Unpacking Normativity

Conceptual, Normative, and Descriptive Issues

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INTRODUCTION

The function of law is, as the matter is frequently put, to guide human behaviour. To accomplish this objective, law must perform a couple of functions. First, to successfully guide behaviour, the law must be reasonably contrived to inform subjects of what acts are required or proscribed of subjects. Second, to ensure that law is efficacious in regulating behaviour, the law must attempt to provide subjects with what they are likely to treat in their deliberation as reasons for conforming their behaviour to the law – at least in cases in which they are strongly inclined to do otherwise. Accordingly, the law is characteristically, if not necessarily, structured to perform both an epistemic and a normative function: the epistemic function is to inform subjects of their obligations under the law while the normative function is to provide something that would motivate them to comply with those obligations (ie something subjects regard as a reason for action).

It seems plausible to think, then, that it is part of the very nature of law that it either is or purports to be normative – whether we are speaking of laws as mandatory norms or of legal systems as institutional normative systems. That law is contrived to provide reasons for subjects to do as it requires is a paradigmatic feature of law that must be explicated – or unpacked – if we are to develop a comprehensive understanding of the institution of law. Understanding the putative normativity of law involves a host of problems that range from explaining how law could provide reasons for action to understanding the very nature of normativity itself.

Unpacking Normativity is a collection of essays that attempt to explicate the notion of normativity and to understand whether and how law is normative. The volume is divided into five major sections that approach the issue of legal normativity from different vantage points. Some are concerned with conceptual issues while others are concerned with more practical issues having to do with how to understand the role of normativity in legal reasoning and, more generally, in the normative theory of practical rationality.

The first section is concerned with identifying various methodological approaches to understanding normativity in law. In ‘Is Moralised Jurisprudence Redundant?’ Dimitrios Kyritsis considers whether what Julie Dickson characterises as an indirectly evaluative methodology can produce an adequate philosophical explication of the normativity of law. Kyritsis concedes that an indirectly evaluative methodology plays an important role in explicating the nature of law, but argues that there are significant limits with respect to what it can tell us about law. A moralised methodology that is agnostic between positivism and
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anti-positivism, on Kyritsis’s view, is needed to supplement the indirectly evaluative approach and enable us to achieve a comprehensive understanding of the normative institution of law.

In ‘The Metric Approach to Legal Normativity’, Triantafyllos Gouvas calls attention to a methodological assumption that, he argues, is common to positivist and anti-positivist theories. Gouvas takes Raz’s normative/explanatory Nexus as a basis for advancing a functionalist account of how to evaluate what he terms the ‘robustness’ of any theory that purports to explain a source of practical normativity in terms of reasons for action. More precisely, Gouvas argues that a theory’s normative robustness depends on the capacity of the facts to which a theory assigns normative relevance to jointly perform three distinct functions: metaphysical, evaluative and explanatory. The resulting picture, as Gouvas puts it, ‘animates a metanormative taxonomy capable of tracking affinities and divergences between foundational theories of law which the traditional positivist/non-positivist divide seems to suppress.’

The second section of the volume is concerned with the nature of legal normativity and legal obligation. In ‘The Nature of Legal Obligation’, Brian Bix argues for two provocative claims. First, Bix defends a volunteerist account of legal obligation and normativity according to which the normativity of law depends on whether citizens choose to regard law as normative or obligatory. Second, he argues that the manner in which the notion of normativity applies in law is logically independent of the manner in which that notion applies in morality; thus, on Bix’s view, legal normativity should be understood as sui generis and not merely as a form of or subset of morality.

In ‘The Problems of Legal Normativity and Legal Obligation’, Kenneth Einar Himma takes a position at odds with Bix’s volunteerist conception of legal normativity. In particular, Himma argues that the only plausible account of legal obligation is a non-volunteerist one that holds that legal obligations bind all putative subjects by providing prudential reasons for action. Any other account of legal normativity, he argues, implies that mandatory legal norms merely purport to define legal obligations and hence merely purport to provide reasons for action – a view that Himma believes is inconsistent with the legal practices and self-conceptions of practitioners that construct the content of our very concepts of law and legal obligation.

In ‘Non-Naturalism, Normativity and the Meaning of Ought: Some Lessons from Kelsen’, George Pavlakos argues that Kelsen is committed to certain non-naturalist presuppositions that are incompatible with what Pavlakos characterises as ‘a strict separation between the legal and the moral domain’. As he understands it, non-naturalism ‘is synonymous with, or at least constitutes a condition of’, practical normativity in general. Pavlakos argues that insofar as normativity pertains to the moral as well as the legal domain, one cannot consistently treat legal obligation in a non-naturalistic manner and concludes by attempting to sketch an alternative account of normativity that does not, as he believes Kelsen’s does, entail an artificial distinction between law and morality that ‘condemn[s] law to inertness.’
The third section of the volume is concerned with norms as reasons for action. In 'Norms, Reasons and the Law', Andrei Marmor argues that it is a mistake to think that there is something unique to the normativity of law. He argues that different kinds of norms provide reasons for action in different ways, identifying four different classes of norms: (1) norms that function to codify preexisting reasons for action; (2) norms that instantiate, or complete, reasons for action that underdetermine the modes of conduct which would be responsive to the reasons; (3) norms that constitute various human activities; and (4) authoritative directives. Having explored how these different types of norms bear on our reasons for action, Marmor argues that these four kinds of norms are present in law as well, suggesting that the normativity of law is both complex and multifarious. Normativity in law, he concludes, is not fundamentally different from normativity in other practical domains.

Wil Waluchow's 'Normative Reasoning from a Point of View' defends the idea that judges can interpret and apply the law while taking a detached point of view that does not endorse, so to speak, the point of view that is expressed in the law. Waluchow argues that the Razian view that judges who accept law's claim to moral force cannot interpret and apply the law from a detached point of view is mistaken. If, on Waluchow's view, (1) the judge accepts and endorses her legal system as reasonably just and effective; (2) accepts and endorses her moral obligation to decide a case according to law's demands; and (3) that moral obligation demands an interpretation of a constitutional provision constructed from the point of view of the legal system and its history of prior moral commitments, then the judge will consider herself morally bound (in a fully committed way) to accept a constructive interpretation she would ideally prefer to reject. Such commitments, he points out, are not anti-democratic in character.

Horacio Spector's 'Legal Reasons and Upgrading Reasons' is, like Gouvas's contribution, concerned with the Nexus Thesis, according to which law gives its addressees reasons for action only insofar as its norms track, trigger, or are otherwise related to prior reasons. Authoritative legal norms track pre-existing reasons, according to the Nexus Thesis as Spector understands it, only insofar as they partially or totally reproduce pre-existing reasons. Spector concedes that the Nexus Thesis is generally true, but argues that law's main function is to create reasons that do not necessarily track or trigger prior reasons but are rather, as he puts it, plugged into such reasons. According to Spector, people in complex societies have higher-order reasons ('upgrading reasons') for recognising authoritative mechanisms of reason-giving into which the lower-order reasons generated by these authoritative mechanisms are plugged.

The fourth section is concerned with the role of normativity in understanding legal reasoning. In 'The Normativity of Basic Rules of Legal Interpretation, Bojan Spaić considers a number of theoretical questions that arise in connection with different classes of rules of interpretation and their role in guiding and justifying ascriptions of meaning to legal texts. Spaić identifies and explicates certain shared commitments that are presupposed by three different conceptions of basic norms
of interpretation: (1) those that are presupposed by viewing basic norms of interpretation as constitutive; (2) those that are presupposed by viewing basic norms of interpretation as regulative; and (3) those that are presupposed by viewing basic norms of interpretation as instrumental. He concludes by posing something of a theoretical dilemma for the theory of legal interpretation: if, on the one hand, basic norms of interpretation are conceived as constitutive or instrumental in character, they cannot justify guide interpretative ascriptions of meaning; but if, on the other, such norms are conceived as regulative in character, they lend themselves to a problematic indeterminacy that they are supposed to solve.

Andrej Kristan's 'Another Way to Meet Hart's Challenge' is concerned to show that legal realism can meet the Hartian challenge of being able to distinguish law from what he called the game of scorer's discretion. Hart argued that legal realism is unable to distinguish law from the game of scorer's discretion because it defines law so as to include the contents of final judicial decisions and thus gives rise to a presumptively problematic form of rule-scepticism. Kristan concedes for the sake of argument that legal realism leads to such rule-scepticism and argues that the same considerations that lead Hart to believe legal realism implies such scepticism also problematise his theory. If such a rule-scepticism is sufficient to refute legal realism, it is also, Kristan concludes, sufficient to refute Hart's own positivist theory of law.

Katharina Stevens's contribution, 'The Constraining Force of Analogies and the Role of the Judge,' explicates and defends the role that reasoning by analogy plays in common-law reasoning. In particular, Stevens is concerned to rebut the claim that analogical reasoning fails to constrain judicial decision-making insofar as it can be used to justify any conclusion a judge might be predisposed to reach. She argues that judges typically regard themselves as interlocutors who have the task of understanding and evaluating arguments and are therefore properly disposed to evaluate the argumentative force the analogy might have. For judges so disposed, arguments from analogy can provide epistemically legitimate normative guidance, even when judges cannot find applicable rules that would determine the outcomes of their decisions.

The fifth section of the book is concerned with the notion of legal normativity as it extends beyond the law of states. In 'What Makes a Transnational Rule of Law? Understanding the Logos and Values of Human Action in Transnational Law,' Veronica Rodriguez-Blanco argues for two related theses concerning coercion and the rule of law as it pertains to transnational law. First, she argues that, once the notion of coercion is properly understood, the 'coercion question' does, contrary to initial appearances, arise in transnational legal contexts. Second, she argues for a 'thick' conception of the rule of law as it pertains to transnational law that would enable us to understand how participants of a legal practice comply with regulations, rules, directives, and principles (RRDPs). A satisfactory account of how human beings comply with RRDPs, on her view, paves the way to properly understanding the role of coercion at the transnational level.
Closing out the volume is ‘Theorising “Unidentified Normative Objects” of Global Regulatory Regimes’, by Miodrag Jovanović. Jovanović’s concern is with certain regulatory instruments (‘unidentified normative objects’ or UNOs) that are poorly understood through the framework of existing conceptual theories of law. Jovanović distinguishes two problems: (1) the epistemological question of how to identify and distinguish normative statements from ‘is-statements’; and (2) the normative question of how to explain how, from the standpoint of practical rationality, norms provide us with reasons for action. Jovanović argues that law’s normative force competes with the normative force of other classes of orders and that law’s higher level of efficiency should be attributed, not to some special sort of normativity, but to the combined effects of law’s institutionalisation and its coercive guarantees. He concludes by applying these findings to two paradigmatic cases of UNOs – regulatory instruments of the World Health Organization and the Basel Committee on Banking Supervision.

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