A Treatise of Legal Philosophy and General Jurisprudence

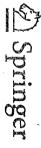A Treatise of Legal Philosophy and General Jurisprudence

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Legal Doctrine as Knowledge of Law and as a Source of Law

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Chapter 6

METATHEORY AND ONTOLOGY
FOR LEGAL DOCTRINE

6.1. The Question of Cognitivism

6.1.1. The Controversy over the Truth of Normative and Evaluative Statements

A theory of legal doctrine was previously outlined based on a wide reflective equilibrium centred on platitudes. But a critic may ask whether a doctrine of this kind—containing normative components—can lay a claim to truth. For example, can a legal interpretive statement—supported by a weighing of moral arguments—be true even if it can be justified only by a set of premises containing evaluations? Here we will turn to a more abstract problem than that discussed between relativists and objectivists in moral theory. Relativists and objectivists can both be cognitivists. Relativists can claim truth but this is a relative truth, the truth within a framework. Objectivists can claim the truth which is independent of a framework (if any such thing is possible). Obviously, a relativist can also be a non-cognitivist. A non-cognitivist can be an objectivist only in a rather odd sense, which is by assuming that there are objective values, even if no one can ever utter a truth-evaluated sentence about them.

The question whether valuations and norms have truth values is notoriously controversial (see von Wright 2000 and Artosi 2000). Moreover, What is truth? Minimalists (like Horwich) work in Tarski's paradigm: "Snow is white" is true if, and only if, snow is white. Quotation marks make all the difference between talking about words and talking about snow. The truth predicate is a device for unquoting. But then we are still left with metaphysical questions to be asked about snow and whiteness. A minimalist expels metaphysics from the theory of truth but does not thereby destroy metaphysics. She merely sets out a minimalist theory that requires a complement in the form of competing and controversial conceptions about the furniture of the world.

6.1.2. Normative and Descriptive Meaning

Before entering further into this discussion, I need to emphasize a point with regard to the meaning of normative and evaluative statements. There is an important difference between descriptive and evaluative statements: The former have a descriptive meaning only while the latter have a descriptive meaning *and* a normative meaning on top of that.[1]

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[1] Cf. Peczenik 1989, 51ff, on the *practical* and *theoretical* meaning of a norm-expressive statements and value statements.

The normative meaning of norm-expressive statements can be grasped by way of their normative qualification. These statements qualify human actions and events as prescribed, permitted, prohibited, and so on. I will not consider here the more complex types of normative qualification. "Prohibited," "prescribed," and "permitted" express a qualification (even if this does not exhaust their meaning). In general, a norm qualifies actions and events as conforming to or violating the norm in question. One can regard normative qualification as an inverted truth, so to speak. This is so because "true" and "false" are also qualifying words. A descriptive proposition p will be qualified as true if the facts are in accord with the way p describes them; the proposition will be false, then, if it does not correspond to the facts (cf. Peczenik 1967, 133; 1968, 119). Svein Eng subsequently expressed a similar view discussing what happens in case an utterance should fail to correspond with reality. When the speaker modifies the utterance for alignment, this fact will indicate that what she intended to utter was a descriptive statement; when she tries to correct reality, this fact will indicate that what she intended to utter was a normative statement (cf. Eng 1998, 310–50).

At the same time, however, normative and evaluative concepts have a descriptive meaning. This descriptive meaning is expressed by criteria that set forth the meaningful use of the same concepts. Normative and evaluative statements may thus be justified. Justifiability implies that a person confronted with a norm-expressive statement or a value statement can ask, "Why?" and hence request reasons in support of the statement. On our part, pointing out that the action in question is good, or that it ought to be performed, will suffice to show that the same action fulfils at least one of the established criteria of evaluation (cf. Peczenik and Spector 1987, 467ff.).

The basis of this theory is intuitionist. There obviously exist moral intuitions of (morally sensible) individuals. These intuitions—often concerned with particular cases, but also with general principles—are expressed in evaluative as well as normative sentences that tell us about the reasons behind the intuitions. These reasons include other intuitions of the same kind. Finally, we also have the general intuition that moral intuitions ought to be justified. We have a passion for reason or, more precisely, a preference for coherence (Peczenik 1999, 210).

These simple observations come close to David Copp's philosophical theory of realist-expressivism. The core of this theory is this:

It holds that our moral beliefs and judgments represent moral states of affairs and can be accurate or inaccurate to these states of affairs, which is the central realist thesis, but it also holds that, in making moral assertions, we express certain characteristic conative attitudes or motivational stances, which is central positive view of expressivism. (Copp 2001, 1)

Further:

The truth conditions of basic moral propositions are given by propositions about what is called by relevantly justified or authoritative moral standards. (Ibid, 27)

These standards are decided by society, and the theory is thus society-centred (ibid, 28). The expressivist side of the theory means that Copp has

been arguing for the plausibility of the conventional-implicature view for cases in which a speaker asserts basic moral propositions by using moral terms. In such cases [...] the speaker conventionally implicates, other things being equal, that she subscribes to a corresponding standard. In other cases [...] a speaker who expresses a moral belief conversationally implicates that she subscribes to a corresponding standard, other things being equal. (Ibid, 34ff.)

6.1.3. Four Possibilities

The questions just introduced are highly controversial. Let me outline four possible positions.

The first position is non-cognitivist. Jurists are often well disposed towards non-cognitivism. They consequently tend to regard norms as expressive and qualifying statements, not as propositions qualified as true or false. This was my own position in the 1960s and 70s. The theory combines a kind of expressive theory of norms with the following justification of logical rationality in normative contexts. The logic of descriptive propositions deals with the relationships that hold between the truth-values of these propositions. Conversely, one may use normative qualification as a foundation for the logic of norms. Assume, for example, that the meaning of two norm-expressive statements, n_1 and n_2, is such that each action qualified in a given way by n_2 is necessarily qualified in the same way by n_1. It is then plausible to assume that n_1 entails n_2 (cf. Peczenik 1967, 133; 1968, 119; 1969, 46ff.; reprinted in 1970, 31, 11, and 60ff.). Thus, in the realm of norms, the logical connective "if ... then" may generally be defined by way of normative qualification. The same applies to other logical connectives, such as "and" and "not." Thus, a rational non-cognitivist, A, follows her *passion for reason* and can have a rational discussion with another rational non-cognitivist, B. What A does, then, is to show B that B's system of beliefs, preferences, and reasonings supports the conclusion that A proposes.

The problem is, however, that this very passion for reason requires of us, not only to construct coherent normative theories in morality and in law, but also to state what kind of reality these theories are about.

The second position is a mixed one. In 1989 and 1995 I expressed a theory that is cognitivist relative to *prima facie* (better yet, *pro tanto*) norm-and-value statements and non-cognitivist relative to all-things-considered norm-and-value statements: The former are true if they correspond with the cultural heritage of society; the latter may be more or less reasonable in the light of an individual's acceptance-and-preference system, but are not true in any ontological sense. On this theory, knowledge of *pro tanto* values is possible, whereas a well-argued belief about an all-things-considered value merely expresses something essentially similar to knowledge, but not knowledge in the

literal sense. The rationale here is that we are not thereby committed to the view that there is only one right answer to all moral questions (cf. Peczenik 1989, 309ff.; 1995, 670ff.).

This theory is open to criticism because it is a hybrid theory. It splits up the apparently homogenous category of norm-and-value statements into two radically different categories, one of which is truth-assessable and the other is not. Moreover, non-cognitivism does not give us any profound basis on which to require coherence of all-thing-considered value judgments (cf. Rabinowicz 1998, 17ff. and 23; Peczenik 1998b, 62ff.).

The third position is cognitivist. A cognitivist metatheory may be thought to provide a better account of *pro tanto* norm-and-value statements and all-things-considered norm-and-value statements, both. But a theory of this kind will have to avoid the dogmatism that we are all too familiar with from classical natural law: We must preserve the intuition that it is easier to contest weighing in particular cases than to frontally attack such values as human life. But this cognitivist turn is very difficult for me to take, since my roots are in the legal realism of Petrażycki, Wróblewski, Ross, and Olivecrona.[2]

The fourth position is metatheoretical relativism. The best way out is perhaps to endorse Jaap Hage's idea that there is no fixed demarcation line between the objective and the relative (cf. Peczenik and Hage 2000, 337). Presupposing the concepts and standards of moral-cum-legal practice commits us to viewing our knowledge of these concepts and standards as objective knowledge about the world. Thus, the dependence of judgments on concepts and standards does not rule out the objectivity of these judgments. Only when we start doubting the knowledge we allegedly have of the same concepts and standards do we switch over to a relativist language and add such clauses as "I think that," "in my opinion," and so on. Now, it is particularly odd to doubt basic moral values and easier to doubt judicial decisions. But, as previously stated, the difference is not sharply determined in basic philosophy. The borderline is fluid and contingent. What this means for us in this context is that juristic doctrines may be regarded as affording a kind of juristic knowledge only so long as theorists do not begin to have doubts as to what they "really" do.

6.2. Ontology for Legal Doctrine

6.2.1. *The Problem of the Ontology of Law*

Lurking behind epistemology and metatheory is ontology. In Volume 1 of this Treatise, Enrico Pattaro presents an analytical and explanatory theory that

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[2] Jes Bjarup has an insightful point in this regard: "AP's [...] theory can be regarded as a union of utilitarianism with communitarianism emphasizing that the good legal order is characterized by protecting human preferences. The ground for it is in the non-cognitivist view" (Bjarup 1995–1996, 1186).