

Legal Obligation as Conditional Obligation

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Introduction

In this paper, legal conditional norms¹ are examined. A typical example of a legal conditional norm is a norm that imposes compensation on a tortfeasor. For example, Article 709 of the Japanese Civil Code states: 'A person who has intentionally or negligently infringed on any right of others, or a legally protected interest of others, must compensate for any damages resulting in consequence'. The grammatical surface of this article is unconditional. However, we *can* interpret it to have the following conditional structure: If a person has infringed on any rights of others, or a legally protected interest of others, then he must compensate for any damages resulting in consequence. Furthermore, it *must* be interpreted as a conditional norm if we analyse it by employing the language of formal logic. Formal logics, regardless of classical logic or non-classical logic, allow individual consonants or variables to be subjects of sentences. If the subject of a sentence refers to unspecified persons, such as 'a person who has infringed on any rights of other', we must change it into an individual variable with a universal expression (quantifier): For all x, if x is ..., then x is

There are two reasons for the importance of studying conditional norms. First, conditional norms, including conditional norms as a result of interpretations, are the main sources for legal reasoning to derive consequences for particular cases. To explain how consequences are derived from conditional norms and descriptions of particular cases, analyses of the structure of conditional norms are indispensable. Second, their analyses are also indispensable for the dispute between positivism and non-positivism regarding the concept of law. Whereas positivism denies the necessary relation between law and morality, non-positivism affirms it. Because norms are divided into unconditional and conditional norms, four different relationships between legal norms and moral norms are possible: the relationships between unconditional or conditional legal norms and unconditional or conditional moral norms. Therefore, analyses of the structure of conditional norms are the basis for the study of relationships between law and morality.

Although much attention has been paid to the way to represent conditional norms, no persuasive answers have been found thus far². The aim of this paper is to defend a

¹ In this paper, we assume a complete and consistent system of norms. Under this assumption, the distinction between norm and norm-proposition is redundant because both are equivalent.

² See Hilpinen and McNamara 2013; Navarro and Rodríguez 2014.

formulation of conditional norms, that is, a formulation with a wide-scope 'ought' and a material conditional, and to suggest its implications for the dispute between positivism and non-positivism.

1. Wide-scope 'Ought'

The standard system of deontic logic (SDL) allows for the following two ways of representation of conditional norms:

$$(1) \quad O(p \rightarrow q)$$

$$(2) \quad p \rightarrow Oq.$$

In the formulas, O represents deontic operators, meaning 'it ought to be that'. Ought in (1) is referred to as 'wide-scope ought' because it covers both the antecedent and consequent of the formula³, and ought in (2) is 'narrow scope' because it covers only the consequent of the formula⁴. p and q are atomic propositions. ' \rightarrow ' is a logical connective of a material conditional.

There are two objections to (1) as the formulation of a conditional norm. First, the following inference is valid in SDL:

$$(3) \quad O\neg p \models O(p \rightarrow q)$$

(3) means that if it ought to be not p, then it ought to be if p then q. In short, anything impermissible commits us to everything⁵. This conclusion seems to be very absurd.

However, this absurdity can be avoided if we assume $O\neg p$ is a moral norm and exclude it from the system of legal norms. It could be said that $O\neg p$ is a primary and moral obligation, and $O(p \rightarrow q)$ is a secondary and legal obligation imposed in a case where the primary obligation has been violated. There is no reason to keep the coexistence of primary obligations and secondary obligations in one normative system. For example, Article 709 of the Japanese Civil Code provides a conditional obligation, but no article provides the primary obligation: it is forbidden for everyone to infringe on any rights of others. Similarly, penal codes in many countries provide no primary obligation. For example, Article 199 of the Japanese Penal Code

³ (1) is equivalent to $\Box(p \rightarrow q)$ in System DT (Girle 2009), where the accessibility relationship between possible worlds is not reflexive but serial. Therefore, (1) is an interpretation of strict conditional.

⁴ The words 'wide scope' and 'narrow scope' are used in Hilpinen and McNamara 2013, 84. Following Alchourrón, Navarro and Rodríguez 2014, 92, call the former 'insular conception' and the latter 'bridge conception' of conditional norms.

⁵ Hilpinen and McNamara 2013, 86.

provides either imprisonment of at least five years or the death penalty for murder, but no article literally forbids murder.

Second, the formula (1) does not seem to define anything to those living in the real world. It only says that the proposition 'p → q' is true in any ideal world. In SDL, nothing follows from the following two propositions: $O(p \rightarrow q)$ and p. Therefore, in the case of a person infringing on some right of others, the proposition $O(p \rightarrow q)$ tells him nothing. In this sense, proposition (1) appears to be useless for guidance in the real world.

However, $O(p \rightarrow q)$ is not of no value for us because the following inference is valid:

$$(4) \quad \Box p \wedge O(p \rightarrow q) \models Oq.$$

If the necessary fact ('It is necessary that a person infringed on some rights of others') is provable, Oq ('he ought to compensate for the resulting damage') is concluded⁶.

(4) represents the praxes of judicial trials well. A plaintiff in a civil case or a prosecutor in a criminal case does not prove a simple fact. He must prove a necessary fact. He must argue such necessary facts by showing persuasive proofs.

2. Narrow-scope 'Ought'

SDL allows the second formulation: (2) $p \rightarrow Oq$

However, there are two objections to this formulation. First, (2) has an unreasonable conclusion; the following inference is valid in SDL:

$$(5) \quad \neg p \models (p \rightarrow Oq)$$

This means that if a person did not infringe on any rights of others, then if he infringes on any right of others, he ought to do something; for example, compensation, but it could be killing others. (5) is logically valid but appears to be absurd, especially for anyone to comprehend who is unfamiliar with logic.

Second, the formula (2) $p \rightarrow Oq$ is a well-formed formula of SDL, but it is not a norm. Norm is defined as that which prescribes deontic ideal worlds. Employing this definition of norm, (2) is not a norm because it, by itself, prescribes nothing about deontic ideal worlds. It is a description of the actual world⁷. With our definition of norm, only unconditional norms and no 'conditional norms' are possible. We are faced with a dilemma: whether to broaden the

⁶ Hilpinen and McNamara 2013, 118, call (4) 'restricted factual detachment'.

⁷ Because (2) is equivalent to $\neg p \vee Oq$, it means that either $\neg p$ or Oq is true in the actual world.

above-mentioned definition of norm or not employ narrow-scope 'ought'. Because there is another formulation of conditional norms, that is, the formulation (1) with wide-scope 'ought', we decided to retain our definition of norm and reject the narrow-scope 'ought'.

3. Dyadic 'Ought'

The following inference is valid in classical logic:

$$(6) \quad p \rightarrow q \models (p \wedge r) \rightarrow q \text{ (principle of antecedent strengthening)}$$

Because the two formulations of conditional norms outlined above contain material conditionals (\rightarrow), the following inferences are valid:

$$(7) \quad O(p \rightarrow q) \models O((p \wedge r) \rightarrow q)$$

$$(8) \quad p \rightarrow Oq \models (p \wedge r) \rightarrow Oq$$

Conditional norms for which the principle (6) does not hold are called defeasible norms. If a normative system contains defeasible norms, their representation without material conditionals is indispensable because defeasible norms cannot be represented by formulas using material conditionals, regardless of whether 'ought' has a wide scope or a narrow scope.

B. Hansson proposed introducing the dyadic deontic operator $O(/)$ instead of the monadic operator O_p to represent defeasible norms⁸. According to his system, the following are valid:

$$(9) \quad O(q/p) \text{ is true at a world } u \text{ if and only if the best } p\text{-worlds for } u \text{ are all } q\text{-worlds.}$$

$$(10) \quad Oq \text{ is true if and only if } O(q/T^9), \text{ so if and only if all the unqualified best worlds for } u \text{ are } q\text{-worlds.}$$

Because it is possible that some of the best p -worlds for u are not the best p - and r -worlds for u , the following inference is not valid:

$$(11) \quad O(q/p) \not\models O(q/(p \wedge r))$$

There are two objections to using the dyadic deontic operator for the representation of conditional norms.

First, introducing the dyadic deontic operator makes the difference between law and morality unclear because the following inference is not valid:

⁸ Hansson 1971. This paper follows the overview of his system by Hilpinen and McNamara 2013, 117.

⁹ T is a tautology.

$$(12) \quad O(\neg p) \vDash O(q/p)$$

In Hansson's system, the primary obligation and the secondary obligation can coexist in a system of norms. Thus, it is possible to establish a unified normative system. However, the significance of such a system is doubtful because such a system, in which different types of norms can be mixed up, may turn our interest away from relationships between legal norms and non-legal norms, especially moral norms.

Second, we are ultimately interested in what the normative system states we ought to do in particular situations when we consider all things (all-thing-considered 'ought')¹⁰. Although many legal norms that are considered as premises of legal reasoning are defeasible, it does not follow that the legal norm of its consequence is also defeasible. If all-things-considered legal norms are non-defeasible, dyadic deontic operators are unnecessary to represent them.

Concluding Remarks

In this paper, we focused on legal conditional norms and proposed to represent them by using formulas with wide-scope 'ought' and material conditionals. Based on this representation, the system of legal conditional norms is distinguished from the system of moral norms. This distinction seems to have an affinity with legal positivism; however, that is not our intention. According to our underlying intuition, the relationships between law and morality are not logical but practical. This subject is beyond the focus of this paper and should be discussed at the next opportunity.

¹⁰ Belzer and Loewer 1997, 45.

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