

## THEORY AND PRACTICE IN JURISPRUDENCE: A FALSE DICHOTOMY

Radical shifts of paradigm in legal theory have, with surprising frequency, claimed for themselves to form refreshing alternatives to some obsolete theoretical account that preceded them. Indeed legal philosophers as diverse as von Jhering, Hart, Dworkin and the Legal Realists launched their influential accounts by accusing their predecessors of being entangled in futile *abstract theory* while putting forward their own conception as a healthy *practical account* of legal phenomena. This coincidence has cultivated the belief that theory and practice correspond to two ways of doing legal philosophy that are mutually exclusive. So much so, that most lawyers (be they academics or practitioners) are keen on dismissing any theoretical discussion with regard to law while endorsing whatever happens to convey (usually just by carrying the appropriate label) the impression of a practical account. At the same time it seems to be rather difficult to pin down with precision what it is that makes an account of law an instance of theory rather than practice, for the two concepts have for the most part been subjected to rhetorical or even polemical use instead of serious analysis. Be that as it may, it is possible to associate a number of general features with each of the two styles of thinking, features that have emerged from the various uses the two terms have been subjected to.

*Abstract theory* in jurisprudence has been thought of as being synonymous with abstract philosophical analysis that aims at demonstrating that all legal phenomena possess certain universal characteristics corresponding to a number of epistemic criteria or formulas that may be applied to the analysis of any type of legal system. What is more, such criteria are conceived of as being neutral *vis-à-vis* any context-dependent features of legal systems, not least substantive values that reside within them. Along these lines, jurisprudence lawyers who uphold this ideal of analysis have been accused of subscribing to a sterile form of analysis of legal phenomena, one that relies on a set of general criteria that form an infallible body of knowledge that is exempted from our experience with respect to particular legal institutions (*i.e.* it functions as an example of *a priori* knowledge). As a result of their reliance on such an axiomatic point of view, the accusation continues, those legal philosophers end up neglecting a lot of what is essential to legal phenomena, most importantly their practical character or their ability to form normative standards for action and agency in general.

Contrapositively, *practical accounts* in jurisprudence have been praised as pursuing an understanding of legal phenomena deriving from the study of concrete legal practices. Instead of looking for general, context-independent criteria and formulas that can work irrespective of any context and are isolated from the substantive values of particular legal systems, this second type of analysis suggests that we ‘discover’ law in the particular instantiations of a legal practice, instantiations that materialise through the responses of the practice to specific practical problems (and – in most cases – can be read off from the practice of adjudication). Such responses help us disclose the ‘internal rationale’ of the practice, a rationale that refers to a set

of values or purposes that present themselves as a coherent body at any given time, albeit undergo continuous change when studied diachronically.

The issue of NILQ at hand is set out to demonstrate that there is less than meets the eye in the sharp juxtaposition of theory with practice. Despite the fact that the individual authors do not explicitly address the relation between theory and practice, a common theme that runs through all four papers is the conviction that any sharp distinction between theory and practice is doomed to fail, for there is no single legal philosophy that constitutes a pure instance of either theory or practice. It is not difficult to see why: any jurisprudential account of law necessarily commits itself to a number of philosophical assumptions regarding the nature of law and the possibility of legal knowledge. Thus, any so-called *practical account* must first explain why context and substantive values should become part of law's nature. In doing so, however, it shall make use of the language of necessity, the *a priori*, and a handful of other concepts that supposedly mark the domain of heavy-handed theory. Likewise, a strong *theoretical approach* that favours generalisations and context-independent conclusions will have to face the challenge of explaining law's institutional and normative character, a challenge that cannot be met successfully until a careful account of adjacent institutions and substantive values has been given.

To that extent, the dilemma 'theory or practice?' is a false one. Instead, what is the case are more and less successful accounts of legal phenomena, their success or failure depending on the quality of the arguments employed on either the levels of theory and practice not, however, on which of the two levels obtains. Along these lines, it is far more fruitful to make explicit the theoretical commitments of any account of law and investigate whether they manage to meet the practical claims raised by the normative and institutional character of legal phenomena<sup>1</sup>. It is in this vein that the authors of this issue attempt to tackle a number of key jurisprudential issues.

Sean Coyle undertakes an investigation into the nature of legal rationality by discussing the notorious Jørgensen dilemma, named after its author the Danish logician Jorgen Jørgensen, whose intuitive appeal questions law's rational character. The first horn of the dilemma is the proposition that normative (legal and moral) arguments resist logical analysis, for their

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<sup>1</sup> In recent years there has been an increase in publications that combine a serious theoretical analysis without losing sight of the practical aspects of legal phenomena. Instead of others see: N. Stavropoulos, *Objectivity in Law* (1996), Oxford: OUP; C. Heidemann, *die Norm als Tatsache* (1997), Baden-Baden: Nomos; T. Endicott, *Vagueness in Law* (2000), Oxford: OUP; J. Dickson, *Evaluation and Legal Theory* (2001), Oxford and Portland, Oregon: Hart Publishing; S. Coyle and K. Morrow, *The Philosophical Foundations of Environmental Law* (2004), Oxford and Portland, Oregon: Hart Publishing; V. Rodriguez-Blanco, *Meta-Ethics, Moral Objectivity and Law* (2004), Paderborn: Mentis. See also the following edited works: J. Coleman (ed), *Hart's Postscript* (2001), Oxford: OUP; B. Leiter (ed.), *Objectivity in Law and Morality* (1999), Cambridge: CUP; W. A. Edmundson (ed): *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2004), Oxford, Blackwell Press; J. Coleman, and S. Shapiro, (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, 2002, Oxford: OUP; S. Coyle and G. Pavlakos (eds), *Jurisprudence or Legal Science?* (Forthcoming in 2005), Oxford and Portland, Oregon: Hart Publishing.

premises are not truth-evaluable (*i.e.* they can not be asserted as true or false as, conversely, can the premises of a theoretical argument). The second horn comprises the thought that in spite of the failure of logical analysis normative arguments still seem to be rationally comprehensible. When combined the two propositions require on pain of contradiction that either rationality or comprehensibility of the law be given up. The author submits the philosophical assumptions underlying the two horns to careful scrutiny concluding that in normative contexts logical validity is not a precondition of rationality, for in such contexts it is possible to disagree rationally with an argument or position without impugning it as false. Once this strong assumption has been undermined, normative reasoning begins to appear rationally comprehensible independently of logical validity rather than in spite of it and Jörgensen's dilemma loses a great deal of its edge.

Carsten Heidemann's analysis of Kelsen's transcendental method rests somewhat contrapuntally to the first paper. While Coyle argues that law's rationality does not necessarily go hand in hand with logical validity, this author refers to Kelsen's methodology with a view to developing conditions for legal knowledge. Faithful to his Neo-Kantian background Kelsen thought that the subject matter of legal science, legal norms, do not stand for any autonomous entities but are instead 'constructed' by means of the cognitive activity legal science engages in. This activity is conditioned or regulated by a conceptual presupposition, the so-called *Grundnorm* or basic norm whose function is to enable normative knowledge by setting apart the realm of normativity (in other words the realm of 'Ought') from all other kinds of empirical entities (or the realm of 'Is'). What is more, besides enabling the cognition of legal norms, the basic norm is the ultimate source of legal validity, for it stands at the apex of a normative pyramid from which all legal norms flow. It follows that by connecting the knowledge of legal norms with the basic norm the truth and falsity of legal propositions becomes synonymous with their validity: what exists in the realm of norms is what legal science pronounces valid. An interesting question arising in this context is whether the explication of legal truth via legal validity manages, in pointing at a kind of rationality that is special to law, to avoid Jörgensen's dilemma along the lines suggested by Coyle. In concluding, let it be noted that Heidemann's paper is one of the few available discussions of the Neo-Kantian foundation of Kelsen's jurisprudence and is expected to provoke animated discussions within circles of the Kelsen scholarship.

Emmanuel Melissaris integrates the topics of law's rationality and knowledge in the context of a discussion of Max Weber's England problem. Max Weber, in applying his elaborate theory of rationality to the classification of legal systems, concluded that the English legal system suffered from a deficit in rationality. This conclusion contradicted sharply his project of establishing a necessary link between capitalism on the one hand and the idea of the formal-rational legal system on the other, for England had actually been the cradle of the industrial revolution and the capitalist mode of production. The author attempts to disentangle the resulting puzzle by arguing that rationality in the legal context encapsulates far more than Weber had assumed, for law embodies an instance of communicative or discursive reason wherein participants purport to establish the correctness (justice) of legal propositions. This escapes Weber's narrow formal-sociological analysis and points at a more substantive notion of

rationality, one that is interested in just outcomes. No sooner, however, rationality has been explicated in the light of communicative reason than the English law ceases to be irrational and, instead, emerges as an example of a substantive notion of legal rationality. Melissaris' discussions of Weber's Neo-Kantian background and the different conceptions of rationality can be used for making illuminating cross-references to the previous two papers.

The last paper, by Stefano Berteà, is perhaps the most straightforward demonstration of the need to integrate theoretical reasoning with practical considerations within legal philosophy. The author illustrates with admirable clarity how theory construction regarding law's nature should be responsive to the normative claims raised by law in any of its instantiations. He sets out to do so by taking on board the relatively uncontested concept of authority. All three major schools of legal thought, *i.e.* realism, positivism and natural law theory, accept authority as a conceptual component of the concept of law, albeit by advancing very different understandings thereof. Berteà rejects the individual understandings not because they are flawed but because they are incomplete or partial. In their place he advances a hybrid understanding that integrates elements from all three theories. What holds these elements together is the argumentative structure of law. This, Berteà argues, is a necessary element of law's authority if law is to make sense as a social practice that creates reasons for action. On this explication there is no ultimate formula or perfect definition for capturing the essence of law. Instead an appropriate understanding thereof would require that we combine empirical, practical and evaluative elements into a matrix that is constantly redefined and reshaped by an argumentative process of practical reasoning. Berteà submits that the transformation of law's traditional understanding that emerges from the argumentative explication of law "opens up a completely new research programme for legal theorists, calling on them to redirect the focus of jurisprudence . . . [in order to] arrive at a comprehensive theory with which to understand current legal systems and attack the problems attendant on them". One couldn't agree more!

In selecting the contents of the volume I hope to have managed to make a strong case for a more creative way of practicing legal theory, one that is not inhibited to take on board calm philosophical reasoning in order to identify the actual problems pertinent to law's nature rather than sticking to any perceived labels, residues of old ideological wars. In preparing the issue I was very lucky to have been the recipient of excellent support and advice from a number of colleagues and friends. My thanks go to all four authors for being extremely efficient in responding to deadlines and taking on board my often less than coherent comments. Gordon Anthony, Emmanuel Melissaris and Sally Wheeler offered fresh ideas and encouragement throughout the planning and execution of the project. Last but not least I would like to express my gratitude to the previous editor of NILQ, David Capper, for inviting me to edit a special jurisprudence issue.

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