12.
A TRIADIC MODEL
FOR THE STUDY OF IMPOSSIBILITY
IN THE LEGAL DOMAIN

Guglielmo Feis

CONTENTS: 1. 'Impossibility' in the legal domain – 2. The triadic model: an overview – 3. Comparisons: possible worlds semantics, Santi Romano's institutionalism – 4. Applications of the model and open questions – References.

In this paper I survey various things that are called 'impossibility' in the legal domain. I classify the different facets of impossibility in the law and then I propose a triadic model that can account for impossibilities in the legal domain.

The paper is organized as follows. I present the issue of impossibility in the legal domain, introducing the different things that have been called 'impossibility' in the legal domain (§ 1.).

I then present the three elements of the domain that compose the model: (i) the set of all sources of impossibilities, (ii) the set of impossibility of the analyzed legal order, (iii) the assuming-function for impossibilities (§ 2.). I then sketch some structural analogies between my model and: (i) the possible world semantics of modal logic; (ii) Santi Romano's pluralistic theory of legal institutions (§ 3.). A description of the problems that can be investigated through the proposed model is then provided as a conclusion (§ 4.).

1. 'IMPOSSIBILITY' IN THE LEGAL DOMAIN

Despite *brocarda* such as *ad impossibilia nemo tenetur* or *impossibilium nulla obligatio*, alledged uses of 'impossibility' and 'impossible' are quite frequent in legal theory and in the legal discourse.

Here we face a philosophical problem: from the fact that many things are called 'impossible' or 'impossibility' it seems that the concept of impossibility in the legal domain is more structured and complex than it appears

197

from the *brocarda*. Further, talking about impossibility is ubiquitous even if the impossible carries no obligation (thus, one might be tempted to think, it's useless to think and talk about impossibility). To explain this talking of impossibility despite there being the *brocarda*, it seems that either legal thinking is confused about the issue or there are ideological uses of impossibility in the legal domain or there's something more about impossibility in the legal domain.

Let's see what these "impossibilities" in the legal domain amount to. Here is a short list of what can be counted or be conceived as "impossible in the legal domain":

1. *Prohibitions*: building on the structural isomorphism between modal logic and deontic logic [1], it is possible to say that a prohibition states an impossibility: it ought to be that the things prohibited are never the case. Thus, if we move to Ought world [*Sollen*], a prohibition states that it is necessary that no violation of it occur. On this view, prohibitions give rise to what we may call *deontic impossibility* (advocated primarily by A.G. Conte 2001 and A.G. Conte - P. Di Lucia 2012, 2013).

2. *Validity requirements of acts*: in order to complain with the law, there are requirements to be fulfilled. If the requirements are fulfilled and the procedures are followed, the corresponding acts achieve *validity*. Consider the case of will making in the Italian civil law. According to the Italian code, it is impossible to make a will without any written signature by the testator [2]. Writing down in details the way in which you want your estate to be distributed after your death is not enough to produce a valid act of will-making without a signature. It is not that you will produce an invalid testament, the story says, *you will simply produce no testament at all*. Given that the rules that lay down validity conditions of acts (e.g. the act of will-making) are called anankastic-constitutive rules [3], we can call the impossibility due to anankastic-constitutive rules, *anankastic impossibility*.

3. *Constitutive conditions of objects*: constitutive rules are able not only – as anankastic-constitutive rules do – to set or determine the properties of some acts, i.e. to assign validity to some act, they can further

---

[1] That is to say the idea that necessity : obligation = possibility : permission. This, according to von Wright (1951), is what led him to the discovery of deontic logic. This is by no chance the place to explain how and why such an analogy is probably one of the most productive philosophical mistakes ever.
[2] Will-making is ruled by article 602 of the Italian civil code that states (art. 602): "*Il testamento olografo deve essere scritto per intero, datato e sottoscritto di mano del testatore. La sottoscrizione deve essere posta alla fine delle disposizioni*". "The holographic will must be written entirely, dated and hand-signed by the testator. The signature must be written at the end of the will dispositions".
[3] This is the kind of rule has been the one that, inside the typology of rules based on conditions (see G. Azzoni 1988), had been criticized the most. See M. Jori 1986; R. Guastini 1986; C. Roversi 2012, pp. 38-52; W. Żełaniec 2013.

create entire objects. When this happens, it is said they *are* conditions (rather than *set* or *lay down* conditions) [4]. The standard example is that of chess pieces: prior to the existence of the rules of chess, wood pieces are nothing but wooden placeholders; once the rules are there, these placeholders become pawns, rooks, bishops and so on. The rules that are able to create new objects and define their essences have been called eidetic-constitutive rules [5]. They define new *types* of entities. Besides chess, they are quite spread in the legal domain and appear typically in the norms that define and create the flag of a State. We can call the impossibility due to eidetic-constitutive rules, *eidetic impossibility*.

4. *Gaps or imperfections of the legal machinery*: legal gaps or legal imperfection can be considered impossibilities for the legal order. Given a legal gap, there is no way in which the legal order can proceed, at least prior to some change in the legal order itself. The legal order, because of a legal gap, thus creates some *ex novo* impossibility (more on this below) [6].

This is just to set the stage and present what the triadic model is meant to explain. Defending all these alleged impossibilities as robust impossibilities is not part of this paper [7].

2. The triadic model: an overview

The triadic model I propose is composed of:

1. A set that is the *source-set of available impossibilities*: logical, physical, etc. [8]. These are the different *kinds of impossibility* a legal order can include or qualify through a norm or a deontic operator.

2. The set of *impossibilities of the legal order we are considering*. This set includes two different subsets of impossibilities: (i) the set of the impossibilities *due* to the rules of the legal order and (ii) the set of the impossibilities *imported* or assumed by the legal order.

3. An *assuming-function for impossibilities*: this is the function the legal order uses to pick up and qualify new impossibilities among the set of sources (1) and include them into the second kind of impossibilities of the set of our actual legal order (2) above.

---

[4] The most recent discussion of the topic which is accessible to the Anglo-American world is W. Żełaniec 2013.

[5] See A.G. Conte 1988 for eidetic-constitutive rules.

[6] An example of impossibility represented (and due to) a legal gap, is that described by Z. Ziembiński 1966.

[7] I actually think all of them are quite implausible as impossibilities because they rely on the hypostatization of some contingency due to the way in which a legal order is structured. See more in G. Feis 2015, chap. 7.

[8] Here the research interestingly overlaps which that on metaphysical necessity and grounding (e.g. J. Lowe 2012; K. Fine 2012).

Before moving on, it is helpful to summarize the different meanings of 'legal impossibility' in the different sets of the triadic model:

1. When looking at the source-set of available impossibilities, 'legal impossibility' is a kind of impossibility among others (physical, logical, etc.) in source-set.

2. When looking at impossibilities of the legal order we are considering, 'legal impossibility' is a way to refer to the whole set of impossibilities of a legal order. Nonetheless, these legal impossibilities at a closer look can be further distinguished in:

   a. *Ex novo* legal impossibilities, i.e. the impossibility originally created by an actual legal order because of its peculiar rules.

   b. *Qualified/assumed* legal impossibilities, i.e. the impossibilities that are non legal in nature but that receives a legal relevance in the legal order because they are included by means of the assuming-function.

   c. Imported *non ex novo* legal impossibilities, i.e. impossibilities that are legal in nature but that belongs to different set of rules or legal orders. These impossibilities are assumed and imported by way of the assuming-function for impossibilities.

The peculiarity of the model is due to the fact that a legal order, as a system of rules (some of which are constitutive), *both creates* its new legal impossibilities *and qualifies* other kinds of impossibilities that are not legal, giving them a new legal import inside the system.

In the case of the physical impossibility for a human agent of being in two places at the same time we find a legal import in the concept of *alibi* that grants the agent immunity from being convicted as the material executor of murder.

This is clear in the second element of the model. When we consider a positive legal order we have to differentiate its impossibilities: some are due to and constituted by the norms of the legal order (think about its prohibitions or its legal gaps), whereas some are only received or qualified but are non-legal in nature (i.e. they are physical or logical impossibilities that are received, as in the case above of *alibi*) [9].

Such a difference leads us to the last element: the assuming-function of impossibility, i.e. the conceptual tool we need to differentiate between impossibilities with a legal import that are only due to the legal order's rules and other impossibility that are based on other then legal norms that, nonetheless, play a role in the legal order. The result of the application of the assuming-function is the following: impossibilities that are not created *ex novo* by the legal norms become nonetheless part of the legal order. These

---

[9] In the Italian civil code art. 2724 mentions (and, according to my lexicon, assumes) a mysterious form of moral impossibility. Granting that there is such thing as moral impossibility, this is an example of assuming a non-legal impossibility in a legal order, giving to it a legal import.

impossibilities are somehow included and absorbed in the legal order and thus, loosely speaking, they become legal impossibilities themselves.

Thus, the triadic model for impossibility in the legal domain gives us *two criteria to compare different legal orders*: (i) the first is the set of its peculiar impossibility, i.e. its legal impossibilities that are grounded into its norms [10]; (ii) the second is the way in which it deals with and uses non-legal impossibilities, that appear in the second subset of the set of the impossibilities of our present legal order.

I think there are at least *two ways* in which we can assume impossibilities outside the legal order:

1. Impossibility is *explicitly stated inside a legal norm*: this is the case of the qualification of moral impossibility outlined in article 2724 of the Italian civil law.
2. Impossibility is not *explicitly stated inside a legal norm but assumed as a presupposition*: this happens often for physical impossibilities. The legal order presupposing to be ruling human and earthly things in such a way that, for agents, it is impossible to be in two places at the same time [11] or that material objects preserve their identity through time.

What I explicitly laid down as a relation – the assuming-function that absorbs impossibilities – seems to be covertly operative in the legal domain. Impossibilities are more often tacitly assumed or presupposed in the linguistic formulation of the norms rather than being explicitly stated.

3. COMPARISONS: POSSIBLE WORLDS SEMANTICS, SANTI ROMANO'S INSTITUTIONALISM

It is now time to compare my framework with some other approaches. As stated above, the model draws on two different sources. Terminologically, I use Santi Romano's lexicon of institutionalism (Romano 1947); conceptually, I am influenced by possible world semantics.

The comparison with the latter is easily obtained: in modal logic there is a set of worlds (my source-set of impossibilities), an actual world (my set of the impossibility of the legal order considered) and an accessibility relation (my assuming-function for impossibilities) [12].

The special features of the present model are: (i) the worlds of the source-sets are qualitatively different as we have different sources of

---

[10] Here we see that talking about "legal impossibility" can be misleading as they are impossibility grounded into something contingent as a certain set of rules. This is not the place to criticize that. See G. Feis 2015, esp. chap. 7.

[11] If you think about it, this physical impossibility is one of the reasons that motivates the power of the institution of the *alibi* to remove culpability.

[12] Such a framework is often attributed to S. Kripke 1963. See R. Goldblatt 2006 for a more detailed history.

impossibilities (logical, physical, moral, legal, etc.); (ii) our actual world is more structured as we have both legal impossibilities and non-legal impossibilities with a legal import[13].

Santi Romano's terminology is useful to make clear how a set of rules determines its set of impossibility. The impossibilities I am considering are somehow contingent, i.e. they are peculiar to the legal order we are considering. An impossibility such as the one exhibited by legal gap is the product of the rules of the legal order, it is *nomophoric* as Conte and Di Lucia (2012, 2013) say. The gap depends on the fact that there are those particular rules of the legal order that, *ex novo*, determines some impossibility.

Nonetheless, the impossibility created *ex novo* – we may call these the *proper* impossibilities of a legal order – is just a part of the impossibilities of a positive legal order. As we have seen before, a legal order is able to give a normative flavor and qualify some impossibilities that are not created *ex novo*.

4.   APPLICATIONS OF THE MODEL AND OPEN QUESTIONS

A question suddenly arises: does all legal impossibility come in the form of *ex novo* impossibility? In presenting the different elements of the triadic model I said that, in the first set, the sources of impossibility, various kinds of impossibility are included. Among them, there is also legal impossibility. As a legal impossibility, it depends from a legal order and its rules so the question arises: is all legal impossibility a form of *ex novo* impossibility?

A first answer is negative. Given that the assuming-function of legal impossibility enables us to include impossibilities from the source of impossibility into the legal order, there are legal impossibilities (i.e. impossibilities that are part of the legal order) that are not *ex novo* legal impossibilities because they are physical or logical impossibilities that are assumed and turned into relevant legal impossibilities.

A more interesting question is the following. Let's focus only on the proper legal impossibility: are all the legal impossibilities of a positive legal order created as *ex novo* legal impossibilities relative to some set of *legal* rules? What we are now considering is the possibility of having impossibilities that are legal in nature – not impossibilities of another sort, legally qualified through the assuming-function – but that are not created *ex novo* by that precise legal order. I think we cannot exclude cases in which the

---

assuming-function for impossibilities acts upon legal impossibilities that are already there (i.e. non *ex novo* legal impossibility).

These legal impossibilities that reside outside the considered legal order can be of two kinds: (i) they can be created *ex novo* by another legal order or (ii) they can be there already, if you accept some sort of natural law. Conceptually, these two cases cannot be excluded.

This is just a short introduction of the triadic model for impossibilities. Some applications of it have been presented; nonetheless further research questions are available now that we have such a model [14] *.

REFERENCES

Azzoni, G. (1988). *Il concetto di condizione nella teoria delle regole*, Pavia: CEDAM.

Conte, A.G. (1988). *Eidos*. An Essay on Constitutive Rules, *Poznań Studies in the Philosophy of the Sciences and the Humanities*, vol. 11, pp. 251-257.

Conte, A.G. (2001). Dimensions of Nomic Freedom, in I. Carter - M. Ricciardi (eds.), *Freedom, Power and Political Morality. Essays for Felix Oppenheim*, London: Palgrave, pp. 69-78.

Conte, A.G. - Di Lucia, P. (2012). *Adýnaton*. Four Dichotomies for a Philosophy of Impossibility, *Phenomenology and Mind*, vol. 1, pp. 134-143.

Conte, A.G. - Di Lucia, P. (2013). Normative Dimensions of Impossibility, in C. Stancati - A. Givigliano - E. Fadda - G. Cosenza (eds.), *The Nature of Social Reality*, Newcastle upon Tyne: Cambridge Scholars Publishing, pp. 34-44.

Feis, G. (2015). *Impossibilità nel diritto*, Pisa: ETS.

Fine, K. (2012). A Guide to Ground, in F. Correia - B. Schnieder (eds.), *Metaphysical Grounding: Understanding the Structure of Reality*, Cambridge: Cambridge University Press, pp. 37-80.

Goldblatt, R. (2006). Mathematical Modal Logic: A View of Its Evolution, in D.M. Gabbay - J. Woods (eds.), *Modalities in the Twentieth Century, Volume 7 of the Handbook of the History of Logic*, Amsterdam: Elsevier, pp. 1-98.

Kripke, S. (1963). Semantical Considerations on Modal Logic, *Acta Philosophica Fennica*, vol. 16, pp. 83-94.

---

[14]   The list includes but is not limited to the following: What exactly is these creation of impossibility *ex novo* due to a legal order? Is all the legal impossibility an *ex novo* impossibility? What is the difference between assuming an impossibility and creating a legal fiction? How does the assumption of impossibility happen, i.e., in which way the assuming-function operates in the legal order? Can a legal order modify an impossibility it is assuming? Is there impossibility, properly speaking, in the legal codes?

Guastini, R. (1986). Norme che sono condizioni sufficienti del loro oggetto?, *Materiali per una storia della cultura giuridica*, vol. 16, pp. 213-222.

Jori, M. (1986). In margine all'ultimo Conte, *Materiali per una storia della cultura giuridica*, vol. 16, pp. 443-469.

Lowe, E.J. (2012). What is the Source of Our Knowledge of Modal Truths?, *Mind*, vol. 121, pp. 919-950.

Roversi, C. (2012). *Costituire. Uno studio di ontologia giuridica*, Torino: Giappichelli.

Romano, S. (1947). Realtà giuridica, in *Frammenti di un dizionario giuridico*, Milano: Giuffrè, pp. 204-219.

Wright, G.H. von (1951). Deontic Logic, *Mind*, vol. 60, pp. 1-15.

Żełaniec, W. (2013). *Create to Rule*, Milano: LED.

Ziembiński, Z. (1966). Les lacunes de la loi dans le système juridique polonais contemporain et les méthodes utilisées pour les combler, *Logique et Analyse*, vol. 9, pp. 38-51.