A Paradox of Hart's Fallible Finality

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Abstract. This paper constitutes an appeal to redefine the concept of the fallibility of final judicial decisions. Its standard understanding, based on Hart's work, is far more problematic than is usually assumed. The author shows that the usual understanding gives rise to a contradiction. Namely, that it is (sometimes) legally correct to do that which is not legally correct. The author then briefly tests three methods of solving the problem. He concludes that none of them speaks in favour of distinguishing between the finality and infallibility of judicial decisions. Accordingly, he re-examines Hart's motivations for embracing that distinction and identifies a misstep in his reasoning.

Key words: law, judicial decision, finality, (in)fallibility, Hart

Here is a non-legal paradox to set the tone—the barber paradox reported by Russell (1919: 355). The story goes like this: You can define the barber as one who shaves all those, and only those, who do not shave themselves. Now, ask yourself, "Who shaves the barber?" This question makes the paradox emerge. If the barber shaves himself, he does not shave himself (for the barber only shaves those who do not shave themselves). But, if the barber does not shave himself, then he shaves himself (for the barber shaves all those who do not shave themselves). The lesson of the story is that you cannot satisfactorily define the barber as one who shaves all those, and those only, who do not shave themselves because that gives rise to a contradiction. The assumption ('You can define the barber as…') is wrong.

I believe a somewhat similar deficiency ought to be attributed to H.L.A. Hart's (1961: ch. 7) characterisation of final judicial decisions as 'fallible' or possibly incorrect from the legal point of view.[1] My argument

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1   Hart's own wording is different, but nothing substantial hinges on this.

is short and simple. Assume there is *a*) a legally incorrect final decision in *b*) a system with the rule to the effect that it is legally correct to comply with final judicial decisions. The paradox consists in that it is then legally correct to comply with what is legally incorrect. In other words:

> (*) It is legally correct to do that which is not legally correct.

By analogy with the lesson drawn from the barber paradox above, one might suggest that one of our initial assumptions—namely, *a*)—is wrong: there is no legally incorrect final decision. On this account Hart's characterisation is unsatisfactory because it gives rise to a contradiction. Final judicial decisions cannot possibly be incorrect from the legal point of view.

Note, however, that this suggestion is not the only possible reply at hand. As we will see, one might reject assumption *b*) instead, or resolve the paradox in one of the more sophisticated ways in which such paradoxes usually get resolved. In the brief remainder of this paper I purport to show that these other options are, however, no more beneficial for subscribers to Hart's notion of fallible finality than the first attempt to resolve the paradox.

Rejecting the second assumption (to wit, 'there is a system with a rule to the effect that it is legally correct to comply with final judicial decisions') puts one's theory, unlike Hart's, completely out of touch with reality. Indeed, it limits the theory's scope of application to 'immature' systems with no secondary rules providing for the institution of finality. Whether such systems even count as systems of law is debatable. While Hart (1961: 142) considered them, they were not his main preoccupation and nor are they in the centre of jurisprudential interests today. Moreover, dropping the second assumption makes the notion of fallible finality entail an institution which is absent from the very system constituting our object of investigation. This option is therefore excluded. Accordingly, let us turn to more sophisticated ways of resolving the paradox.

One promising option consists in disambiguating the phrase 'legally correct' as the culprit of the reflexive fallacy in (*). In this aim, one might hold that the rule violated by a final decision imposes a duty on judges and other public officials, whereas the rule that one ought to comply with a final decision imposes a duty on citizens. Therefore, the argument continues, (*) actually stands for 'It is legally correct *for citizens* to do that which is not legally correct *for public officials*' and thus the paradox would

be resolved. *Or not*—for surely public officials also have the duty to comply with final judicial decisions, and so the paradox remains in place.

An effective way to solve the paradox through disambiguation is to hold that it is legally correct *all things considered* to do that which is not legally correct *all things considered, but one rule* (i.e. the one regarding the authority of final judicial decisions). While this avoids the paradox, it also goes against Hart's basic stance that final judicial decisions are possibly incorrect from the legal point of view. As it turns out, *all things considered*, they never are.

Another of the more sophisticated options worth exploring here is the most lawyerly solution to the problem. This solution is based on the observation that, strictly speaking, our 'paradox' is but a special type of inconsistency stemming from the legal system as the system is construed, and it is perfectly consistent, not paradoxical, to describe that inconsistency with (*). On the one hand, there is the rule that one ought to comply with final decisions (hereafter named R1). On the other hand, there is a rule violated by the final decision in question (say, R2). If the final decision did not violate R2, then there would be no inconsistency between what follows for the case at hand from R1 and R2, respectively. This is why the inconsistency is of a special type—it is contingent. The two rules only come into conflict when applied to a concrete case of a final decision violating R2. This type of inconsistency is not so rare a phenomenon as to leave us perplexed in the way the barber paradox does.[2] Indeed, practising lawyers are trained to face such inconsistencies (among others). They solve most of them by means of the traditional meta-principles of preference, which are based on the criteria of hierarchy (superior rules prevail over inferior ones), scope of competence, specificity (more specific rules prevail over more general ones), and posteriority (subsequent rules prevail over earlier ones). So, let us see what these criteria say about our case. Given that R1 is part of the ideal of rule of law,[3] I take it that R1 clearly belongs to the highest level in the hierarchy of laws, has the widest scope of competence, and the highest grade of generality. Hence, the application of R1 ought to be given preference over the application of R2 in most cases, but not always. The opposite is true in the instance of R2 being posterior to, or less general than R1, while having the same rank and the same scope of competence.

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2   See Malgaud 1964: 18 (*l'antinomie accidentelle*) or Guastini 2011: 107 (*l'antinomia in concreto*) for examples.

3   See, e.g., *Brumarescu v. Romania*, no. 28342/95, § 61, ECHR 1999-VII, which started a clear and constant European jurisprudence on this point.

On the face of it, this lawyerly analysis permits us to dismiss the 'paradox' as unworthy of serious consideration and to precisely identify the circumstances in which it is *safe* to speak of fallible finality without being over-scrupulous. But is it, really? Arguably, *it is not*. To see why not, we can think of three possible scenarios with the rare circumstances just described. In the first (and the most unlikely) scenario, the fact that R2 ought to trump R1 is brought to the attention of a court that accepts the case for consideration. (We will see in a moment what follows from this.) In the second scenario, the courts reject considering the case. In the third scenario, the issue is not even brought before a court. In the first scenario, the issue is resolved through (constitutional) interpretation operated by the courts in a new final decision. By that very fact, the previous decision, which violates R2 and has been hitherto protected by R1, loses the status of finality. Therefore, it does not count as an example of a legally incorrect final decision even though it is erroneous, all things considered. In the second and the third scenario, the solution confirmed in our final decision prevails regardless of what ought to be the case in virtue of the meta-principles of preference mentioned earlier. This means that in the second and the third scenario, the characterisation of the final decision as legally incorrect has no legal consequence whatsoever.

To my knowledge, neither Hart nor his followers have offered a similar analysis to correct—and therefore to narrow—the usual scope of application of the notion of fallible finality. However, it appears that Hart would have accepted its conclusion. He admitted that it may seem 'pedantic' to distinguish, in cases of *res judicatae*, between finality and infallibility of the court ruling precisely because 'the statement that the court was "wrong" has no consequences within the system' (Hart 1961: 141). Nonetheless, he decided to embrace the said distinction after his illuminating considerations of a fundamental dis-analogy between legal adjudication, on the one hand, and what he called 'the game of scorer's discretion', on the other (Hart 1961: 142–46). I will now provide a summary of those considerations and close the paper with a counterargument that meets all of his preoccupations without falling into legally irrelevant pedantry.

In Hart's fictitious game, the score is what the scorer says it is. This is 'the scoring rule'. Moreover, there is no sign of criticism seriously addressed to the scorer for misapplications of the scoring rule. In legal settings, by contrast, genuine criticisms frequently invoke misapplications of the law. The existence of such criticisms indicates a fundamental difference. Hart thought that in order to explain the difference, one has

no other option but to assume that the result of legal adjudication, unlike that of scorer's discretion, is bound by rules established in advance. On this assumption, criticisms of judicial rulings obviously make sense (that is, as reactions to their perceived violations of pre-existing rules), as does the distinction between the finality and infallibility of court rulings.

This argument is widely shared in legal theory, but is based on a mistake. Hart's explanation is *not the only option* to illuminate the difference between legal adjudication and his fictitious game.[4] There is another explanation that does not require one to embrace legally irrelevant pedantry.

Instead of assuming that the result of legal adjudication is bound by rules established in advance (unlike the scorer's discretion), this other option consists of pointing to the following (pragmatic) presupposition, which is constitutive of participation in legal adjudication but absent from any game of scorer's discretion: interpreters in legal adjudication purportedly agree with the lawgiver. Their decisions, or proposals thereof, are based on the sources of law and are not a mere fiat of discretion.

To see the point, think of an umpire who, when publicly stating his decision, says that its content is in disagreement with every pre-existing authoritative pronouncement that is relevant to the case at hand. Such a disagreement would be conceptually impossible under the scoring rule ('The score is what the scorer says it is'), because there is no way for the scorer to break this constitutive rule of scorer's discretion, and by that very fact, step out of the game. By contrast, such stepping out is possible in legal adjudication. Were a judge to make the same statement as the umpire above—that is, were he to state, when he makes his decision public, that its content is in disagreement with every pre-existing authoritative pronouncement (constitutional clauses, statutory provisions, judicial precedents, etc.) relevant for the case at hand—we would say that he is not acting as a judge. His decision-making speech act, I believe, would be deemed pragmatically infelicitous. One promising explanation for this infelicity is that the judge denied the said presupposition of agreeing with the lawgiver. Because of such a step out, we would not be talking about a legally incorrect judicial decision. Rather, his decision would simply not count as judicial.

Based on these considerations, we can now explain the criticism of judicial rulings without assuming that these rulings are bound by rules established in advance. Therefore, we can also explain the criticism of

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4   One may wonder why we should bother to explain the difference between legal adjudication and some fictitious inexistent game, but I leave this objection aside.

such *final* rulings without embracing the problematic notion of fallible finality.

Criticisms of judicial rulings make sense as expressions of a perceived presupposition failure of those rulings. In other words, they purport to show, contrary to the presupposition in question, that a given ruling is in fact in disagreement with the relevant sources of law (either because the relevant sources are thought to be different from those actually considered by the judge, or because the ruling is deemed incompatible with the sources that were rightly considered relevant). If the presupposition in question were semantic rather than pragmatic in character, the presupposition failure would affect the correctness of the ruling. But since we have to do with a pragmatic presupposition, the fact that this is not accepted by (some part of) the audience does not affect the ruling's correctness as such. This explains why you can also criticise final judicial decisions even if you think that they cannot possibly be incorrect from the legally relevant point of view.

We have now arrived at the end of this short paper. Its objective was to demonstrate that Hart's characterisation of final judicial decisions as possibly incorrect from the legal point of view gives rise to a paradox. We have briefly tested three methods of solving the paradox (i.e. by rejecting one of the initial assumptions, by disambiguation of the expression 'legally correct', and through a resolution of the inconsistency between the rule that one ought to comply with final judicial decisions and the rule violated by the final decision in question). As it has turned out, none of the solutions treated here speaks in favour of distinguishing between the finality and infallibility of judicial decisions. We have therefore re-examined Hart's explicit motivations for embracing that distinction and identified a misstep in his reasoning. Finally, we have seen an argument that meets all of Hart's preoccupations without paying the price, as he did, in legally irrelevant pedantry.

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