighed against the applicability of the rule and legal security as reasons for application, but in theory it may outweigh these reasons and make that there is an exception to the rule.

3.3. Legal rules in theory and in reality

In the above sections we made the following observations about rules and principles:

1. A rule is applicable if its conditions are satisfied. If a rule is applicable, this is a contributive reason to apply it.
2. There can also be reasons not to apply a rule. These reasons can be decisive or contributive. A decisive reason not to apply a rule is when another rule with an incompatible conclusion is applied. A contributive reason not to apply a rule is when application would be against the purpose of the rule.
3. A contributive reason not to apply a rule must be weighed against the rule's applicability is a reason to apply it.
4. If a rule is applicable, but it is nevertheless not applied, either because of contributive or decisive reasons not to apply it, we say that there is an exception to the rule.
5. If a rule is applied it generates a decisive reason for its conclusion. So, application of a rule leads always to the rule's conclusion.
6. If the conditions of a principle are satisfied, it generates a contributive reason for its conclusion, unless there is an exception to the principle.
7. (Almost) the only exception to a principle is that there is a rule which covers the case. However, under exceptional circumstances, the applicability of the principle may be a contributive reason not to apply an applicable rule. If the rule is not applied then, it does not block the operation of the principle.

It should be emphasised, however, that these observations merely sum up the logical possibilities. They do not give directives about what should be done in legal practice. Moreover, the logical distinction between rules and principles does not answer the question whether some rule-like entity in the law is a rule or a principle. The basic idea behind the distinction is that rules have explicitly been made by some legal authority, and that they summarise and replace the reasons that inspired them. This idea is linked to that of legal security and the image of a law-giver who makes rules and the courts that merely apply them. This picture is, however, an idealisation, since application of legal rules in some cases involves a kind of law-making through interpretation. Moreover, legal security may play a role in case of principles, too. But principles have also a significant substantive weight, independent from authority of the law-giver, whereas rules derive their weight typically from authority.

In the real world, the use of legal provisions varies. In most cases, legal provisions are applied if their conditions are satisfied and they generate decisive reasons. With hindsight, such

cases may be called 'easy' ones. Sometimes, however, there are major objections against treating legal provisions as 'hard' rules. Then one is prepared to make an exception. Such cases are with hindsight called 'hard' ones.³ In hard cases, almost all legal provisions can be defeated on the basis of weighing contributive reasons for and against their application (Peczenik 1989). Then the logical behaviour of legal provisions resembles more that of principles than that of rules.

The distinction between the two readings of legal provisions is complicated by two circumstances: First, the relevant factors change in time. The lawyers must thus solve cases about which the law-maker did not think. For that reason, legal provisions that originally almost always were read as rules may increasingly be read as principles. Second, the authority of the law-making agency is not absolute. In some cases, let it be rare ones, a lawyer may have a reason to treat the case in question as hard in spite of the fact that the law-making agency already did consider this kind of cases when making the rule.

4. Defeasibility

In the previous two sections we discussed legal principles and legal rules, and the contributing reasons and decisive reasons corresponding to them. Our treatment of these subjects there was informal. In this section we introduce a simple formalism for rules, principles and reasons that we can use in the rest of this paper.⁴

4.1. The logic of principles and contributing reasons

Principles are represented by means of the $\supset$ operator. This operator must be distinguished from the material implication that is represented as a single arrow: $\rightarrow$. For instance, the principle that one should avoid pollution is rendered as follows:

`contributes_to(measure, pollution)  $\supset$  0( $\sim$ measure)`

This should be read as: if a measure contributes to pollution, it ought not to be taken.

If the conditions of a principle are satisfied and there is no exception to this principle, the facts that satisfy the conditions are a contributing reason for the conclusion of the principle. So, if granting a license to a polluting industry contributes to pollution, this fact is a contributive reason why the license should not be granted:

Contributing reasons are represented by means of the predicate `Cr`:

`Cr(contributes_to(grant_license, pollution), 0( $\sim$ grant_license))`

The contributing reason described in this sentence is rather complex. The general forms of sentences in which contributing reasons are expressed are `Cr(a, b)` and `Cr(a,  $\sim$ b)`. These sentences express that a is a contributing reason for, respectively against b.

The validity of a principle is expressed by the predicate `Valid`:

`Valid(contributes_to(measure, pollution)  $\supset$  0( $\sim$ measure))`

Exceptions to a principle are expressed by means of the predicate `Exception`:

`Exception(contributes_to(grant_license, pollution)  $\supset$  0( $\sim$ grant_license))`

³ There are also hard cases resulting from interpretation problems.

⁴ The formalism is based on the formalism of Reason-based Logic (Hage 1997), but to increase readability it is simplified considerably.

The argument in which this principle about preventing pollution is applied to the case of the license is rendered as follows:

Valid(contributes_to(measure, pollution) $\supset$ 0($\sim$ measure))
 Contributes_to(grant_license, pollution)

therefore:

Cr(contributes_to(grant_license, pollution), 0($\sim$ grant_license))

Notice that this argument does not contain the premise that there is no exception to the principle, although the absence of such an exception is a condition for the application of the principle. The reason why the absence of an exception is not an additional premise is that this absence is assumed by default. If the premise that there is an exception is added to the premises, it is not possible anymore to derive that the fact that granting a license contributes to the pollution is a reason why the license should not be granted. From

Valid(contributes_to(measure, pollution) $\supset$ 0($\sim$ measure))
 Contributes_to(grant_license, pollution)
 Exception(contributes_to(grant_license, pollution) $\supset$ 0($\sim$ grant_license))

it cannot be derived anymore that

Cr($\sim$ (violated(mary, y) & criminal_law(y) & written(y)), $\sim$ punishable(mary))

This illustrates what is meant with the statement that the original argument is *defeasible*. The addition of a premise to the original argument makes that a conclusion that could validly be derived is not derivable anymore. It turns out that the possible presence of an exception to a principle causes the defeasibility of arguments based on the application of a principle. This is only one cause for the defeasibility of legal arguments. In the rest of section 4 we will encounter both another form of the same cause, and a completely different cause of defeasibility.

If there are both contributing reasons for and against a conclusion, the conclusion must be based on the balance of reasons.⁵ The weighing of contributing reasons is the second cause of defeasibility that we want to discuss. We start again with an example. Suppose that John, fifteen years old, mistreated a passer-by, and that both the principle that mistreators should be punished and the principle that minors (persons less than 16) should not be punished. Given these principles and the case at hand, we have two contributing reasons: The fact that John is a mistreator is contributing reason why John should be punished. The fact that he is a minor is a reason why he should not be punished. These reasons must be balanced to determine whether John should be punished. Let us assume in addition that John's minority outweighs his being a mistreator, so that the conclusion must be that John should not be punished.

Now let us add a little to this case. Assume that John has more often mistreated other persons, so that he is a second offender. Assume, moreover, that the principle is valid that second-offenders should be punished.⁶ Under these assumptions, there is a second contributing reason why John should be punished, namely that he is a second offender. This second reason may tip the balance, so that presently the reasons why John should be punished outweigh the reasons against his being punished.

Formally:

⁵ Instead of the balance of reasons, one might also speak of the balance of the principles underlying these reasons in the case at hand. This is merely a terminological matter.

⁶ Probably this principle is better rendered as a principle that deals with the relative weight of sets of reasons, but we leave this possibility out of consideration to avoid unnecessary logical complications.

$\{\text{minor}(\text{john})\} > \{\text{mistreator}(\text{john})\}$
 $\{\text{mistreator}(\text{john}), \text{second_offender}(\text{john})\} > \{\text{minor}(\text{john})\}$

After these facts have been added, the conclusion concerning John's punishability must change. The new conclusion is that John should be punished. This illustrates the second version of *defeasibility*, namely that new facts may bring about new contributing reasons which tip the balance of reasons.

Let us treat the balancing of contributing reasons more in general. Suppose, for example, that we have two contributing reasons, a and b , which plead for the conclusion z , and that we have three contributing reasons p , q , and r , which plead against z . This makes the following sentences true:

$\text{Cr}(a, z), \text{Cr}(b, z), \text{Cr}(p, \sim z), \text{Cr}(q, \sim z), \text{and } \text{Cr}(r, \sim z).$

Suppose, moreover, that the set of contributing reasons $\{a, b\}$ outweighs the set of contributing reasons $\{p, q, r\}$. This is represented as follows: $\{a, b\} > \{p, q, r\}$. Then we can conclude that z is the case.

It may be convenient to have abbreviations for the sets of all reasons that plead for and against a conclusion. Therefore we introduce the following conventions:

$\text{cr}^+(c) = \{f \mid F \ \& \ \text{Cr}(f, c) \text{ is true}\}$

($\text{cr}^+(c)$ is the set of all facts f , such that f obtains and is a contributing reason for c .)

$\text{cr}^-(c) = \{f \mid \text{Cr}(f, \sim c) \text{ is true}\}$

($\text{cr}^-(c)$ is the set of all facts f , such that f obtains and is a contributing reason against c .)

In the above example this would mean that $\text{cr}^+(z) = \{a, b\}$, and that $\text{cr}^-(z) = \{p, q, r\}$.

Given these conventions it holds that

- from
 $\text{cr}^+(c) > \text{cr}^-(c)$ (the contributing reasons for c outweigh the contributing reasons against c)
it may be derived that c .
- from
 $\text{cr}^-(c) > \text{cr}^+(c)$ (the contributing reasons against c outweigh the contributing reasons for c)
it may be derived that $\sim c$.

It is not possible to give general criteria to indicate which set of contributing reasons outweighs which other set. There are, however, two exceptions to this general impossibility. Both exceptions have to do with empty sets of reasons. The first exception is that an empty set of contributing reasons does not outweigh any other set of contributing reasons:

$\forall s1(s1 = \emptyset \rightarrow \sim \exists s2(s1 > s2))$

The second exception is that an empty set of reasons is outweighed by any non-empty set:

$\forall s1 \forall s2((s1 \neq \emptyset \ \& \ s2 = \emptyset) \rightarrow s1 > s2)$

We have seen two kinds of defeat where reasoning with principles and contributing reasons is concerned. One kind has to do with exceptions to principles, and the other with the balancing of contributing reasons based on principles. The two kinds of defeat can be combined. If a new fact causes an exception to a principle, there is one contributing reason less, and this may change the balance of reasons so that a different conclusion must be drawn.

For instance, in our example about punishing mistreators, it is possible to interpret the principle about second offenders differently, namely as a principle that makes an exception to the

the principle that minors should not be punished. Under this interpretation there remains in the extended case only one contributing reason that pleads for the punishability of John, namely that he is a mistreater. The reason against his being punished, namely that he is a minor, does not exist anymore because of the exception. Given the fact that any reason outweighs the empty set of reasons, the fact that John is a mistreater tips the 'balance' of reasons, and the conclusion is that John should be punished.

4.2. The logic of rules and decisive reasons

Rules are represented by means of the $\Rightarrow$ operator. For instance, the (fictional) rule that minors are not allowed to drink alcohol is rendered as follows⁷:

`minor(x)  $\Rightarrow$  fd(x, drink_alcohol)`

The validity of a rule is also expressed by the predicate `Valid`:

`Valid(minor(x)  $\Rightarrow$  fd(x, drink_alcohol))`

If the conditions of a rule are satisfied, the rule is applicable. So if John is a minor, this rule is applicable to John. If a rule is applicable, this is a contributing reason why this rule should be applied. This connection is formulated in the following principle:

`applicable(conditions  $\Rightarrow$  conclusion)  $\supset$  applies(conditions  $\Rightarrow$  conclusion)`

Given the validity of this principle, it is possible to derive from

`Applicable(minor(john)  $\Rightarrow$  fd(john, drink_alcohol))`

that

`Cr(applicable(minor(john) $\Rightarrow$ fd(john, drink_alcohol)),
applies(minor(john) $\Rightarrow$ fd(john, drink_alcohol)))`

If a rule applies, the facts that satisfy its conditions are a decisive reason for its conclusion:

`Applies(conditions  $\Rightarrow$  conclusion)  $\rightarrow$  Dr(conditions, conclusion)`

In our example, this would involve that

`Applies(minor(john) $\Rightarrow$ fd(john, drink_alcohol))) $\rightarrow$
Dr(minor(john), fd(john, drink_alcohol)))`

It is, however, possible that there is an exception to the rule. Exceptions to a rule are expressed by means of the predicate `Exception`:

`Exception(conditions  $\Rightarrow$  conclusion)`

If there is an exception to a rule, the rule does not apply, and even its applicability is not a contributing reason for its application anymore. In brief, exceptions are decisive reasons against the application of the rule to which they are an exception:

`Dr(exception(conditions $\Rightarrow$ conclusion),
~applies(conditions $\Rightarrow$ conclusion))`

The presence of exceptions to rules can both be due to the application of other rules, such as conflict rules (e.g. *Lex Specialis*), or be the result of the balance of reasons. Exceptions to rules are similar to exceptions to principles and they therefore cause the defeasibility of rule applying arguments. For instance, the conclusion that John is not allowed to drink alcohol must be withdrawn if there is an exception to the rule that minors are not allowed to drink al-

⁷ `fd` stands for 'forbidden to do'.

cohol. Such an exception may be based on the fact that John needs alcohol for medicinal purposes and the rule that such a fact makes an exception to the general prohibition.

5. The unity of practical reason

The formalism of the previous section is sufficiently powerful to underlie a semi-formal theory of practical reasoning. The development of such a theory is the main purpose of the following section. However, before entering into formalities, we must make a number of conceptual distinctions.

The first concept we want to introduce is that of *practical reason*. This is not the place to develop a full theory about practical reason. Instead we will explicate our assumptions. Practical reason is the facility by means of which a *person* determines what she *should* do. The two italicised words are crucial. Practical reason as we use the expression deals with the reasons that a person has for acting. On this view, it is possible that the law does not enter into one's practical reasoning. A person who is not interested in what she ought to do legally has no place for the law in her practical reason.

Moreover, practical reason deals ultimately with what a person should do, *all things considered*. The English language has a subtle distinction between what somebody *should* do and what she *ought to do*⁸. An ought has normally to do with the interaction between persons. It indicates how a person has to behave herself with respect to other persons. As a consequence, a person is not free to choose the norms that determine what she ought to do. Both norms of social morality and legal norms prescribe what one ought to do, and this is reflected in their heteronomous nature. Morally I ought not to kill other persons, whether I like it or not. Notice that this position does not involve nor deny a form of realism that holds that moral norms exist independent of human culture. Morality, at least social morality, can be a cultural phenomenon, and at the same time be heteronomous for the persons that must live with it. The same counts for the law.

Practical reason, on the contrary, is autonomous. What one *should* do is in the end fully up to the person at stake. She may be guided by her moral views, but she may also fully disregard morality. Because of its autonomous nature, practical reason is closely related to one's motivation. Hare argued that one cannot sincerely say 'I ought to do X' without at least being motivated to do X⁹. In our opinion Hare's view is correct for practical reason; it is not well possible to believe that, all things considered, one should do something, and yet not even be motivated to do the thing in question. The opposite is the case with heteronomous norms. Someone who can escape the strong arm of the law may well admit that legally she ought to pay her taxes, and nevertheless not be motivated at all to do so.

Personal morality may be seen as somehow in between practical reason and social morality. Moral norms have to do with values that concern human (or sentient being) interaction and the balance of interests. Any human society has one or more sets of moral norms that are accepted by most members of (subsets) of the society. Such sets contain norms of social morality. Norms of social morality are heteronomous and one needs not be motivated by them. (However, if a sufficiently large majority is not motivated by them, these norms do not exist as social morality.)

Most human beings, however, have a (slightly) different set of norms which they both believe to be right and moral. These norms are concerned with more or less the same objectives as social morality. The rightness implies that the person whose morality they form tends to be motivated to act in accordance with these norms. In Hartian terminology one might say that

⁸ See Williams 1985, pp. 4f.

⁹ Hare 1952, pp. 163f.

where one may take the external point of view towards the social morality of one's society, one takes by definition the internal point of view towards one's personal morality. The rightness also implies that the person whose morality they form believes to have reasons to be thus motivated.

One does not speak of personal law as one speaks of personal morality. Nevertheless a similar phenomenon as personal morality can occur with respect to the law. Somebody may internalise the legal norms of her society to such an extent that she tends to be motivated to do what these norms prescribe. This would be exceptional, however. It occurs more frequently that somebody has the general principle that he ought to act in accordance with the law. Such a person will also be motivated to act in accordance with the norms of law, but the mechanism is different. If the law is completely internalised one will act in accordance with the law because one feels motivated to act in that particular way which happens to be the legal way too. If one has the principle to obey the law, the legal norms may not motivate directly, but merely indirectly through the motivation to act in accordance with the law. Whatever the mechanism, in both cases legal reasons will provide the person who takes the internal point of view towards the law with reasons why she should act in a particular way. Legal norms play a role in the practical reasoning of the person who adopted these norms. We will call legal norms to the extent that they provide practical reasons *internal law*.

Internal law and personal morality are related in that they both provide *prima facie* answers to the central question of practical reason: What *should* I do? They even both give this answer in the form of a judgement concerning what the agent *ought* to do. And yet, since law and personal morality are different, they may give different, and even incompatible, answers to this question. It happens sometimes that the law requires something from an agent which she sincerely believes to be morally wrong. From the point of view of practical reason, this amounts to colliding reasons, one from the moral, and from the legal point of view. The outcome of this collision depends on the relative weight of these reasons, which may be determined by again other factors.

It is one function of the law to provide security; one should be able to determine what is required. From this perspective it is quite unattractive if it is clear what the law requires, but nevertheless unclear what one should do because there are colliding reasons from other points of view. To avoid this dilemma, the law employs a dual strategy. On the one hand it incorporates fragments of morality by using moral terms in its norms, for instance by imposing the duty to compensate for damages which were inflicted *unlawfully*.

On the other hand the law has the pretension that it excludes other points of view. To reuse an example of Raz (1975): If an army officer a soldier commands to appropriate a van, this is not only a reason for the soldier to appropriate the van, but also a reason to disregard all other reasons. Through the incorporation of moral considerations into the law, the number of threatening conflicts is strongly reduced. And, as a second step, the remaining conflicts are set aside by making legal reasons into exclusionary reasons. This second step is based on the assumption that legal norms are the outcome of a decision making process in which the relevant moral considerations have been taken into account. On this assumption, it is not necessary to reconsider these moral factors when the outcome of the law is clear. These factors have already been taken into account in making the law, and it would be disproportionate to count them twice by weighing them against the law. (See also section 3.2 above). Yet, exactly this is done in some hard cases. In such cases, legal practice admits exceptions in spite of the fact that the absence of exceptions had been assumed by default. (See also section 3.3 above).

Morality employs a similar strategy. In deciding what one ought to do, one should take into account that one lives in a society with a legal system. This system creates expectations that are morally relevant. Moreover, if many agents would follow their personal morality against

the law, this would undermine the legal system as a whole and would result in a lawless society. This is in general undesirable, also from the moral point of view. As a consequence, what legally ought to be done is an important consideration in determining what one should do morally.

Summarising, we find that law and personal morality can be seen as different norm systems, but are nevertheless dependent on each other because they both aim to provide the final answer to the question what should be done. The finality of such an answer depends on the compatibility of the answer from the one norm system with the answer of the other system. That is why both systems take the norms of the other system into account. As a consequence, the number of conflicts between what one should do legally and what one should do morally is strongly reduced. Nevertheless such conflicts can occur, and in that case the actor must balance her moral and her legal reasons. If this balancing of reasons ultimately is to be a rational matter, internal law or personal morality or both must both be revised in such a way that they form a coherent totality. In this paper, we do not explore this problem.¹⁰ Neither we go into the terminological discussion whether this totality deserves the name “moral”. Here, it suffices to say that collisions between internal law and personal morality are undesirable from the legal point of view.

6. A logical framework for law, morality and defeasibility

In the previous section we have presented an argument about the relation between personal morality and internal law within practical reason as the facility by means of which a person determines what she should do. In this section we elaborate these points and attempt to make them more precise by embedding them in the logical framework we gave above.

We start with an elaboration of the formalism by (re-)introducing the predicates Od and Fd . Od stands for ought to do, while Fd stands for forbidden to do. Both predicates have two parameters. The first parameter indicates which person ought (not) to do something, while the second parameter indicates what kind of action ought (not) to be done. We assume that an ought (not) can be relativised to a point of view. In that case the point of view is indicated by means of a subscript. For instance, the sentence $Od_{\text{legally}}(\text{john}, \text{drive_carefully})$ means that from the legal point of view John ought to drive carefully, while the sentence $Fd_{\text{morally}}(\text{jane}, \text{kill})$ means that from the moral point of view, Jane ought not to kill. (Forbidden to do is the same as ought not to do.)

Moreover we also introduce a predicate Sd (should do), which is very much like the predicate Od , with the difference that it deals with practical reason in general. Therefore this predicate is not subscripted. For instance, the sentence $Sd(\text{john}, \text{help_jane})$ expresses that practical reason prescribes John to help Jane.

With the help of these predicates we can characterise *personal morality* by the following principle:

$$od_{\text{morally}}(I, \text{action}) \supset sd(I, \text{action})$$

This principle is a principle of practical reason, and it says that if I (in the first person because practical reason is involved) ought, from the moral point of view, perform some action, I should do so. This principle translates moral prescriptions into directives of practical reason. If an actor uses this principle, the morality concerned is her personal morality.

Notice that this principle allows two ways in which the step from moral obligation to a practical all things considered judgement can be defeated. First there can be an exception to the principle, so that the moral ought does not even give a reason for the practical should. This

¹⁰ See Peczenik and Hage, Legal Knowledge about What?.

can occur in situations where one assumes that morality does not play a role. For Nietzsche this would be the case when love is at stake.¹¹

Second, if “should” is understood from the motivational point of view (rational or not), application of this principle only makes that the moral ought is a contributing reason for what one should do. This reason may have to be balanced against other reasons. In section 2, we gave an example of this.

If one takes the *internal point of view towards the law*, a corresponding principle holds:

$$od_{\text{legally}}(I, \text{action}) \supset sd(I, \text{action})$$

This is also a principle of practical reason and it says that if I ought, from the legal point of view, perform some action, I should do so. This principle translates legal prescriptions into directives of practical reason.

Thus far we discussed translations from limited points of view such as the legal and the moral point of view to the all encompassing practical reason. It is, however, also possible to model the mutual relations between law and morality. The following principle, for instance, which might be valid as a moral principle, incorporates the law into morality:

$$od_{\text{legally}}(\text{actor}, \text{action}) \supset od_{\text{morally}}(\text{actor}, \text{action})$$

This moral principle says that if somebody ought legally to do something, this is a contributing reason why she ought to do it morally. Again there are two possible ways of defeat. There may be an exception to this principle in which case it does not generate a reason at all, and the contributing reason based on this principle may have to be balanced against colliding reasons.

In the law, a corresponding principle may hold:

$$od_{\text{morally}}(\text{actor}, \text{action}) \supset od_{\text{legally}}(\text{actor}, \text{action})$$

This legal principle says that if somebody ought morally to do something, this is a contributing reason why she ought to do it legally. The two familiar ways of defeat apply again.

Both the moral and the legal principle indicated above can be regarded as something more profound than the contingent content of the respective systems. Are the concepts of “law” and “morality” necessarily connected with these principles? We do not pursue this problem here.

There are more ways in which morality can be incorporated in the law, however. A legal system might for instance have the principle that if the application of some rule would lead to a morally undesirable situation, this is a reason against applying this rule. Let us formalise that a situation is morally undesirable as $Ob_{\text{morally}}(\sim\text{situation})$. (From the moral point of view, the situation ought not to be the case.) Then the following sentence expresses the above mentioned principle:

$$ob(\sim\text{situation}) \supset \sim\text{applies}(\text{conditions} \Rightarrow \text{situation})$$

Informally this sentence means that if some situation ought morally not to be the case, this is a reason why a rule whose application would lead to this situation should not apply. Adoption of this principle in a legal system implies that each time that a rule is to be applied, the moral consequences of this application are normally taken into consideration. There may be exceptional cases in which this does not happen. Then there is an exception to the principle. There may also (much more often) be cases in which the principle generates a reason why a rule should not be applied, but in which this reason is outweighed by the applicability of the rule and the demands of legal security which plead for application of the rule. Adoption of this principle is, however, meant for cases in which application of a rule would lead to such unde-

¹¹ F. Nietzsche, 1886, Sprüche und Zwischenspiele 153: ‘Was aus Liebe getan wird, geschieht immer jenseits von Gut und Böse.’

sirable results that the rule should not be applied. In those cases the contributing reason against application based on the principle outweighs the applicability of the rule and the demands of legal security.

However, even in this case, it cannot be said that the law is set aside in favour of morality. This only happens in practical reason when a legal *ought* is outweighed by a moral *ought* in deciding what *should* be done. The above principle 'only' makes that a moral *ought* influences what legally *is* (not: ought to be) the case.

7. Summary

In this paper we have assumed that the law and morality are closely interconnected. By giving a logical analysis of some of the major elements of the law, that is legal principles including goals and legal rules, we illustrated the ways in which legal reasoning is defeasible. The introduction of a simple formalism made it possible to express and specify this defeasibility. Moreover, it became possible to characterise the interrelations between personal morality, internal law and practical reason by logical means.

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