

Swiss Philosophical Preprint Series

85

Maksymilian Del Mar

**The Problem Of Normativity
In Contemporary Legal Theory**

Added 22/03/2009

ISSN 1662-937X

© Maksymilian Del Mar

The Problem of Normativity in Contemporary Legal Theory

*Maksymilian Del Mar**

Abstract

This paper examines the problem of normativity in contemporary legal theory, paying particular attention to the relationship between the conception of the problem and related explanations of behaviour. The first part of the paper shows how the problem of normativity, conceived of as a matter of determining how legal norms function as reasons for action, is linked to an explanation of behaviour that is posited or assumed to be capable of being guided by reasons. More importantly for the purposes of the paper, the first part also shows the problem of normativity plays a certain function (called here a ‘thought-context’) thanks to which a theorist can, e.g., evaluate lawmaking and adjudication practices (Timothy Endicott); scrutinise the reasonableness of norms (John Finnis); critically examine the circumstances under which law is authoritative (Joseph Raz); or make distinctions between certain kinds of phenomena that influence conduct (H.L.A. Hart). The second part of the paper offers the sketch of an alternative relationship between a conception of the problem of normativity and an explanation of behaviour. The general aim of the paper is to endorse an engagement with the works of others that pays attention to the relationship between problems and explanations, and to the implications of any one way of drawing that relationship for images and practices of theorising.

Introduction

In its broadest sense, this paper attempts to embody an attitude to engagement with other theoretical pictures that does not approach those pictures from the perspective of their verisimilitude with reality, e.g., with what legal life, or life under the law, is ‘really’ or ‘actually’ like. Rather, the attitude with which this paper is informed is one that attempts to look particularly carefully at the relationships between problems and explanations in any one theoretical picture, as well as at the implications of any one way of drawing that relationship for the images and practices of theorising.

More specifically, in the first part of the paper, this attitude is employed in order to show how a certain conception of the problem of the normativity of law tends to play certain kinds of functions in different theoretical pictures. The paper eases its way into recognising these functions by looking carefully at the relationship between a certain kind of conception of the problem of the normativity of law (i.e., as a matter of determining how some set of

* University of Edinburgh and University of Lausanne. Email: Maksymilian.DelMar@unil.ch.

already available reasons guides behaviour) and a certain kind of explanation of behaviour (i.e., as capable of being so guided). Paying attention to this relationship allows for a reading of the treatment of this problem in theoretical pictures as a thought-context for: 1) the evaluation of lawmaking and adjudication practices (Timothy Endicott); 2) the scrutiny of the reasonableness of norms (John Finnis); 3) the critical examination of the circumstances under which law is authoritative (Joseph Raz); or 4) the making of distinctions between certain kinds of phenomena that influence conduct (H.L.A. Hart).

Having provided such a reading, the second part of the paper goes on to offer a different kind of relationship between a conception of the problem of normativity and an explanation of behaviour. Based on an explanation of behaviour as a matter of the exercise of certain common ways of seeing and doing, acquired and developed over long periods of time in certain specific contexts, the second part of the paper offers a conception of the problem of normativity as one of negotiating a balance, both on the individual and social level, between repetition and change. It is argued that this conception, in turn, may lead to an alternative image and practice of theorising, namely as one of maintaining a relationship between the ability of consensus and the ability of concern – which, significantly, also happens to be an image and practice of theorising that does not necessarily take law as its exclusive object of inquiry, but that combines the interests and approaches of legal, moral, political and social philosophies.

The paper does not present the patchwork of relationships between problems and explanations, and implications thereof for the image and practice of theorising, offered in the second part, as superior to that in the first. It does, however, offer the patchwork in the second part as a genuine alternative. What is particularly interesting, for the purposes of this paper, is that in order to be a genuine alternative, the proposal offered in the second part must introduce changes not only in what one sees as problematic, and what kinds of resources one

sees as promising for certain kinds of solutions, but also in how one understands one's role as a theorist and how one practices theory.

Part I. Normativity as a Thought-Context

There is an intimate relationship between the problem of the normativity of law, conceived as a matter of determining the role that legal norms (imagined principally as a realm of already available reasons for action) play in guiding human conduct, and a certain kind of explanation of behaviour, namely, one in which it is either posited or assumed that human conduct is such that it can be guided by already available reasons. Of course, providing an account of that notion of guidance that is not so deterministic or authoritative as to leave no room for spontaneity and freedom, and thus also fallibility, is extremely difficult. For present purposes, it will be useful to begin a discussion of the problem of normativity in contemporary legal theory by paying particular attention to the relationship between the issue of guidance and the explanation of behaviour as capable of being guided. As we shall see later, paying attention to this relationship may help us bring out an alternative appreciation of the problem of the normativity of law, i.e., as playing different kinds of functions in specific works of legal theory.

A useful context for a discussion of these issues is a recent paper by Timothy Endicott. Endicott's work has focused on the relevance and implications of certain problems in the philosophy of language for legal theory, and in particular, on the problem of vagueness.¹ More recently, however, Endicott has turned to confront the implications of the phenomenon of vagueness for the normativity of law.² On its face, the implication appears very troublesome. After all, if the very 'point of a norm is to guide conduct for a purpose', then the

¹ See, Endicott 2000.

² Endicott 2005.

vagueness of a norm ‘seems repugnant to the very idea of making a norm.’³ For a vague norm, as Endicott continues, ‘leaves the persons for whom the norm is valid with no guide to their conduct in some cases.’⁴ Once more, ‘a vague norm in a system of norms does not control the officers or officials responsible for applying the norms or resolving disputes – and part of the value of a system of norms is to control the conduct of the persons to whom the system gives normative power.’⁵ In contradistinction to these worries, however, Endicott sets out to show that not only is vagueness ‘a central technique of normative texts, i.e., that it is needed in order to pursue the purposes of formulating such texts’, but that it is also ‘of central importance to the very idea of guiding conduct by norms.’⁶

It is important for Endicott to underscore that ‘not all norms are vague.’⁷ Examples of terms that Endicott characterises as vague include ‘child’, ‘trade’, or, more ‘extravagantly’, ‘abandoned’, and ‘reasonable.’ Vagueness, on this view, is a property of certain terms and phrases. It is inherent in them; it is a characteristic of the nature of language. It is not that any term or phrase can, in certain circumstances (or, to speak somewhat artificially, “on certain facts”), become vague. Rather, on this view, language contains its own properties that allow it, as it were, to propel itself.

Significantly, Endicott’s move, i.e., the demarcation of vagueness as an inherent property of certain terms and phrases, allows him to characterise vagueness as a technique used by lawmakers. Sometimes lawmakers have a choice – they can either choose what Endicott calls the ‘arbitrariness of precision’ (arbitrary not because it is vague, but because it is unclear for what other reason the voting age is, say, exactly 18, rather than 18.5) or the ‘arbitrariness of vagueness.’⁸ At other times, precision may be impossible – Endicott’s

³ *Ibid.*, 27.

⁴ *Id.*

⁵ *Id.*

⁶ *Ibid.*, 28.

⁷ *Id.*

⁸ *Ibid.*, 37-40.

example is laws concerning baby-sitting – at which point the ‘impossibility’ of precision is quickly characterised as in any event ‘undesirable’, such that Endicott is free to conclude that ‘because there is no precise way of setting precise standards that will meet the criteria for a good legal regime’ (in the case of baby-sitting, Endicott describes this as a matter of law not interfering too much with what counts as good parenting), so ‘the purpose of the regulation itself requires vague standards.’⁹

Recall that Endicott set out to show how vagueness is of central importance to the guidance of human conduct by norms. The above argument serves, at best, to justify some practices of lawmaking, rather than answering how vagueness is good for the normativity of law amongst ordinary citizens. For Endicott, to recall, a ‘norm is a reason for action: the point of a norm is to guide conduct for a purpose.’¹⁰ Endicott continues:

The reason for making the norm is to promote or to achieve the purpose; the norm itself is treated as a reason, or it is not treated as a norm at all. It is a consequence of this understanding of a norm, that a normative text is a text formulated and communicated to express a reason for action. Normative texts have the general purpose (whatever other purposes they may have in particular instances) of guiding conduct.¹¹

Having set out the requirement of legal normativity that way, Endicott struggles to provide an example of where a norm that he characterises as vague (e.g., not ‘neglecting’ one’s child when deciding on a baby-sitter) actually plays a role, let alone a beneficial role, in the behaviour of citizens. ‘Under the Children and Young Persons Act,’ says Endicott, ‘the parent needs to decide whether it would be “neglect” (and may need to guess whether officials would count it as neglect).’¹² Is this assertion, as to what a parent would need to do, capable of proving the role or the beneficial role of a vague term in a statute in the practical reasoning of an agent? Without elaborating on the example, Endicott quickly asks us to ‘note that many

⁹ *Ibid.*, 42.

¹⁰ *Ibid.*, 36.

¹¹ *Id.*

¹² *Ibid.*, 34.

norms are addressed to officials or institutions.’¹³ Indeed, here as elsewhere in the paper, Endicott keeps hiding the problem of legal normativity for the citizenry under the carpet of justifying (or, more generally, evaluating) the alleged inherent vagueness of norms vis-à-vis the practices of lawmaking and adjudication. It is not that, or it is at least difficult to see from Endicott’s discussion how, the norm of ‘neglect’ actually functions as a reason for action for a parent. Rather, what appears to matter, for Endicott, is whether the evaluative term ‘neglect’ can and ought to be reasonably used as a resource for evaluating the conduct of parents. A parent that officials are likely to recognise as properly caring for their children would not need to, nor would be expected to, consult a statute requiring them to abstain from neglecting their children. At best, the inclusion of the term ‘neglect’ in a statute that is to be used when evaluating the conduct of a parent charged under the statute, helps officials to consider the widest possible array of circumstances surrounding the case (arguably necessary given the variety of parenting styles and the complexity of familial contexts), as well as to serve the liberal values of minimising the interference of the state in the private lives of families – in short, once again, the alleged vagueness of a term, especially when characterised as an inherent property of a term, helps to justify (or, more generally, offers possibilities for evaluating) lawmaking and adjudicating practices. It does little to advance a solution to the problem of the guidance of the citizenry by rules (vague or otherwise).

To state this is not necessarily to disagree with Endicott that it may indeed be beneficial for ‘the framers of norms’ to ‘be prepared to assess competing forms of arbitrariness, and to judge whether the forms of arbitrariness resulting from a vague norm are more or less damaging than the forms of arbitrariness that result from a precise norm.’¹⁴ It is simply to state that this argument is silent on the role of such norms in the behaviour of the citizenry – once again, it functions more as a justification for (or an evaluation of) the use of

¹³ *Ibid.*, 35.

¹⁴ *Ibid.*, 47.

certain kinds of resources in the post factum evaluation, by third parties, of the behaviour of others. That it is also capable of serving as a justification for (or evaluation of) minimising the interference of the state in the regulation of private realms does not turn it into a proof of the role, beneficial or otherwise, of such norms in the ex ante first person behaviour of the citizenry.

The brief discussion above certainly raises a puzzle. One cannot but help ask: what is the purpose of the problem of the normativity of law for legal theories? The discussion of Endicott above has provided us with one kind of answer, i.e., by looking at how Endicott set up the problem and linked it with the issue of guidance by a certain section of the citizenry (i.e., parents deciding on an appropriate baby-sitter), we also saw how Endicott was able to use the problem of normativity and the related explanation of behaviour to justify (or, more generally, evaluate) lawmaking and adjudication practices (i.e., in the above case, of issuing a vague decree, and using it to evaluate parental decisions to employ baby-sitters).

The rest of this part of the paper will continue with this strategy, i.e., I shall look at a number of legal theories in which the problem of normativity plays a certain function, called here a 'thought context.' First, I shall look at John Finnis and note how the problem of the normativity of law – conceived, as with Endicott, as a matter of determining how some set of already available reasons guides conduct – enables, in Finnis' case, the scrutiny of the reasonableness of norms. Second, I shall consider Joseph Raz, and show how the problem of normativity plays a function thanks to which Raz can discuss the circumstances under which law is authoritative. Third, and finally, I shall look briefly at H.L.A. Hart and show how for him making room for the problem of legal normativity allows him to make distinctions between different kinds of phenomena that may be said to influence our conduct. As with the discussion of Endicott, I will take the relationship between a certain conception of the

problem of the normativity of law and the related explanation of behaviour as my guiding analytical instrument.

It is useful to begin an all too brief encounter with Finnis by showing how he privileges, as Endicott does, the first person ex ante perspective in explaining behaviour. Consider the following passage from a recent article by Finnis, where he is providing a summary of the thesis of a co-authored paper by Hart and Stuart Hampshire:

One has a knowledge of, and certainty about, what one is doing, one's own voluntary actions, which is not an observer's knowledge, and is not based like the observer/spectator's on empirical evidence or on the observation of one's own (the acting person's movements): it is practical knowledge.¹⁵

Like Raz, as we shall see below, Finnis endorses Hart and Hampshire's privileging of the first person ex ante point of view, though not without some qualifications. The principal criticism made by Finnis is that Hart does not consider the *content* of rules seen from the perspective of the internal point of view, i.e., from a perspective under which those rules are reasons for action. Hart's legal theory, says Finnis, 'leaves those reasons largely unexplored, and rests largely content with reporting the fact that people have an attitude which is an internal aspect of their practice.'¹⁶ 'It does not', as clearly Finnis argues it should, 'seek to understand those reasons as reasons all demand to be understood – in the dimension of soundness or unsoundness, adequacy or inadequacy, truth or error.'¹⁷ Indeed, Finnis goes as far as to say that Hart's position suffers from a serious incoherence:

Trying to understand the internal point of view makes, I would say, no sense as a method in social theory unless it is conceived as trying to understand the intelligible goods, the reasons for action, that were, are and will be available to any acting person, anyone capable of deliberation or of spontaneously intelligent response to opportunities. Once these reasons are understood, along with accompanying, potentially reinforcing, potentially disruptive, subrational inclinations (passions, emotions), theorists are equipped to understand the myriad ways in which the practices of individuals and groups can, do and doubtless will respond, reasonably and

¹⁵ Finnis 2007, 31, summarising Hart and Stuart Hampshire 1958.

¹⁶ Finnis 2007, 42.

¹⁷ *Id.*

more or less unreasonably, in the ever-variable but far from random circumstances of human existence.¹⁸

What is interesting here, for present purposes, is that Finnis sets up the problem of the normativity of law in a way that it functions for him as a thought-context thanks to which the reasonableness of legal norms can be evaluated. By creating a possible world in which the rules really do function as reasons for action (including, potentially, as exclusionary reasons – to be discussed below), the thought-context allows Finnis to justify his own practice of taking the evaluation of the content of the rules seriously. Surely, or so the argument goes, if rules function as reasons, and thus are capable of guiding the behaviour of the citizenry, then the content of the rules matter. Of course, this is not the only way for the content of the rules to matter (one might, for example, place importance on how the ‘law itself’ symbolises, represents, the values of a particular community), but it certainly appears to be a way used by Finnis to justify taking seriously the importance of the reasonableness of the content of rules (of course, it is important to add that Finnis has his own conception of what reasonableness entails, and actually engages in detailed critique of existing legal norms, as well as offering an exposition of ideal systems of legal norms, based on his own conception of reasonableness).

It is time now to look a little more closely at the thought-contexts set up by a certain conception of the problem of the normativity of law in Raz and Hart. Of assistance here will be some of Sundram Soosay’s work.¹⁹ The aim of the discussion below is not to provide a comprehensive overview of Soosay’s contribution, but rather, to note some of the main critical points raised by him, while also making reference to some of the principal sources in legal theory that he focuses on.²⁰

Taking Soosay’s work as a guide also allows me to make an important point with respect to the attitude with which this paper is written. Soosay criticises Hart and Raz on the

¹⁸ *Ibid.*, 52.

¹⁹ Soosay 2005. See also Soosay 2006.

²⁰ The focus below is on Hart 1994 and Raz 1990.

basis that the pictures of behaviour offered by both of them is unrealistic. However, as has been noted above, it is one of the principal aims of this paper to resist this kind of criticism, and to show that there is a more generous, and also arguably more careful, reading of either the function of the problem of the normativity of law in contemporary legal theory or related explanations of behaviour. In other words, in the context of the contemporary literature on the normativity of law, arguing over the reality or unreality of those pictures may mean that we will miss the function of the problem of the normativity of law as a thought-context thanks to which those theorists can, e.g., discuss and evaluate the importance of rules, their pedigrees and their content. This paper resists, then, Soosay's assumption that there is a meta-standard or unproblematic account of reality, such that any one theoretical picture can be said to be closer to the truth of the matter; and it endorses, by contrast, an approach to the engagement with the works of others that looks carefully at the relationships between problems and explanations in any one theoretical picture.

The object of Soosay's criticism is directed to the 'tendency always to imagine that intentional action is carried out in a wholly self-conscious and deliberate manner, with explicit decision-making included as an inevitable part of its structure.'²¹ In Soosay's view, this is a tendency that has dominated thinking within legal theory, 'particularly, of analytic and positivist legal theory, the view championed by the likes of Hart, Neil MacCormick²² and Raz', but also Ronald Dworkin.²³ As noted above, the discussion will below will not consider Soosay's treatment of MacCormick and Dworkin, but focus instead of his criticism of Raz, and then Hart.

One of Soosay's examples of the above-mentioned dominant tendency to favour the self-conscious and explicitly deliberative mode of explanation of behaviour is Raz's *Practical*

²¹ Soosay 2005, 10.

²² Soosay's criticism of MacCormick is based on MacCormick's previous work – indeed, in subsequent work, MacCormick acknowledges and discusses Soosay's criticism (see chapter 4 of MacCormick 2007).

²³ Soosay 2005, 10.

Reason and Norms.²⁴ Raz, says Soosay, exemplifies ‘unspoken adherence to the self-conscious, deliberative model.’²⁵ He assumes ‘a thoughtful, self-conscious attitude on the part of human agents’ and thus he speaks of action always and invariable being taken for reasons.²⁶ Raz recognises that there ‘are occasions when decisions are made and action is taken where reasons do not appear to play the role we expect’ – where there is, in other words, ‘no careful weighing up of reasons.’²⁷ Nevertheless, in explaining this phenomenon Raz, according to Soosay, ‘does not depart from his scheme of reasons’ and chooses, instead, to speak of ‘exclusionary reasons’, i.e., ‘the idea...that among the reasons the individual has to work with, a special class of reasons exists which operates not by contributing to the process of reasoning, but by shutting the process down altogether.’²⁸ An ‘exclusionary reason’, then, ‘is a reason not to reason’,²⁹ the latter being a reason undertaken deliberately and self-consciously.³⁰ Raz thus appears to reify the concept of a reason for action – he promotes, in other words, the view that we really do act for reasons even when it would appear that we are not.

Soosay’s dissatisfaction with Raz’s approach is that an explanation that uses the concept of ‘exclusionary reasons’ is not ‘representative of our experience of norms and of legal life specifically.’³¹ But, keeping in mind the attitude endorsed by this paper, let us consider *PRN* from another angle – i.e., one that does not depend on its verisimilitude (or lack of) with legal life, but that looks carefully at the function, within any one particular theoretical picture, of the problem of the normativity of law.

First, we can place *PRN* in a historical context. *PRN* can be understood to be a response to – and an attempt at a solution of – a problem that Raz found with Hart’s ‘practice

²⁴ Raz 1990, 176; hereinafter, referred to in the text as *PRN*.

²⁵ Soosay 2005, 14.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Ibid.*, 15.

³¹ *Ibid.*, 16.

theory of rules.’ Raz’s characterisation of norms as reasons for action is designed to avoid the three major defects he argues that the practice theory suffers from: that ‘it does not explain rules which are not practices; [that] it fails to distinguish between social rules and widely accepted reasons; and [that] it deprives rules of their normative character.’³² Consider the alleged third defect: the claim is that the practice theory ‘deprives rules of their normative character.’³³ This defect is tied to the understanding that Raz attributes to Hart of the use of an expression such as ‘it is a rule that one ought to.’³⁴ Raz takes it that Hart understands the use of such an expression to be warranted only if the practice of conforming to the rule exists.³⁵ In this way, Raz states, ‘rule sentences are used to make normative statements’, but those normative statements are not statements that there is a reason to act in the manner prescribed by the rule, but ‘merely...that there is a reason.’³⁶ In other words, rules understood by Hart, according to Raz, do not provide reasons for action. They simply describe the circumstances – by way of Hart’s internal point of view – in which a member of a community can felicitously use the expression, ‘one ought to....’ In that sense, says Raz, the internal point of view reveals to us when a speaker, the member of a particular community, is not alone,³⁷ but it contributes nothing to practical reasoning, i.e., it does not provide a reason *for* acting in accordance with the rule.

Following on from Finnis’s critique cited above, Raz’s argument should feel familiar. Now let us consider why Raz, like Finnis, wants to promote, or make room for, the problem of the normativity of law, conceived of as a matter of showing how rules function as reasons for action. Arguably, for Raz, unlike for Finnis, the reason why we need the problem of legal normativity is not in order to scrutinise the reasonableness of the content of legal norms, but

³² Raz 1990, 53.

³³ *Ibid.*, 56.

³⁴ *Ibid.*, 57.

³⁵ *Ibid.*, 58.

³⁶ *Id.*

³⁷ *Id.*

rather, to explain, and also critically reflect on, the authority of law. Saying that rules of law function as exclusionary reasons for action is, for Raz, a thought-context thanks to which we can examine the circumstances under which law is authoritative. Law is authoritative when the rules of law function as exclusionary reasons for action; therefore, looking carefully at when law really does function as exclusionary reasons for action will help us to understand the circumstances in which law is authoritative.

Soosay is certainly right to notice that in Raz the conception of the problem of the normativity of law as a matter of guidance by some set of already available reasons for action leads to, or is supported by, a certain kind of explanation of behaviour, i.e., as capable of being governed by (or be responsive to) that set. But Soosay's strategy to criticise the second half of that relationship, i.e., the explanation of behaviour, on the basis that that explanation is unrealistic, is misleading. In criticising Raz's work from this perspective, Soosay misses the function that the problem of the normativity of law plays in Raz's theoretical picture. In other words, he misses the way in which the problem of the normativity of law enables the evaluation of law's authority.

Let us move on, briefly, to Soosay's criticism of Hart. Soosay argues that 'Hart insisted that our experience of...[law] was characterised by a "critical reflective attitude," going out of his way to distinguish this attitude from "mere habits of behaviour".'³⁸ Similarly with the distinction between internal and external rules – here, says Soosay, 'Hart sought to make clear that obedience to the law arises from a self-conscious commitment to the law, which is what the internal aspect amounts to. It describes not only cognisance of the rule in question, but explicit acceptance of it.'³⁹ Finally, Hart's 'preference for a deliberate, self-conscious view of law is reflected...in his insistence that law and morality be seen as separate', an insistence that Soosay attributes to the attempt to 'make clear that legal life is

³⁸ Soosay 2005, 38.

³⁹ *Id.*

not a matter of intuition or feeling or cultural inheritance’, but rather, ‘a matter of self-conscious choice’ – ‘a matter of taking a hand in our own destiny, approaching life in a thoughtful manner and making decisions as to how we will live.’⁴⁰ Soosay calls Hart’s approach ‘a top-down, bureaucratic model’, and one he wants to challenge by offering ‘instead a ground-up, experiential one.’⁴¹ A good part of Soosay’s criticism is what Soosay calls Hart’s ‘searching’ investigation into ‘habits of behaviour.’⁴² Soosay argues that ‘for Hart, the unthinking, automatic character of such habits surely could not be sufficient to account for the complexity of legal life.’⁴³ For Soosay, habits, ‘both of perception and behaviour’ – or, in another way, ‘the embedding of the law in the environment the human agent perceives’⁴⁴ – are ‘central to the operation of the law...in the present day.’⁴⁵

However, as we have seen with Finnis and Raz, a problem or an explanation can be more generously considered as an element in a theory, and its function within that theory can be examined. In the case of Finnis and Raz we have looked at the function of the problem of normativity (conceived of in a certain way). In the case of Hart, let us consider the function of an explanation of behaviour that privileges the first person *ex ante* perspective, and which envisages conduct as largely intentional, conscious and deliberative.⁴⁶ It is important to see that Hart describes his own project, in *The Concept of Law*,⁴⁷ as that of advancing ‘legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion,

⁴⁰ *Id.* In this respect, assuming Soosay’s point to be correct, it is interesting to note the great degree of similarity – of course, noted by many scholars before – between Hart and John Stuart Mill.

⁴¹ *Ibid.*, 40.

⁴² *Ibid.*, 41.

⁴³ *Id.*

⁴⁴ *Ibid.*, 42.

⁴⁵ *Id.*

⁴⁶ To do so is not to endorse the view that this is an accurate representation of Hart’s explanation of behaviour; it is just to use that representation (borrowed from Soosay) to show how it can lead us to read Hart’s theoretical picture in a more generous way (and not merely from the perspective of verisimilitude).

⁴⁷ Hart 1994.

and morality, as types of social phenomena.’⁴⁸ In that spirit, his theory can be taken to be an analytical scheme that allows us to differentiate between types of phenomena that influence our conduct. As Hart repeatedly stresses, ‘the ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule, without which’, he thought, ‘we cannot hope to elucidate even the most elementary forms of law.’⁴⁹ In that respect, then, one can see that the privileging of the self-conscious and deliberative mode of explanation of behaviour plays a supportive role, assisting, in Hart’s case, in the drawing of distinctions without which his definition of a legal system as a union of primary and secondary rules would be impossible. In other words, we are liable to exclude the explanatory power of Hart’s distinction between primary and secondary rules on the sole basis that the explanation of behaviour relied on to make the distinction is unrealistic. Is this not too high a price to pay? Is it, even more pertinently, a price we need to pay?

What we have seen, then, in the above discussion, is that when one engages in the criticism of the work of another theorist from the perspective of verisimilitude, one takes the risk that one will not see the unique ways in which problems and explanations are linked in any one theoretical picture. Of course, this paper has barely scratched the surface of the kind of relationships at play in theoretical pictures of law where the problem of normativity arises. We have seen that there may be important links, in any one theoretical picture, between, on the one hand, the relationship of a conception of the problem of normativity and a certain kind of explanation of behaviour, and, on the other hand, the following kinds of theoretical activities: 1) the evaluation of lawmaking and adjudication practices (Timothy Endicott); 2) the scrutiny of the reasonableness of norms (John Finnis); 3) the examination of the circumstances under which law is authoritative (Joseph Raz); 4) or the making of distinctions between certain kinds of phenomena that influence conduct (H.L.A. Hart). There are no doubt

⁴⁸ *Ibid.*, 17.

⁴⁹ *Ibid.*, 80.

other kinds of links to be unearthed. It has been the aim of this part of the paper to simply offer a glimpse of the possibilities opened up by the adoption of this kind of engagement with the works of others.

II. Normativity between Repetition and Change

The discussion above raises the following questions: first, are there other kinds of relationships between conceptions of the problem of normativity and alternative explanations of behaviour? Second, if we begin with the explanation of behaviour, and offer an alternative explanation of it, does that mean that we may also offer a different patchwork of problems? Third, if that is so, is there an explanation of behaviour that allows us to characterise the problem of normativity in a different way? Fourth, will characterising the problem of normativity in a different way lead it to play a different kind of function in our theoretical picture, and if so, what might this function be? Fifth, if there is a different kind of function to be played by the problem of normativity, may this also have an impact on the very image and practice of theorising, and if so, what kind of impact might it have? This paper cannot tackle these questions in any depth. However, in answering the above questions with a resounding ‘Yes!’, it aims to sketch out an alternative research path. Again, to reiterate, this second part does not wish to suggest that this alternative path is superior to that (arguably) taken by certain theorists discussed in the first part; the aim, instead, is to offer a genuine alternative to the above conceptions of the problem of the normativity of law.

A good deal has been written in the last century about the importance of not introducing overly sharply drawn distinctions between mind and body, mind and world, action and thought, decision and motivation, the individual and the society, and many other such distinctions besides. The alternative explanation of behaviour offered in this part of the paper is positively disposed to this anti-dichotomous sensibility. Under this alternative

explanation, we develop certain ways of seeing and doing – generally engaging with the world and others – over long periods of time, and in certain contexts (e.g., the family, workplaces), where those contexts are themselves the result of long-term interaction (e.g., the family as a structure ought to be understood in socio-historical terms). It does not make much sense to say that those common ways of seeing and doing (let us call them ‘common activities’) are governed by rules or norms, however implicit. Rather, it makes more sense to conceive of these common activities as forms of adaptation leading to certain kinds of expectations, which are sometimes transmitted over generations, and where explanatory priority is given to the concept of learning – i.e., a matter, at least initially, of the imitation of more skilled persons, thereafter becoming ever more subtle and refined in the performance of certain tasks thanks to repetitions in increasingly familiar environments.

This particular concept of learning is important. It is a concept generous enough to include explicit instructions, but not such as to allow those instructions to dominate elements of enactive, unspoken, dynamic, unplanned and adaptive teaching. It is a concept, furthermore, designed to remind us that the body can be just as nuanced as any explicit instruction, both in its ability to sense the appropriateness of an action (or any other object of evaluation), and in its ability to communicate that evaluation to another human being.

It is also important for this alternative explanation of behaviour that the focus be on abilities. The concept of an ability is sufficiently flexible to be held in different degrees in different individuals, but also sufficiently robust to give us an indication as to the kinds of activities, and ideal results, that the exercise of such an ability might entail. Further, the concept of an ability does not suggest that a person exercising it will always get it right: in other words, it leaves open the possibility of defeating circumstances, including some that are better conceived as internal to the individual (e.g., spinal damage resulting in lack of control over the movement of one’s hand, etc).

There are two other elements of this alternative explanation of behaviour that need to be mentioned. First, there is the element of salience, or more precisely, a particular conception of salience. Second, there is the element of mutual regulation by the interaction of emotions. Salience is here conceived not as a matter of applying certain rules to a situation (even tacitly or blindly), but as a matter of having come to pay attention to a certain patchwork of similarities and differences that others – within your community (however broadly or narrowly this is conceived in different circumstances) – will also have come to pay attention to. Naturally, one's attention can be relocated; this can happen because of changes in circumstances, or because an individual or group makes an effort to organise what is relevant for them in a different way. Nevertheless, in much of everyday life, according to this explanation of behaviour, persons tend to pay attention to the same kinds of things, distinguishing between things in similar ways, and are generally oriented to seeing similar things as offering possibilities for certain kinds of activities. Secondly, with respect to emotions, the fluidity of much of everyday life, again according to this alternative explanation of behaviour, is knitted together on the basis of often quite nuanced mutual regulation via the interaction of emotions. Particularly powerful emotions, such as shame and guilt, but also joy and other more positive emotions, are constantly being expressed and traded between persons, not necessarily in any explicit fashion, but much more so via the use of gestures and other kinds of signs and expressions that are performed automatically. These emotions develop and change in certain ways, but, on the whole, they acquire (a particularly tenacious) contextualised stability very quickly.

Under the guise of such an alternative explanation of behaviour, the problem of normativity acquires a different hue (from that which we saw in the first part of the paper). The problem becomes not a matter of guidance by (or responsiveness to) some realm of already available reasons (or any other set of normative requirements or conditions of

correctness, etc), but rather, a matter of negotiating a balance between repetition and change. Given our involvement – on the alternative explanation of behaviour – in many different kinds of contexts, where we tend to repeat certain kinds of activities, and develop certain kinds of abilities, the issue becomes: how can we remain sufficiently open and flexible as not to be caught in the grip of any particular way of seeing and doing – at least not to the extent that we cannot adapt to changing circumstances, or indeed, recognise the need for such adaptation?

Notice that this way of posing the problem of normativity is at once both individual and social. In other words, both persons and communities are afflicted by the challenge to negotiate – and keep negotiating – a balance between the weight and frequency of repetition, and the difficulty of, and sometimes great need for, change. Further, this balance is important not only in the political arrangements made by societies, e.g., arrangements to distribute and re-distribute resources in specific ways, or arrangements that recognise one or another group as full members of the society. It is also important in, for example, scientific communities, or more generally, scholarly communities. In those kinds of communities it is equally important to negotiate a balance between the stability of knowledge (e.g., agreement on and common use of certain methods of inquiry) and the capacity for revising that knowledge (whether methodological or substantive). In other words, then, the problem of normativity so conceived allows a theorist to understand the dynamics of repetition and change and to examine the circumstances in which change may be required.

Finally, on this briefest of possible sketches, how does such a conception of the problem of normativity – i.e., to repeat, the negotiation of a balance between repetition and change at both individual and social levels – affect the very image and practice of theorising? It can do so very starkly. It may lead, for example, to the argument that a theorist is better off – especially in the humanities and social sciences – to have an image of theorising, and to

practice theory, as a matter of maintaining a balance between two abilities: first, the ability of consensus; and second, the ability of concern.

The ability of consensus seeks to find common ground, or overlapping agreement, amongst a range of different views. In other words, this ability recognises that we need to coordinate our actions, and that for that occur, there must be sufficiently stable structures that enable and perhaps even reward repetition and its effective transmission. The ability of concern, on the other hand, is exercised in the name of change. It attempts to relocate attention; it attempts to loosen the grip of certain pictures over us, and thereby to offer new ways of seeing and doing; it seeks to open alternative paths for future research, and alternative ways of accounting for the legacy of the past. Most importantly, it is exercised in the name of those persons and communities who may be silenced by current arrangements, i.e., it seeks to address the difficulties of, and open possibilities for, those who have, until now, been unable, for want of basic needs and capabilities, to exercise their freedom and the right to a full life.

The image and practice of theory so conceived is wary of placing too much emphasis on either ability (i.e., of consensus or concern). Therefore, it pays particular attention to maintaining a relationship between the two abilities, making sure that the two are informed by each other. The ability of concern must recognise that we need to reach consensus, at least temporarily and defeasibly, at certain times and in certain places. It also needs to recognise that for the purpose of fruitful discussion, we may need to make tentative assumptions and presumptions; and that we cannot attempt to start from scratch, but that we ought to begin with our current (non-ideal) arrangements. The ability of consensus, however, must realise that any existing arrangement is bound to exclude and marginalise some persons and communities; that nothing is capable of guaranteeing the achievement of any particular ideal we may aspire to; that no set of arrangements, whether procedural or substantive, ought to be posited or assumed to be out of the range of criticism and revision; and that all judgements of

appropriateness are themselves revisable on the basis of changing circumstances and the bottomless imagination of the future. In short, it is only by learning from each other, by feeding off and informing each other, that the two abilities can continue to develop.

It may appear that we have come a long way from examining the problem of the normativity of law in contemporary legal theory. Although understandable – given the generality of the above discussion – this would be a mistaken sentiment. The point of this second part of the paper has been to show that there is a relationship between: 1) an explanation of behaviour; 2) a conception of normativity that that explanation may lead to (and the function that conception may play); and 3) the image and practice of theorising. In other words, if we accept the explanation of behaviour offered in this second part, and adopt the related conception of the problem of normativity, we also come to realise that we must change both how we think of the role of theoretical work and how we do theory. In other words, if we do not conceive of the problem of the normativity of law on the basis of the role of already available sets of reasons for human beings explained in such a way that they are capable of such guidance, then we also widen the scope of our theory to broader concerns. In doing so, we move closer to an image and practice of theory that does not take an object, such as law, and look to see what function it plays in human life, but we look more broadly at the lives of individuals and societies. After all, we cannot understand or examine the dynamics of repetition and change solely on the basis of a theory of law; we must extend our interests and approaches to moral, political and social philosophies.

In the end, however, whatever one thinks of the merits of this alternative proposal, what is particularly interesting to note, in the context of this paper, is that it is impossible to come up with a genuine alternative conception of a certain problem, and an arguably related explanation, without also introducing profound implications for the image and practice of theorising.

Conclusion

The problem of normativity is an extraordinarily complex one, and one that has, in the last half century, been particularly heavily debated not only in legal theory, but also in many other areas of philosophy. One way of understanding this flurry of activity is to attribute it to the spectacular rise of the sciences and, thus also, arguably, of the rise of a certain kind of approach to the study of human behaviour and the world, namely naturalism. Normativity, then, in many philosophical quarters, has been seen as the last bastion of a defence against the inroads made by various kinds of empirical methodology. In other words, by pointing to the internal point of view, or to the notion of a reason, or to the specificity and irreducibility of the ought (and its mysterious, non-deterministic force), philosophers have, it is sometimes said, sought to carve out an object that only the philosophical method (i.e., a conceptual, non-empirical method) might approach.

In the context of this paper, the correctness or not (historically or otherwise) of this characterisation is beside the point. It may, for example, be undermined by the attempts of some philosophers, including legal theorists, to refuse to accept a distinction (at least in kind) between empirical and conceptual inquiry, or, more generally, between facts and values. But what is crucial for this paper is to notice that the understanding and employment of certain methodologies – taken in a broad sense to encompass what has been here called images and practices of theorising, including the embodiment and endorsement of certain attitudes – is linked to what a theorist sees as problematic and, equally, what a theorist collects by way of resources for promising solutions. More accurately, as noted above, in any one theoretical picture there are at play complex relationships between problems and explanations (including possible solutions), which have implications for the images and practices of thinking. In attempting to offer a glimpse of this approach by reference to the problem of the normativity

of law, it is my hope that the paper has at least indicated the potential fruitfulness of an engagement with the works of others that resists the temptation to evaluate those works from the unbecoming Olympian perspective of verisimilitude.

References

- Endicott, Timothy (2000), *Vagueness in Law*, Oxford: Oxford University Press
- Endicott, Timothy (2005), 'The Value of Vagueness', in Bhatia, Vijay K., Jan Engberg, Maurizio Gotti and Dorothee Heller (eds), *Vagueness in Normative Texts*, Bern: Peter Lang, 27-48
- Finnis, John (2007), 'On Hart's Ways: Law as Reason and as Fact', *52 American Journal of Jurisprudence* 25-53
- Hart, H.L.A. (1994), *The Concept of Law*, Oxford: Clarendon Press, 2nd edition
- Hart, H.L.A., and Stuart Hampshire (1958), 'Decision, Intention and Certainty', *67 Mind* 1-12
- MacCormick, Neil (2007), *Institutions of Law: An Essay in Legal Theory*, Oxford: Oxford University Press
- Raz, Joseph (1990), *Practical Reasons and Norms*, Princeton: Princeton University Press
- Soosay, Sundram (2005), *Skills, Habits and Expertise in the Life of the Law*, PhD thesis, University of Edinburgh
- Soosay, Sundram (2006), 'Is the Law an Affair of Rules?' in Leskiewicz, Maksymilian (ed), *Alternative Histories of Law and Legal Theory, 2005 Annual Publication of the Australian Legal Philosophy Students Association*, Brisbane: ALPSA