

## BOOK REVIEWS

***EDUCATING ONESELF IN PUBLIC. CRITICAL ESSAYS IN JURISPRUDENCE. By Michael Moore [Oxford University Press, Oxford, 2000, xiv + 464, Hardback £70]***

In the preface of the book the author mentions that in choosing the title he wanted to engage himself in the modest project of “educating oneself in public” rather than delivering a grand, Hegel-like system of thought (Hegel, the author informs us, originally used that expression in order to comment, in a somewhat pejorative way, on Schelling’s large volume of published preliminary work). Modest as his project may be, Moore certainly managed to educate this reader with the rigour of his analytical thought and the clarity with which he discusses the complex philosophical problems that underlie jurisprudential thought. Finally, the solutions he suggests to many of these problems have far-reaching philosophical implications that exceed the boundaries of jurisprudence.

The essays that compose the volume are organised around three major jurisprudential themes: Legal Positivism (essays 2 to 5), Legal Realism (essay 6) and Natural law (essays 7 to 9). These are in turn taken to reflect three major trends of philosophical thought: Conventionalism, Scepticism and metaphysical Realism. In addition there is a fourth part (essays 10 and 11) that deals in more detail with the tenet of Interpretivism as it has been put forward in philosophy and jurisprudence in particular. Finally, the volume is completed by an extensive new introduction that presents the single chapters in the light of a common theme and, at the same time, is of great help to the reader in navigating through the plethora of the topics and ideas raised in the book. Given the multiplicity of the issues raised and the thoroughness of the exposition, I will confine the comment at hand to the two chapters that discuss the theories of Hart and Dworkin (chapters 3 and 8 respectively). This is the more meaningful, as the issues addressed in those chapters recur throughout the book.

Chapter 3 argues for the possibility of Hart’s external jurisprudence. In specifying the features of Hart’s external account, Moore says that it is *general* (i.e. purports to apply to any legal system), *normative* (i.e. it aims to account for legal obligation) and involves a *semantic account* for the concept “law”, in other words an account of the meaning of that concept. Notoriously, external jurisprudence stumbles over the requirement of normativity, as there is no general consensus on whether a description of facts pertinent to legal sources or actors’ behaviour, manages to ground the notion of obligation that is central in any account of normative phenomena. Yet Hart thought it possible to report facts about the legal practice of a community which can exhaust the content of “obligation”, without resorting to an internal analysis of what it *actually takes* for actors to be obligated. This, he thought, was possible by depicting those facts that refer to the external behaviour of actors who take themselves to be obligated. In particular, Hart focused on facts about the behaviour of those legal officials (judges) who regard themselves as obligated by a master rule (the so-called

Rule of Recognition) which contains the conditions of legal validity and, in effect, distinguishes law from all other normative domains. What is more, the actual reasons for which judges regard themselves as being obligated, *vis-à-vis* the Rule of Recognition, are irrelevant to Hart's jurisprudence. To that extent, Hart's theory is content with something like an *appearance of obligation* and does not make any demands on the content of the obligating reasons. It follows that, according to Hart, there is no necessary connection between any kind of substantive reasons (say justice-related reasons) and legal obligation and that, at least to the extent that obligation exhausts normativity, there is no connection between substantive reasons and law's normativity. Along these lines, descriptive jurisprudence can hold that law is necessarily normative without holding that it is necessarily just or correct.

It is not entirely clear whether Moore is defending the enterprise of external jurisprudence and the method it employs in general, or if he is just trying to defend Hart's sophisticated version of it *vis-à-vis* Dworkin-type criticisms. Despite the general language he is using at various places, he appears to be arguing merely for the latter point, in which case I would like to make a few critical remarks regarding the success of any sophisticated version of external jurisprudence. For sophisticated versions of external jurisprudence to succeed they need to sustain a clear distance from naïve versions thereof. This can be put succinctly as follows:

(1) Not everyone who conforms to a regular pattern of behaviour is under an obligation.

Accordingly, sophisticated external jurisprudence, as opposed to the naïve one, needs to offer an external account of obligation. The externality of the account is ensured by bracketing off all substantive considerations that obligate actors (obligating reasons) and focusing merely on the external manifestation of actors' beliefs about them being under an obligation.

(2) An external account of obligation consists in an account of facts about the behaviour of those who regard themselves as obligated.

Given this, it is possible that:

(3a) Judge A manifests external behaviour B because he believes that legal norm L is just.

(3b) Judge B manifests behaviour B' because she believes that legal norm N is unjust but is concerned about social pressure.

(3c) For any external jurisprudence to succeed B and B' should constitute evidence for the same thing, namely for the fact that the addressees of a legal norm believe that they are under an obligation irrespective of obligating reasons. It follows that B and B' are indiscernible as proofs for the existence of an obligation.

But then:

(4a) B and B' will also be indiscernible from some other token of conforming behaviour, say B'', when an actor is abiding by a standard of conduct and when no belief in an obligation exists, as in:

(4b) Judge C manifests behaviour B'' because he is bribed by the mafia.

Given that external jurisprudence is only interested in the external aspects of actors' behaviour and that there is nothing *externally* that could give away any obligating reason, it follows that:

(5) For all we know, any external behaviour of conformity ( $B, B_1, \dots, B_n$ ) to a pattern of behaviour corresponds to a belief that one is under an obligation.

And finally:

(6) For all we know, anyone who conforms to a regular pattern of behaviour is under an obligation.

Clearly the contradiction that arises between (1) and (6) is the result of the way external jurisprudence chooses to conceptualise obligation, namely as a belief of actors in the existence of an obligation; moreover this belief can be exhaustively reported by describing its behavioural output rather than the reasons that generate it. Contrapositively, resolving the contradiction would require one to move from an external towards some form of internal form of analysis that allows obligating reasons into the account of actors' beliefs in obligation.

To be fair to Moore, it should be noted that towards the end of the chapter he concedes that external jurisprudence needs to be supplemented by an internal jurisprudence and proceeds to sketch the main tenets thereof, which, however, he takes to be different from Dworkin's version and more akin to some full-blooded kind of Natural Law theory. Given its deep deficiencies, I am less convinced that external jurisprudence should be practiced even alongside internal jurisprudence and more that it should not be practiced at all.

Chapter 8 can be read as Moore's effort to lay down some general guidelines with respect to the content of a tenable internal jurisprudence. This is performed in an indirect way, via a detailed engagement with the main tenets of Ronald Dworkin's Interpretive jurisprudence, a species of internal jurisprudence. According to Moore, Dworkin's metaphysical commitments are untenable and, at the end of the day, fail to carry through his ambitious Interpretive program, which aspired to occupy a middle position between conventionalism and metaphysical realism. A conventionalist lawyer is someone who takes legal sentences to be meaningful within the boundaries of the (linguistic) conventions of a legal community and otherwise to be meaningless (as in the case of "art is unjust"). In contrast, for the metaphysical realist, the issue of meaningfulness is not as important: any sentence that is well formed, grammatically and syntactically, is meaningful. What can vary in this case, and is worth investigating, is its truth-value: the realist helps himself to the binary code true/false on the basis of a robust metaphysics, which assumes that what makes a sentence true or false is an entity that exists in the environment in a mind-independent way.

Moore, in borrowing an expression from Raz, accuses Dworkin of "cheating" in respect of his metaphysics: he helps himself to the language of truth-values plus all attendant advantages, without being prepared to carry the appropriate metaphysical burden. As a result, Dworkin dismisses sentences like "art is unjust" not merely as meaningless but as wrong, without wanting to accept that their wrongness derives from something that exists as part of the fabric of the world and is independent of the practices of

a community. What is more, Dworkin tries to substantiate the view that there is a middle space to occupy between conventionalism and some form of crude realism, wherein truth-values are not pre-fixed but, instead, need to be determined on the basis of a substantive theory in whose light sets of facts about practices and/or the environment acquire normative (legal or moral) significance. Moore rejects the existence of such a middle space and argues that the very idea of “substantive theory” is a version of conventionalism.

The insightful criticisms of Moore notwithstanding, it is still possible to grant the existence of such a middle space, albeit not entirely along Dworkinian lines. The starting point is the realisation that a crucial element of Dworkin’s substantive theory is what he calls the “point of a norm”. In other words, a substantive theory is the hermeneutic enterprise of trying to make the most coherent sense of sets of data about the practice of a community and/or the phenomenal environment, *in the light of the point of a set of norms*. The crucial question regarding the substantive theorist’s metaphysical commitments is whether any of the normative points are exempted from the hermeneutic process. In other words, whether normative points (be it one or many) constitute an indisputable foundation for any substantive theory.

A positive answer to that question suggests the existence of certain foundational norms akin to the Kantian *a priori* norms of morality. These allow a substantive theory to ascribe truth-values (right/wrong) to normative sentences in an objective way. At the same time, these norms occupy a metaphysical space that is neither realist nor conventionalist: in being some sort of thought-dependent abstract objects, they belong to our conceptual scheme. However, in being *a priori* knowable they constitute the boundaries of our conceptual scheme and, hence, the conditions of our understanding of anything as being a norm of law, morality etc. What is more, they allow for the possibility of ascribing truth-values to normative statements in an objective way.

Admittedly, to go down this line of reasoning would require one to part with the strict lines of Dworkin’s Interpretive program. Be that as it may, the idea of *a priori* norms/normative points seems to stand a chance in grounding the middle space between conventionalism and realism, whose possibility Moore vehemently resists, without explicitly opposing the fundamentals of Dworkin’s Interpretive program.

**DR GEORGE PAVLAKOS**  
***School of Law, Queen’s University of Belfast***

***THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION. By Eileen Denza [Oxford, OUP, 2002, xxxv + 387 pp inc. index; £60.00]***

In establishing the European Union, the Treaty of Maastricht made the European law jargon slightly more colourful, albeit not any clearer, by introducing the term “pillar”. The European Union is the overall structure within which integration is achieved in different areas at a different pace. As ancient temples were based on pillars, the European Union is based on three sets of rules. The first one consists of the European Community, the European Coal and Steel Community and the European Atomic Energy Community; the second pillar is entitled Common Foreign and Security Policy (CFSP); and the third pillar is now entitled Police and Judicial Cooperation in Criminal Matters. These sets of rules are distinct in nature, in so far as the EC is organised on the basis of various supranational features, whereas the second and third pillars are, in essence, intergovernmental. Despite their distinct normative characteristics, the pillars often interact in terms of their institutional structures, administrative provisions, legal machinery and political momentum.

In her book, Eileen Denza studies the second and third pillars. To underline the timely nature of this book is to mention the obvious. On the one hand, the legal framework within which the Member States have carried out their common foreign policy started developing to a very considerable extent even prior to the current debate about the Future of Europe. The development of the European Security and Defence Policy and the war in Iraq have recently made it all the more relevant. On the other hand, the post-9/11 period has seen active cooperation amongst Member States in criminal matters. However, there is another reason which makes Denza’s book all the more welcome: the voluminous body of literature on the above issues has been produced, mainly, by political scientists and international relations specialists. It is most refreshing to see that lawyers are still attracted to the rules pursuant to which the EU acts in areas closely associated with national sovereignty. In the light of her experience as a Legal Counsellor to the Foreign and Commonwealth Office and a Legal Advisor to the UK Representation to the EC, as well as her academic expertise, Denza’s book is all the more interesting to read.

The first chapter sets out the canvas against which the analysis of the second and third pillars are to be carried out. It identifies the public international law genesis of those pillars, overviews the main characteristics of intergovernmental law-making and concludes that EC law and international law “are capable of cross-fertilization and [that] they are cross-fertilizing to an increasing extent” (page 32). It is rightly pointed out that the so-called Community method is not the only valid one for managing integration, a conclusion borne out by the post-Maastricht revisions of the EU Treaty. The following two chapters overview the genesis and development of the CFSP and the third pillar under the Maastricht Treaty. The fourth chapter seeks to define the achievements and weaknesses of the CFSP. In doing so, it focuses on specific activities undertaken by the European Union under the second pillar, both in terms of its approach to specific geographical areas (such as Russia, South Africa, Bosnia) and in terms of more general policies (such as

the Stability Pact, landmines, sanctions, regulation of exports of dual-use goods and arms exports). This is a most interesting analysis as it provides a measured and thoughtful response to the widely-held and, in this reviewer's opinion unjustified, perception of the EU as a spectacular failure in the area of foreign policy. Denza shows that, whilst not necessarily spectacular, the successes of the EU in the area of foreign policy have been considerable given the institutional limitations set out in the TEU and various practical problems of implementation. In relation to Bosnia, for instance, it is argued that that "the Community and later the Union deployed all the sticks and carrots which were legally within their power" (page 119) and concludes that "[e]ven if the Union had had more powerful tools at its disposal, it is unlikely that they would have been deployed in the absence of a clear mandate from the national parliaments and the peoples of Europe for serious involvement" (page 120).

The fifth chapter examines the amendment of the CFSP framework introduced at Amsterdam and provides a commentary of the relevant TEU provisions. This is a detailed and most useful analysis of the legal provisions of CFSP. An interesting issue examined by Denza at some length is that of the legal personality of the EU. Whilst the Member States rejected proposals at both Amsterdam and Nice to endow the EU with express legal personality, they did provide for treaty-making power. This is so both in the CFSP area pursuant to Article 24 TEU and the third pillar under Article 38 TEU. These provisions raise the question whether the EU has, in fact, implied legal personality. Whilst academic opinion seems to accept this conclusion, especially on the basis of agreements actually concluded pursuant to those provisions, Denza is not convinced. She argues that, in relying upon Articles 24 and 38 TEU, the EU institutions merely exercise a delegated treaty-making power on behalf of the Member States; accordingly, it is the latter which are bound in international law by those agreements negotiated and concluded on their behalf. Whilst following a tightly argued line of reasoning, this conclusion does not sit comfortably with EU practice. All agreements concluded under Article 24 TEU refer to the EU as a contracting party. A case in point is the recent Council Decision 2003/222/CFSP on the conclusion of the Agreement between EU and FYROM on the status of the European Union-led Forces in FYROM ([2003] OJ L 82/45), Article 2 of which authorises the President of the Council "to designate the person empowered to sign the Agreement in order to bind the European Union". Be that as it may, there can be no doubt that "the Member States are more concerned with questions of their own internal procedures than with their potential responsibilities under international agreements" (page 177).

Chapter 6 examines the achievements and weaknesses of the third pillar and chapter 7 provides a commentary on the legal provisions of the third pillar as laid down in the Amsterdam Treaty. The following chapter sheds light on the extent to which the legally distinct EU pillars in fact interact by examining specific actions such as common strategies, the legal regime of sanctions and exports of dual-use goods and visa policy. Denza concludes that "on the evidence of recent instruments, the institutions are becoming familiar with cross-pillar techniques and are now able to use their various powers in a consistent and convincing manner" (page 309). The following two chapters examine the extent to which judicial and parliamentary supervision is exercised over the pillars, the latter referring to the role of

national parliaments too. Finally, chapter 11 analyses the security and defence policy of the European Union.

The international law background of the author and the practical insights she has gained from her career make reading of this book all the more rewarding. All in all, this is an excellent book, comprehensive in scope and detailed and succinct in its analysis. Denza's measured tone and thoughtful approach to the subtleties of intergovernmental law-making render it essential reading for anyone interested in the intergovernmental pillars of the EU.

***DR PANOS KOUTRAKOS***  
***School of Law, University of Birmingham.***