The Legality of Law (2004)

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The Legality of Law

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'Philosophy is not lexicography', as Joseph Raz reminds us.[1] An explanation of the nature of law is not an explanation of the meaning (let alone a definition) of the word 'law' nor of any of its cognates. We speak of laws of nature and laws of logic. We speak of legal moves in chess and illegal operations by computer programmes. There is nothing suspect or misleading about these usages. They are not, for example, mere figures of speech. Yet we should not expect a philosopher of law to account for them. It is no objection to an explanation of the nature of law that according to it the laws of logic are not laws, or that according to it a computer programme cannot act illegally. Whereas it is an objection to an explanation of the nature of law that according to it the laws of Sweden are not laws, or that according to it the US government cannot act illegally. This shows that there are non-verbal criteria involved in settling what falls inside, and what falls outside, our enterprise as philosophers of law.

Nevertheless, some recent work in the philosophy of law has been insufficiently sensitive to ambiguities. In this paper I will briefly compare and contrast some different senses of 'law' and

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[1] Raz, 'The Problem about the Nature of Law' in his *Ethics in the Public Domain* (rev ed, Oxford 1995), 198.

'legal', all of which must be accounted for in a complete explanation of the nature of law. Because of the complex relationships among these different senses, proposals like 'law is made up of laws' and 'all laws are legal' are not as tautologous as they look. Behind their simple truths they harbour complex untruths. In getting at the complexity I will mainly be drawing on H.L.A. Hart's work. Hart showed great sensitivity to the ambiguities I have in mind, and thereby avoided many confusions. No doubt this helps to explain why he is sometimes accused, unfairly, of confusing philosophy with lexicography.

1. The genre and its artefacts

It was once thought – notably by Austin and Kelsen – that the best way to approach the question 'What is law?' is to begin with the more humble question 'What is *a* law?' Laws, it was thought, must have some properties in common with each other that distinguish them as laws even when they are taken in isolation from other laws. Thus, said Austin, a law is a command of the sovereign backed up by the threat of a sanction. No, said Kelsen, a law is a norm directing an official to exact a sanction under specified conditions. Of course, both agreed, laws relate to each other in interesting ways – notably, in adding up to legal *systems* - and to explain the nature of law one must explain not only what laws are but also these interesting ways they have of relating to each other. But already having an explanation of the nature of a law, it would be a good deal easier to explain how laws relate to each other. For Austin, a legal system is that set of laws issued by one and the same sovereign. For Kelsen it is the set of laws ultimately authorised by one and the same constitution. Either way, legal systems are sets of appropriately related laws, the nature of laws having been independently explained.

In *The Concept of Law*, H.L.A Hart explored two difficulties with this traditional order of inquiry.[2] The first was also spotted by Kelsen.[3] All laws are legal norms but not all legal norms are laws. Laws are only those legal norms that are capable of being applied to a succession of different fact-situations. 'Tortfeasors are liable to pay reparative damages to those whom they tortiously injure' is a possible law. 'Jones is liable to pay Smith $50 in reparative damages', by contrast, is a possible legal norm but not a possible law. So legal systems are not simply systems of laws. They are systems of laws (or legal rules) and binding applications of those laws (or legal rulings).[4] Here Kelsen and Hart agreed. But they disagreed on a second and more important point. Kelsen defended the traditional order of inquiry thus:

> This dynamic concept differs from the concept of law defined as a coercive norm. According to this [dynamic] concept, law is something that is created by a certain process, and everything created this way is law. This dynamic concept, however, is only apparently a concept of law. It contains no answer to the question of what is the essence of law, what is the criterion by which law can be distinguished from other social norms. This dynamic concept furnishes an answer only to the question whether or not and why a certain norm belongs to a system of valid legal norms, forms a part of a certain legal order.[5]

Exposing the fallacy in Kelsen's thinking here, Hart showed how it is possible that legal norms have no 'essence', nothing that makes them distinctively legal, except that they are norms belonging to one legal system or another. And Hart argued, I think successfully, that this is not only possible but true. One needs to begin by asking what property or set of properties all legal systems have in common that distinguish them from non-

[2] Oxford 1961. Hereafter '*CL*'.
[3] *General Theory of Law and State* (trans Wedburg, New York 1945), 37.
[4] *CL* 94-5.
[5] *General Theory of Law and State*, above note 3, 122.

legal systems. Only when armed with that information can one identify legal norms (including laws) as legal norms. One distinguishes laws and other legal norms as norms belonging to legal systems. *Pace* Kelsen, one does not distinguish legal systems as systems made up of laws and other legal norms.[6]

Hart himself emphasised various intriguing features as the distinguishing features of legal systems. Notably: (a) legal systems are systems of norms, not systems of (say) predictions, incentives, commands, or beliefs;[7] (b) the norms of any legal system are all made (whether accidentally or deliberately and whether by delegation or by inherent jurisdiction) by human agents acting individually or in concert (Hart calls them 'officials');[8] (c) each legal system contains a 'rule of recognition' that identifies its officials of inherent jurisdiction (of whom all other officials are delegates) and specifies by which actions which of these officials of inherent jurisdiction can make legal norms;[9] (d) each legal system has some officials of inherent jurisdiction who at least sometimes make legal norms by applying other legal norms;[10] and (e) in each legal system the rule of recognition is a legal norm that is made by the norm-applying actions of these latter officials, insofar as they add up to a practice of treating certain agents (including themselves) as officials of inherent jurisdiction who make legal norms.[11]

[6] *CL* 77ff.
[7] *CL*, 79-88.
[8] *CL*, 92-3. Note that Hart's espousal of 'soft' positivism (*CL*, 199) does not compromise this thesis. On Hart's view, the demerits of a norm can invalidate it legally if the rule of recognition so provides, without any further invalidating act. But invalidation is one thing and making is another. Hart gives no reason to think that the rule of recognition or any of the norms made under it is thereby exempt from the requirement of being made by someone.
[9] *CL*, 97-107.
[10] *CL* 98-9.
[11] Ibid.

This is not the end of Hart's list of features. He adds quite a few more. But features (a) to (e) are enough to illustrate the difference between Hart's views and those of Austin and Kelsen. For Hart, one knows that one is dealing with a legal norm only if one knows something about the norm taken on its own – that it possesses feature (b) - together with something about the normative system to which it belongs, which must possess features (c), (d), and (e). Kelsen had also noticed feature (c), or something like it, and hence had rejected the famous Austinian thesis that officials of inherent jurisdiction are not regulated by the legal system of which they are officials. Unfortunately, Kelsen relegated feature (c) to what he called the 'dynamic' aspect of law. He agreed with Austin that one can already identify legal norms as legal norms 'statically', i.e. without mentioning feature (c). Hart put them both right.

In spite of this disagreement, Hart shared with Austin and Kelsen a more elementary commitment that he never stopped to explore in any detail. He thought that 'law', the abstract noun, at least sometimes identifies a genre of artefacts, just like the abstract nouns 'sculpture' and 'poetry'. Thesis (b), to slightly narrower versions of which Austin and Kelsen also subscribed, has it that laws (plural) are artefacts. And Austin, Kelsen and Hart all agreed that law is the genre to which these artefacts belong. But can we conversely assume that all the artefacts that belong to the genre law are laws, in much the same way that all the artefacts that belong to the genre sculpture are sculptures and all the artefacts that belong to the genre poetry are poems? No we cannot. And the most important difference is this. Having distinguished poems and sculptures, one distinguishes poetry books as books containing poems, and sculpture gardens as gardens containing sculptures. But, as Hart showed, things are different with law. One cannot begin by distinguishing laws and then distinguish legal systems afterwards as systems containing laws. One needs to distinguish legal systems in order to distinguish laws.

This has the following pay-off: Whereas a sculpture garden, unlike the sculptures in it, does not belong to the genre sculpture, and a poetry book, unlike the poems in it, does not belong to genre poetry, both laws and legal systems belong to the genre law. Law, understood as a genre of artefacts, is a genre made up of systems of norms together with the norms that belong to those systems. Of course, Kelsen and Austin did not deny that legal systems belong to the genre law. They both agreed with Hart that all laws necessarily belong to legal systems. That is enough by itself to distinguish the relationship between laws and legal systems from the relationship between sculptures and sculpture gardens. But it is not enough to establish that legal systems and laws alike belong to the genre law. Hart's arguments establish that extra point. They establish that legal systems are the basic units of law, and laws are essential (but not the only) sub-units.

One may think of Hart's list of features (a) to (e), together with the others he mentions, as a set of proposed *criteria* for determining which artefacts belong to the genre law. In criterion (c), Hart claims that every legal system has a rule of recognition. Such a rule obviously sets further criteria, namely criteria for determining - in a particular system - who can make laws and how. Thinking of laws as sub-units of legal systems, it is tempting to think of these further criteria set by the rule of recognition as sub-criteria for determining which artefacts belong to the genre law. Criterion (c), the thinking goes, can on closer inspection be unpacked into sub-criteria (c_1), (c_2) ... (c_n).

This is the rendition of Hart's position that Ronald Dworkin uses against him in *Law's Empire*.[12] In his earliest work Dworkin had launched his criticisms of Hart's work by focusing on criterion (b). Some legal norms, he had argued, exist solely by virtue of the moral support they provide for other legal norms,

[12] Dworkin, *Law's Empire* (Cambridge, Mass 1986).

and so are not made by anyone. These supporting legal norms, dubbed 'principles', are not artefacts.[13] Dworkin originally mounted a critique of Hart's criterion (c) by relying on this inventive critique of criterion (b).[14] But by the time of *Law's Empire* Dworkin has refined his criticisms of criterion (c) so as to render them independent of his criticisms of criterion (b). We know that the two criticisms are now to be regarded as independent because in making his new case against criterion (c) Dworkin repeatedly relies on analogies between legal norms and works of art and literature. He does not deny that the latter are all of them artefacts with authors. On the contrary, he assumes that they are artefacts with authors.[15] What he denies is that the *meaning* of a work of art or literature can be settled by reference only to the actions of its author. And carrying the same point over to law, he denies that the meaning of legal norms can be settled by reference only to the actions of those who made them. This he takes to be fatal to Hart's proposed criterion (c) for determining what belongs to the genre law.

I believe that this argument against Hart's criterion (c) fails, because Hart's criterion (c) already allows that the meaning of a legal norm could depend on things other than the action of those who made it.[16] But our interest here is not in the success or failure of Dworkin's argument. Our interest is in the radical pay-off that Dworkin ascribes to it in *Law's Empire*. If there are at least some legal systems in which there are no such criteria as those laid down by Hart's rule of recognition, thinks Dworkin, then that has wider repercussions for Hart's enterprise. For it means that there are no criteria that 'supply the ... meaning' of the word 'law'.[17] Hart's attempt to enumerate such criteria – what I listed

[13] Dworkin, Taking Rights Seriously (London 1977), 40-1, 66.
[14] Ibid, 43-4.
[15] *Law's Empire*, above note 12, 50.
[16] See chapter 2.
[17] Law's Empire, above note 12, 31.

as (a) to (e) above – is therefore doomed. It is not enough, says Dworkin, for Hart to abandon criterion (c). He must abandon the search for criteria altogether.

Dworkin offers no argument to explain why he thinks this radical conclusion follows from the supposed error of Hart's criterion (c). Instead he begins *Law's Empire* by simply merging the question of whether criterion (c) is correct with the question of whether there are any criteria such as those I labeled (a) to (e). He merges both into the single question: What are 'the grounds of law'?[18] He is wrong to do so. The question of whether there are criteria such as those provided by a rule of recognition is quite distinct from the question of whether there are criteria such as those I labeled (a) to (e). The criteria set by rules of recognition necessarily vary from legal system to legal system. So they cannot possibly be among the features that legal systems or legal norms have in common that distinguish them as belonging to the genre law. So they are not eligible to join the list (a) to (e). They cannot be thought of as sub-criteria (c_1), (c_2) ... (c_n). The misconception that they can comes of the sound thought that something that was not made by an official identified in the rule of recognition, or by some direct or indirect delegate of such an official, is not a legal norm. Since it is not a legal norm, and obviously it is not a legal system, surely it can't belong to the genre law? That is true but misleading. Because the genre law is made up of legal systems together with the norms that belong to them, there are two different possible explanations of why some artefact doesn't count as a legal norm. One possible explanation points to the non-fulfilment of one of the (universal) criteria for determining which artefacts belong to the genre. But a different possible explanation points to the non-fulfilment of any legal system's (parochial) criteria for a norm to be part of it.

[18] Ibid, 4.

Hart, in *The Concept of Law*, was interested only in the first class of explanations. He left the second class of explanations to lawyers (not quite anticipating the philosophical ingenuity that Dworkin would later bring to their aid). By exploring or problematising the parochial criteria, such lawyers might reasonably hope to show that Hart has one or more of the universal criteria wrong. They might hope to expose a parochial counterexample to Hart's supposedly universal criterion (b), or Hart's supposedly universal criterion (c), etc. This is what Dworkin quite reasonably set out to do in his early work. But his criticisms of some of Hart's proposed universal criteria do not even begin to suggest that there are no universal criteria. On the contrary: Dworkin's arguments by parochial counterexample depend for their success on there being such universal criteria. There can only be a counterexample to Hart's proposed criteria for determining what belongs to the genre law if there are rival criteria such that the counterexample meets them and therefore counts as an example of law, i.e. a legal artefact. If it does not count as a legal artefact it obviously cannot be a counterexample to the proposed criterion for determining what counts as a legal artefact and so cannot serve to undermine the proposed criterion. A successful critique of Hart's criterion (c) therefore depends on abjuring a larger critique of Hart's whole enterprise in seeking criteria like (a) to (e).

As these remarks suggest, Dworkin had different concerns that only overlapped to a limited extent with Hart's. Dworkin was and remains much more of a lawyer than Hart. Lawyers are experts on *the* law, meaning the particular norms of a particular legal system (whether unique to that system or shared with some others). They study legal artefacts in all their parochial glory. Hart, by contrast, aimed to study law without its definite article,

the genre to which such artefacts belong.[19] What Dworkin argued is that the identification of *the* law, in at least some legal systems, is more complicated than Hart's proposed universal criteria (b) and (c) seem to allow. If Dworkin is right that the complications are incompatible with one or more of Hart's proposed universal criteria for identifying law (without the definite article) then the offending criteria on Hart's list clearly have to be modified or replaced with others. Maybe Hart still didn't get his list of features (a) to (e) and so on quite right. But this is just the same kind of criticism that Hart directed at Kelsen and Austin, and Kelsen directed at Austin, and so on. It is not, as Dworkin fancifully maintains, a new 'interpretive' approach to the philosophy of law that casts doubt on the humble Austin-Kelsen-Hart enterprise of isolating the distinguishing features that artefacts of the genre law have in common by virtue of which they are artefacts of that genre and not of some other.

2. From genre to practice

In *Law's Empire* Dworkin obscures the important differences between questions about law and questions about *the* law. He relies on expressions that are ambiguous between the two to help him obscure these differences. But he also neglects another ambiguity to which Hart was highly attentive. The abstract noun 'law' can be used to refer to a practice as well as genre of artefacts. The abstract nouns 'poetry' and 'sculpture' have the same ambiguity. Sculpture is the genre to which sculptures belong but it is also (differently) what sculptors do. Law, likewise, is the genre to which legal systems and legal norms belong but it is also (differently) what lawyers and legal officials

[19] John Finnis, 'Reason and Authority in Law's Empire', *Law and Philosophy* 6 (1987), 357 at 367ff.

do. Dworkin does not respect the difference.[20] But it is an important difference. A practice is made up not of artefacts, but of actions and activities. Many practices are practices of engaging with a certain, often eponymous, genre of artefacts. Often the engagement is one of production. Sculpture is the practice of producing sculptures. With law, however, things are a bit more complicated. Law is not the practice of producing legal norms (law-making). It is the practice of *using* legal norms (law-applying). Yet its central and most distinctive activity is a combination of the two: the production of legal norms by the use of legal norms (law-making by law-applying).

Hart's explanation of law as a genre emphasises this central activity, paving the way for an integrated explanation of both the genre and the practice. Recall that according to Hart's thesis (d), in every legal system there are officials of inherent jurisdiction who at least sometimes make legal norms by applying other legal norms. So far as modern municipal legal systems are concerned, the officials that Hart has in mind are mainly judges. And the ways that he imagines them making legal norms by applying other legal norms are two. We have already noticed them both.

(1) Officials sometimes make new legal norms by applying, as legal norms, other norms that would not have been legal norms but for those very actions of applying them. This, according to Hart's thesis (e), is the way that a rule of recognition is made and changed. In every legal system there is a legal norm designating certain agents as makers of legal norms. This norm is in turn made by an official practice of applying, as legal norms, norms made by the agents that it designates. Here one legal norm (the rule of recognition) is made by applying – usually as an accidental

[20] See his discussion of interpretation in the arts (*Law's Empire*, above note 12, 55–65), where remarks about the interpretation of artistic practices are treated as applying without further argument to the interpretation of works of art, and *vice versa*.

by-product of applying – other norms as legal norms (norms made by the agents designated in the rule of recognition).

(2) By contrast officials sometimes make new legal norms by applying *existing* legal norms. The simplest and most everyday examples are those in which courts make legal rulings (legal norms applicable to one case only) by applying legal rules (legal norms applicable to a succession of cases). The ruling is always a new legal norm even though the case is already regulated by the rule. Why? The making of the ruling has legal consequences: it changes the application of other (not yet mentioned) legal norms. Not until the ruling has been made in his favour, for example, can Smith lawfully enlist petty officials who will auction Jones's property, or attach Jones's earnings. This shows that the ruling is a legal norm even where it is merely a judicial application of the legal rule that already applies to the case.

In examples of type (2), but not examples of type (1), we find our first examples of legal *arguments*. In a legal argument, an existing legal norm is a major premiss and a new legal norm is the conclusion. The legal arguments in everyday type (2) examples are of course very simple. They go something like this:

Tortfeasors are liable to pay full reparative damages to those whom they tortiously injure;

Jones tortiously injured Smith to the tune of $50;

therefore, Jones is liable to pay Smith $50 in reparative damages.

Many legal arguments are a lot more complex than this. Even this one could be made a lot more complex. In the simple variant, we can imagine that the $50 quantification is agreed. But now let's suppose that Jones and Smith disagree about the quantification. In *Smith* v *Jones (No 2)* we can imagine Smith demanding $100, and we can imagine Jones offering, and the court accepting, the following counter-argument:

Tortfeasors are liable to pay full reparative damages to those whom they tortiously injure;

Jones tortiously injured Smith to the tune of $100;

but the tort was also the breach of a contract between Jones and Smith;

the contract provided for maximum reparative damages of $50 for any breach;

contracts and the limits on damages they set are legally binding as between the parties to the contract;

and it is unjust to let someone avoid a legally binding contractual limit on damages by instead suing the other contracting party in tort;

therefore, Jones is liable to pay Smith only $50 in reparative damages.

In this argument, several additional norms are relied upon to justify a departure from the existing legal rule. Two of these norms (the norm which Jones breached when he breached his contract, and the norm in the contract providing for a maximum $50 damages for its breach) are legally-recognised norms but not legal norms.[21] They are contractual norms that have legal effect thanks to the third additional norm, which is a legal norm giving legal effect to contractual norms. The fourth additional norm relied upon in the argument is a moral norm of justice.

We can imagine a legal system in which the idea of using the law of tort to circumvent the disadvantages of contractual terms has already been frowned upon and ruled against by some officials with the ability to make laws. In such a legal system the final additional norm in the argument might be an existing law. But in the legal system I have in mind here we are not yet at that stage. This is the first case in which this circumvention tactic or

[21] Raz, *Practical Reason and Norms* (London 1974), 152-4.

anything like it has been tried and the first time it has been considered a possibility by any legal official. The reason why this court frowns on it is not that the law already frowns on it, but simply *that it is unjust*, never mind what the law already says. Of course this court may be one with the legal power not only to depart from existing legal rules in its rulings, but also to make new legal rules by doing so. In which case future courts inherit a new legal rule, something like: Tortfeasors are liable to pay full reparative damages to those whom they tortiously injure, except where the tort is also a breach of contract and awarding full reparative damages for the tort would allow their recipient to circumvent a legally binding contractual limit on damages for the breach of contract. The ruling in *Smith* v *Jones (No 2)* is the application of such a rule but it is not a legal rule until that ruling makes it so by applying it as a legal rule.

In this explanation I have taken for granted Hart's thesis (b): that the norms of legal systems are all made by human agents. From this it follows that a moral norm, such as a norm of justice, does not become a legal norm until it is made into a legal norm by a human agent, such as a court. What does not follow is that an argument relying on such a norm is not a legal argument. It is a legal argument if it is an argument about what to do (e.g. what ruling to make) in which at least some legal norms figure among the major premisses. In our argument there are two such legal norms: the legal norm that tortfeasors are to pay full reparative damages to those whom they tortiously injure, and the legal norm that contracts and the limits on damages they set are legally binding as between the parties to the contract. The moral norm of justice is called upon to help resolve a local conflict between these two legal norms. It is a legal argument because only the question of how to apply the two norms – and in particular which of them to depart from - makes the moral norm argumentatively relevant. Without the legal norms that make it argumentatively relevant the moral norm that makes it unjust to let someone avoid a legally binding contractual limit on damages

by instead suing the other contracting party in tort would be entirely irrelevant to whether Smith should receive $100, or $50, or anything at all from Jones. That is why the argument remains a legal one even though not all of the norms that figure in its premisses are legal norms. Not all sound legal arguments show that a certain legal ruling is required by existing legal norms. So being committed to Hart's thesis (b) does not commit one to the view that legal argument is non-moral argument.[22]

Should we think of the role of moral norms in legal arguments as akin to the role of contractual norms in legal arguments? Should we suppose that moral norms of justice are relevant to a legal argument like that in *Smith* v *Jones (No 2)* only because of some (undisclosed) legal norm according to which moral norms, or moral norms of justice, are legally binding or at any rate admissible in legal argument? Of course not. This turns the world upside down. The main puzzle about law, as a practice, is not the problem of how legal practitioners, including judges, come to be *legally* permitted or required to apply *moral* norms. It is the problem of how legal practitioners come to be *morally* permitted or required to apply *legal* norms. Legal practitioners, including judges, should act morally in their work for the same reason that doctors and soldiers should: because their work affects people's lives in morally significant ways. There is no further problem of why they should act morally. Whereas there is a further problem – a moral problem – of why they should defer to legal norms when they do so.

In *The Concept of Law* Hart tried to answer this question by arguing that rule-following – and hence the resort to laws – has some generalised trace of moral value independent of whether the rules in question are (otherwise) morally acceptable, lending the same generalised trace of moral value to the law-applying

[22] Raz, 'Legal Rights' and 'On the Autonomy of Legal Reasoning', both in his *Ethics in the Public Domain*, above note 1.

work of lawyers and judges as such.[23] I think this was a mistake. There is no such value. Any generalised allegiance that legal practitioners owe to the legal norms of the system in which they practice is normally owed to the moral bindingness of their oaths and undertakings, their contracts with their clients, and other voluntary and semi-voluntary incidents of their profession. By and large these oaths etc. do not bind lawyers only to apply the existing law. By and large they bind them to do much more complicated things, including making legal arguments, advising on the use of legal arguments, making rulings on the basis of legal arguments, etc. Legal arguments are arguments in which existing legal norms are used to create (or to advocate or defend the creation of) new legal norms, either rulings or rules, and such arguments often need moral premisses whether or not the legal norms themselves authorise such a resort to moral premises.

There is another lesson here apart from the lesson about legal argument. Contrary to what Dworkin assumed in his earliest critique of Hart's work, not all the norms of legal practice – the norms that apply to legal practitioners because they are legal practitioners – are legal norms.[24] They cannot possibly be. The norms of legal practice must also include moral norms governing the relationships that legal practitioners have, as legal practitioners, with the legal norms that they make and apply. The practice of law therefore extends its normative horizons in at least three ways beyond the genre of law and its legal artefacts. First, legal norms often require or permit the application of non-legal norms (norms made by non-officials), such as norms created in contracts or conveyances. Second, even when legal norms are silent on the matter, sound legal arguments often involve the application of non-legal as well as legal norms, and in particular the application of moral norms which are made relevant just by

[23] *CL*, 202.
[24] Cf *Taking Rights Seriously*, above note 13, 35.

virtue of the fact that legal arguments affect people in morally significant ways. Finally, legal practitioners are bound by the moral norms of their professions which regulate, among other things, how legal and moral norms should be treated in their work, including their legal arguments.

3. Legality as an ideal

That there are moral ideals of legal practice is already entailed by the fact that there are moral norms governing its conduct. The moral ideals in question are ideals of conformity with the relevant moral norms. Some of these moral norms are, of course, the same moral norms that apply to everyone. But others are specialised moral norms that apply only to legal practitioners, or to certain groups of legal practitioners, such as judges. These in turn can be subdivided into those that are tied to a particular legal system or legal tradition (e.g. those that come of a certain judicial oath or professional code of conduct), and those, subjection to which comes of the very nature of the job, such that a beginner who doesn't grasp the norms doesn't grasp what line of work it is she is launching herself into. An example of the latter kind of norm – what we could call a constitutive professional norm – is the norm that judges should put norms of justice ahead of other moral norms (such as those of kindness or prudence) in their applications of legal norms. Out of such constitutive professional norms, stylised universal ideals of the great judge, or great lawyer, can be constructed.

As well as moral ideals for law as a practice, there are moral ideals for laws and legal systems – for artefacts of the genre law. Of course strictly speaking it is not the artefacts that are regulated by the moral norms that constitute these ideals. Artefacts are not directly regulated by moral norms; moral norms regulate actions and activities. So the moral norms that regulate laws and legal systems as artefacts strictly speaking regulate the actions of certain agents, namely the officials who make or contribute to the

making of the artefacts. This may make it tempting to think that these norms are the same moral norms that regulate the practice of law. But they are not. Firstly, not all legal officials need be legal practitioners, nor vice versa (even though judges are both). Secondly, and more importantly, the moral ideals for laws and legal systems regulate the actions of law-making officials not mainly according to how they make legal norms, but mainly according to what legal norms they make. It is common to confuse the two. A common error is to think, for example, that since judges should put norms of justice ahead of other moral norms in their applications of legal norms (this is a constitutive moral norm of judicial practice) it follows that laws and legal systems should be just above all. But that does not follow at all. It could be a *disadvantage* of judge-dominated legal systems that the more morally upstanding the activities of the judges as law-appliers the more morally skewed the laws of the system. The judges, whose law-applying activities ought to be just above all, in the process skew *laws* towards being just above all, when as laws it is no less important that they be kind, prudent, etc.

I give away my own view here, about which I have plenty more to say.[25] It is not the case that laws and legal systems should be just above all. Whereas judges should first and foremost administer justice, law-makers should not give priority to norms of justice over other moral norms (those of kindness, prudence, etc.) in determining what laws to make. This often puts judges in situations of moral conflict: They would often be making a rule that is all things considered bad (it is just, but unkind, imprudent, etc.) by making a good (just) ruling.

There is a long tradition – of which Dworkin is the most prominent contemporary representative - of trying to carve out a distinct ideal of legality as an ideal comprised of moral norms to

[25] See chapter 10 for a full account.

which legal systems should conform above all others.[26] But there are no such moral norms. Law answers to all moral norms in proportion to their ordinary moral importance. What do exist are *additional* moral norms that laws and legal systems should conform to only because they are laws and legal systems, norms which add up to constitute a distinctive ideal of legality, also known as the rule of law. They are norms requiring that laws be made clear, prospective, open, general, etc. These norms do not take any priority over the many other non-specialised moral norms by which laws and legal systems may be judged. There is no reason to think that laws and legal systems should live up to the ideal of legality - should be clear, open, prospective etc. – above all else. Nevertheless laws and legal systems should live up to this ideal of legality *inter alia*, in a way that other arrangements need not. It is no bad reflection on me as a friend that I do not announce or clarify the rules of our friendship. On the contrary, it would normally be a bad reflection on me as your friend, or at least a sign that something has gone wrong in our friendship, if I did. But it *is* a bad reflection on me as a law-maker that the legal norms I make are not announced or clarified to those whose actions they purport to regulate. It is a bad reflection because the various functions that legal norms exist to serve, which serve to justify their existence, are by and large better-served to the extent that those whose actions the legal norms purport to regulate are able to resort to those legal norms for guidance in advance. It is a *morally* bad reflection because legal norms typically have morally significant implications for those whose actions they purport to regulate, and being able to resort to these norms for guidance in advance typically enables these people to control the implications (normally, by avoiding actions that would fall foul of the norms).

[26] Dworkin's originally calls his ideal 'integrity' (*Law's Empire*, above note 12, ch 6) but he later spells out, if it was not clear already, that this is his rendition of the ideal of legality: 'Hart's Postscript and the Character of Political Philosophy' *Oxford Journal of Legal Studies* 24 (2004), 1 at 29ff.

This is not the same mistaken claim that Hart made when he claimed that rules by their very nature have some residual moral value in virtue of their generality. The ideal of legality regulates rulings as well as rules, and it is an ideal that rules as well as rulings can fail to live up to. Norms may be genuine rules (susceptible of application to more than one case) and yet lack the rule-of-law qualities of openness, clarity, certainty, prospectivity, and even (all but the most trivial and morally unredeeming) generality.[27]

This is not the place for a study or defence of the ideal of the rule of law.[28] It is, however, the place to observe that the existence of this ideal makes fully intelligible the superficially oxymoronic proposition that some laws are illegal. They are of course laws – artefacts of the genre law - and in that respect they are necessarily legal. But they may still fail to live up to the moral ideal of legality that artefacts of that genre should by their nature live up to. Sensitive as ever to ambiguity, Hart brought this point out very vividly in a neglected passage towards the end of *The Concept of Law*.[29] He claimed that there are two concepts of law, captured in many European languages by distinct words: '*lex*', '*Gesetz*', '*loi*' and '*legge*' (capturing the genre that he had been trying to explain in the rest of the book), and '*ius*', '*Recht*', '*droit*', '*diritto*' (capturing a 'narrower' genre, the genre of law that lives up to whatever moral ideal law should live up to). One may doubt whether Hart's foreign-language lexicography is up to scratch here. But as he himself says, that is not the point; philosophy, after all, is not lexicography. The point is that, however the distinction is marked in language, there is law and then there is *legal* law. Should we say, with Hart himself, that 'legal law' – law that lives up to the ideal of legality - is a second *concept* of law? Probably that is too dramatic, drawing us into

[27] See chapter 2.
[28] See chapter 8 for a study (with only hints of defence).
[29] *CL*, 202ff.

orthogonal debates about the individuation of concepts. Perhaps it is better to say that there are specialised moral norms that are partly constitutive of law as a genre. Anyone who hasn't picked up that legal norms ought to be open, prospective, clear etc. hasn't fully understood the genre. For they haven't understood what Lon Fuller aptly called 'the inner morality of law'[30], a phrase which Hart himself endorsed as suitable to convey this point, and as marking a necessary connection between law and morality that he too could readily accept.[31]

[30] Fuller, *The Morality of Law* (New Haven 1964), ch 2.
[31] *CL* 202.