

LEGAL INTERNALISM
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1 The dual nature of the law

In his landmark paper *Positivism and the Separation of Law and Morals*, Hart goes a long way to argue that two questions should be distinguished. One question is what the law is, and the other one what the law should be.

This distinction is apparently an obvious one. Why then does a thinker like Hart make a point of it? The reason is that the distinction has often been contested, both in philosophy of law and in legal practice. Assume, for instance, that a legal statute prescribes a person to do X, but the person believes X to be so immoral that she does not want to act upon it. Instead she does the morally right Y, thus violating the black-letter law. A Hartian lawyer would then think that *the law* prescribes X, that this law was thought to be immoral and that Y, considered to be morally right, was illegal. Yet, there also is another way to argue, namely that, given the immoral nature of X, it cannot be the law that one ought to do X. Rather one should legally do X', which is still as close to the written law as possible, but which is not immoral.

Here is a practical example of the different ways to see the matter: The German Constitutional Court argued that the immoral nature of the DDR laws made it impossible to protect the DDR soldiers who had shot refugees from criminal responsibility by means of the retroactivity prohibition in Art. 103 Abs. 2 *Grundgesetz*¹. The extremely unjust DDR laws were not law, so to say², *lex iniustissima non est lex*. A Hartian lawyer would think the opposite, namely that the DDR law prescribed the DDR soldiers to shoot refugees and that the law of Bundesrepublik prescribed the courts to let the DDR soldiers go free from punishment on the bases of the retroactive prohibition.

One reason for the persistent controversies of this kind is that legal judgements take a remarkable in-between position with regard to the prescriptive and the descriptive. On the one hand, the law's primary function is to guide human behaviour. In this respect, legal judgements are prescriptive. On the other hand, the law of a country is a matter of fact. It does, at least at first sight, not depend on individual preferences. Two persons can apparently disagree about what the law is just like they can disagree about whether it is raining outside. If such a disagreement occurs, the one is right, and the other one is wrong, depending on facts that are independent of the conflicting judgements. In this respect, legal judgements are descriptive.

Given the presently prevailing view of the world as in itself value- and prescription-free, this dual nature of the law causes theoretical problems. If the law is a matter of fact, it cannot be prescriptive, since bare facts are neutral with regard to human behaviour. If the law is prescriptive, it cannot be purely a matter of fact. The law seems to be on the borderline of is and ought, which is hard to fit into the view of the world as motivationally inert.³ On a different world view, such as the teleological view present in the work of, for instance, Aristotle and Aquinas, the dual nature of the law is much easier to account for. However, not many people are presently willing to re-adopt this view, and therefore the law's dual nature remains theoretically problematic.

¹ Beschluss des deutschen Bundesverfassungsgerichts vom 24. Oktober 1996 (BVerfGE 1995, S. 96 - 143) concerning "Mauerschützen":

"2. Das strikte Rückwirkungsverbot des Art. 103 Abs. 2 GG ("Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde.") findet seine rechtsstaatliche Rechtfertigung in der besonderen Vertrauensgrundlage, welche die Strafgesetze tragen, wenn sie von einem an die Grundrechte gebundenen demokratischen Gesetzgeber erlassen werden.

3. An einer solchen besonderen Vertrauensgrundlage fehlt es, wenn der Träger der Staatsmacht für den Bereich schwersten kriminellen Unrechts die Strafbarkeit durch Rechtfertigungsgründe ausschließt, indem er über die geschriebenen Normen hinaus zu solchem Unrecht auffordert, es begünstigt und so die in der Völkergemeinschaft allgemein anerkannter Menschenrechte in schwerwiegender Weise missachtet. Der strikte Schutz von Vertrauen durch Art. 103 Abs. 2 GG muss dann zurücktreten."

² Cf. Alexy 1993, p. 36 ff. Alexy's book was written before the decision of the Bundesverfassungsgericht, and probably influenced it.

³ Cf. Svein Eng's theory of 'Law as fusion' as presented in his 1998.

In this paper we try to develop a view of the law that explains law's dual nature without taking recourse to a teleological ontology. To this purpose we develop a theory about the law which on the one hand recognises the factual nature of the law, and on the other explains how one's view of the law depends on what motivates one's behaviour.

In ethical theory the connection between the descriptive and the prescriptive nature of moral judgements has received ample attention in the discussion about moral internalism. The central question in this discussion is whether moral views motivate inherently, or merely because one has an independent motivation to behave morally. The internalism discussion in moral theory is closely related to the central issue of this paper, and we will take the internalism discussion as the starting for the development of our view of the law.

In the first part of the paper we will argue for an ontology that leaves room for facts that are conceptually connected to motivation. If the presence of such facts is accepted, it is not difficult anymore to defend a version of moral internalism. It makes it also easier to develop a theory of the law according to which legal facts inherently motivate. We devote the second part of this paper to the development of a theory according to which some legal judgements inherently tend to motivate the behaviour of the person who adheres to these judgements. The counterpart of this theory is that some judgements on which one is not motivated to act can, for this reason, not be legal judgements.

2 The moral problem

In his book *The moral problem*, Michael Smith sketches one of the central issues in ethical theory as follows [Smith 1994, p. 6 and 7]:

'... we seem to think moral questions have correct answers; that the correct answers are made correct by objective moral facts; that moral facts are wholly determined by circumstances; and that, by engaging in moral conversation and argument, we can discover what these objective moral facts determined by the circumstances are'.

but it is also the case that

'...moral judgements seem to be, or imply, opinions about the reasons we have for behaving in certain ways, and, other things being equal, having such opinions is a matter of finding ourselves with a corresponding motivation to act'.

These two characteristics of moral judgements are theoretically compatible, but they seem to become incompatible if one adopts what Smith calls the standard picture of human psychology, the picture popularised by David Hume, that

'...there are two main kinds of psychological state. On the one hand there are beliefs, states that purport to represent the way the world is. ... And on the other hand there are desires, states that represent how the world is to be. Desires are unlike beliefs in that they do not even purport to represent the way the world is.'

This Humean psychology is the psychological equivalent of the logical gap between IS and OUGHT. Just like the IS and the OUGHT are assumed to be (onto)logically⁴ independent, belief and motivation are assumed to be logically independent. But then, if the objectivity of moral language is connected to beliefs, and the motivational aspect is connected to desires, it seems impossible that the objective and the motivational aspect of moral judgements go inherently together. And yet, moral discourse seems to prove the contrary. It seems that it is possible to give judgements that at the same time and necessarily are descriptive and express motivation. This is, briefly stated, the moral problem.

We will not explore Smith's solution to the moral problem, but rather give a theory of our own that rests on a rejection of the Humean distinction between the two main psychological states. To this purpose we develop a theory about the relation between reasons for action and the motivation to act.

⁴ Many issues that are called 'logical' are really ontological. For instance, the impossibility to derive an OUGHT from an IS is little else than the outflow of ontological separation of what ought to be the case and what is the case.

3 Reasons and motivation

3.1 Moral reasons and practical reason

The notion of morality is used in several senses in the literature. First there is the distinction between critical morality and positive morality. The view that moral judgements inherently motivate only holds in connection with critical morality. In connection with moral ought judgements made in accordance with positive morality, Hare (1952, p. 167) writes about the 'inverted comma' use of the word 'ought'. Such judgements do not express a real ought, but merely what 'ought' to be done according to positive morality. That is why such ought judgements do not necessarily involve the motivation to act in accordance with them. In section 7 we will address a similar issue in connection with the so-called spectator view towards the law.

The second distinction is between morality as a particular point of view, and morality as the overarching view about what one should, or ought to, do. Warnock, for example, expresses in his *The object of morality* the view that the general object of moral evaluation must be [Warnock 1971, p. 71]:

'... to contribute in some respects, by way of the actions of rational beings, to the amelioration of the human predicament.'

A similar approach is adopted by Foot [Foot 1972] when she characterises moral judgements as hypothetical imperatives, that is as imperatives that prescribe how one ought to behave if one is to behave morally. Such a view presupposes that it is somehow possible to distinguish moral imperatives from other ones, and that it is possible to distinguish the moral point of view next to other ones.

Opposed to this is the view that morality is concerned with what one ought to do all things considered. On this view moral judgements are overriding in the sense that they and they alone determine how one ought to, or should, behave. This is the view that seems to be expressed by Hare in his *Freedom and Reason* [Hare 1963, p. 169]. It is to be distinguished from the view that morality is a separate point of view, that happens to override all other points of view. In the view of morality under consideration, morality is not so much a particular point of view, but the result of combining all points of view that lead to practical reasons.

This second distinction is in our opinion merely a terminological one. Warnock might be right in that moral reasons are somehow confined to particular subjects. For instance, I may have a reason to take an innocent drink from the refrigerator without there being any moral issue at stake. If this is the only relevant reason, I should take the drink, but it is questionable whether this 'should' is a moral one. This pleads against the view that morality is the overarching 'point of view', or that it is above all points of view. However, if one wants to define the moral point of view as the overarching one, one causes no harm, as long as it is clear what one is talking about. In the present paper we will reserve the word 'morality' for a more restricted set of considerations, which we will not characterise further here.

Given this terminology, the question after the relation between moral judgements and motivation can be framed in two ways. The first way is whether the judgement what one ought morally to do normally determines one's motivation to act. The second way is whether the judgement what one ought morally to do normally causally contributes to one's motivation to act. It is this second way of framing the question that deals with the moral problem as formulated by Smith. The first way adds another problem, namely whether morality as a separate point of view necessarily overrides all other point of view. We will not bother here about this additional problem, but confine ourselves to the question whether one's moral judgements normally lead to a factor that contributes to one's motivation.

This is the question that Smith relates to a seemingly different one, namely whether moral judgements imply opinions about the presence of reasons for acting. The relation between reasons for acting and the motivation to act is not an obvious one, in particular not because the expression 'reason for acting' is itself ambiguous. The disambiguation of this expression is central in our argument for legal internalism.

3.2 Motivating reasons

In the literature on reasons for acting it is customary to distinguish two kinds of reasons. For instance, Raz [1978, p. 3f.] distinguishes between *guiding reasons* and *explanatory reasons*:

'Guiding reasons are facts which affect what one should do; ... Explanatory reasons are all states of mind of the person whose actions are to be explained.'

Smith [1994, p. 92f.] makes approximately the same distinction by contrasting normative reasons with motivating reasons.

The distinction is less simple than it might seem at first sight. Let us start to notice that the notion of a reason is sometimes used in the general sense of 'cause'. For instance, one can very well say that the reason why the rope broke was that it was overloaded. Reasons in this sense have in general little or nothing to do with behaviour.

However, sometimes the notion of a reason is used in the sense of cause, in connection with behaviour. This is illustrated by the sentence 'The reason why John took his umbrella was that he thought it was raining.' In this example, John's belief is the cause of his behaviour. Such reasons are what Raz called explanatory reasons. It might be argued that the belief that it was raining must be expanded with the desire not to become wet [Davidson 1963], but we will not go into this matter here.

Since causes as such only occur if they have had effects, explanatory reasons must be followed by the behaviour that they have caused. It is possible, however, to introduce a related, but somewhat weaker notion. Suppose that John thinks that it is raining and therefore wants to take his umbrella. He knows, however, that his umbrella is on the attic and John does not want to climb all the stairs to fetch it. Therefore he decides not to take it. In this case his belief that it was raining motivated John to take his umbrella, but his knowledge that the umbrella was on the attic motivated him not to take it. There are, so to speak, colliding motivations. At most one of them can determine John's final decision and behaviour, but that does not detract from it that the other motivation at least exercised some influence on his behaviour, if only on the mental process that lead to the final decision. Such mental states cannot properly be called explanatory reasons, because they do not explain the ultimate behaviour. Smith's term *motivating reason* is more appropriate in this case. In this paper we are interested in motivating reasons, disregarding whether they ultimately also explain the behaviour they motivated. Motivating reasons are psychological states that cause or contribute to behaviour *by motivating it*.

The mechanism by which the mental state contributes to the behaviour to which it contributes must in a sense also be *rational*. This seems to be a category mistake, because the relation between a motivating reason and its consequence is a causal one, while causal relations seem to have nothing to do with rationality. However, in the case of motivating reasons, the contrary is true. A mental state can only be a motivating reason, if it is somehow connected with rationality. This observation is a crucial one with regard to the conceptual connection between guiding and motivating reasons for which we will argue.

3.3 Personal reasons

Guiding reasons are facts which affect what one *should* do. For instance, the fact that it is raining is a reason for John why he should take his umbrella. Notice that this fact is a guiding reason for him, independent of whether John knows that it is raining. Clearly, John cannot act on this reason if he is not aware of this fact, but this does not subtract that he should act on it if he is aware of it, on the punishment of being irrational.

Notice also that whether the fact that it is raining is a guiding reason *for John* depends on John. If John likes to become wet in the rain, and does not become ill from it, John has no reason whatsoever to take his umbrella. It depends on John's preferences, but not on his knowledge that it is raining, whether this fact is a guiding reason for him to take his umbrella.

We wrote about guiding reasons *for a particular person*. We will call such reasons, which depend on the personal preferences, *personal reasons*. In the next subsection, we will oppose personal reasons to *reasons from a point of view*. But first we discuss the relation between motivating reasons and personal reasons.

The starting point of this discussion is that if one is aware of having a personal reason to do X, this will normally be a factor that contributes to the motivation to do X. Taking our example again, if John is aware of the fact that it is raining, this should normally contribute to his motivation to take an umbrella. It only contributes to his motivation, because John may also be aware of the presence of other guiding reasons. Another guiding reason would for example be that his umbrella is on the attic.

Whether John will ultimately be motivated to take an umbrella depends on the outcome of the interaction of these two causal factors. The interaction that determines the motivation is between the psychological states or the brain states that underlie them. On the rational level, there may also be an interaction between the guiding reasons, but this does not (directly) affect John's motivation, but rather what it is rational for John to do. It is not obvious that John will act rationally.

The awareness of a guiding reason does not always contribute to the motivation to act. One reason (in the sense of cause) for this is that humans are not always rational. This topic has received ample attention in the literature under the heading of 'weakness of the will' [e.g. Hare 1963; Charlton 1988].

Another reason is that there may be facts which make that something which would normally count as a reason, does under the actual circumstances not count as a reason. Suppose, for instance, that John has made the bet that he would at least on one occasion act against his principles today. He picked as the occasion that he would go outside in the rain without taking his umbrella. So the fact that it is raining, which would normally count as a reason for John to take an umbrella, is on this specific occasion not such a reason. That he made a bet is an exclusionary reason that prevents the fact that it is raining from becoming a guiding reason on this occasion.⁵

In a strict sense, this last variant on which an actor has a reason that prevents other facts from becoming the guiding reasons which they would normally be, is not a counterexample to the theory that the awareness of guiding reasons contributes to motivation. Indeed, the presence of an exclusionary reason makes that the fact in question actually is not a reason, and therefore awareness of it need not contribute to the agent's motivation. If John has made the bet to act against his principles, he should not be motivated to take his umbrella by his awareness that it is raining, because on this special occasion this fact is not a guiding reason for him.

Given these qualifications, one might say that a fact of a particular kind is a guiding reason for a person, if and only if the awareness of a fact of this kind contributes to this person's motivation to act, to the extent that this person is in this respect rational.

Notice that personal reasons as defined here are not necessarily good reasons, not even from the perspective of this person himself. John may have developed the bad habit to drink three glasses of whiskey, each time he had a lousy day on his work. He considers the fact that he had a bad day as a reason to drink whiskey, although he is ready to admit that it were better if he had a more healthy way of compensating for his frustrations. In other words, he recognises a certain fact as a personal reason, without recognising it as a good reason. Normally such a state, recognising something as a personal, but nevertheless a bad reason, is instable. Most people try to recognise only good reasons (in the sense of perceived as good) as personal reasons.

Our point in making the distinction between personal reasons and good reasons is that personal reasons are essentially a psychological, and not a rational category. Personal reasons are, so to speak, the point of transition between the psychological and the rational. They are psychological because they are defined in terms of motivating beliefs. They are rational, first because they are facts about the external world, and not merely psychological states. And second they are rational because they are used for justifying the behaviour for which they are reasons. These rational aspects of personal reasons make that the situation where a person recognises that his personal reasons are irrational, is psychologically instable.

In the notion of a personal reason we reject the Humean psychology. The belief that one has a personal reason is at the same time a belief about an objective fact, and at the same time inherently motivating. A personal reason is both a fact about the (usually external) world, and at the same time something the knowledge of which tends to motivate. The factual and the psychological component in a personal reason may be dissected conceptually, but we doubt whether this is illuminating. In human motivation there is a close connection between (limited) rationality and psychological causation, and a conceptual dissection of these components separates what is joined together psychologically.⁶

⁵ Our use of the term 'exclusionary' reason is slightly deviant from Raz's use of the term in his 1975 and 1978. See for an explanation Hage 1997, p. 18/9.

⁶ Moreover – and this is a side path which we will not follow any further – there is no clear biological foundation for the distinction between mental states that represent beliefs and mental states that represent motivational states. In the end it all is a matter of neurons and their interconnections. To our knowledge, there is no evidence that the electro-chemical properties of neurons distinguish between believes and desires.

With the notion of a personal reason, the relation between reasons for acting and motivation is also clarified. Personal reasons are facts about the world, which by themselves need not lead to motivation. However, facts that are personal reasons for a person P are by definition such that if P is aware of their presence, this awareness tends to motivate P to act in a particular way.

3.4 Reasons from a point of view

Next to guiding reasons for a person, or personal reasons, there are guiding reasons from a point of view. Moral reasons in the sense of guiding reasons from the point of view of *social* morality are guiding reasons according to the norms that are part of the social morality of a particular society. Guiding reasons from the point of view of social morality may be guiding reasons for a particular person. In fact they will be if this person has 'internalised' these norms. But they need not be. Somebody may completely ignore the norms of social morality (and take the consequences). In the case of personal morality, things are different. Personal morality may be defined as those moral norms to which somebody has committed herself, toward which she takes the internal point of view.

Reasons based on personal morality are therefore personal reasons. However, they do not exhaust the space of personal reasons. For instance, the fact that one would like a cool drink is a personal reason to take a drink from the refrigerator, but this has (normally) nothing to do with one's personal morality. So we find that the guiding reasons based on one's personal morality are always personal reasons, while the guiding reasons from social morality are only personal reasons to the extent that they are internalised and consequently also reasons from personal morality. Moreover, there may be reasons from personal morality which are not reasons from social morality.

Personal morality is closely related to, but not completely identical to critical morality. The notion of critical morality seems to comprise at least two aspects. One of them is personal commitment, and this aspect makes critical morality to a subset of personal morality. The other aspect is perceived rationality. One cannot accept something as norm of critical morality while at the same time believing that it is irrational to do so. The relation between personal and critical morality is strongly similar to, if not the same as, the relation between personal and good reasons. In both cases there is a correction on what one recognises as reasons on the basis of standards of rationality.

Obviously it is hard, if not impossible, to have a fully rational set of moral beliefs. The capacity of the human mind is too limited for that. But it is often possible to drop or adapt those of one's moral convictions which one believes to be irrational, with the aim to obtain a coherent set of moral (and other) beliefs. Critical morality is what results if one's personal morality is cleaned up in this way. Since most people attempt to make their moral beliefs coherent, the distinction between personal and critical morality is mainly theoretical. This theoretical distinction is important, however, because it is the distinction between the motivational and the rational aspect of personal morality. This distinction is in turn the counterpart in the field of morality of the distinction between personal and good reasons in general.

4 The solution to the moral problem

The conceptual framework presented above forms the foundation for a solution to the moral problem as presented in section 2. This problem is how moral judgements can both claim to be objective and motivating, while motivation is, according to Humean psychology, independent from the facts. The solution to the problem is, briefly stated, to assume that there are facts which are not motivationally neutral. We called these facts personal reasons.

This solution is not a new one. Foot [1958], for instance, already pointed out that there are 'thick' moral concepts, such as *rude*, which have both a factual and an evaluative (and therefore motivational) component. Searle's [1964, 1969 p. 175f.] derivation of an OUGHT from an IS by means of the intermediate concept of a promise is the prescriptive counterpart of what Foot did for evaluation. The problem with this approach seems to be, however, that the motivational aspect of rudeness or promises seems to be smuggled into a motivationally neutral world. This is, at least, the upshot of Hare's criticism of Searle's derivation [Hare 1964].

In our opinion, this criticism begs the question. It already assumes a motivationally neutral world, and from this assumption it argues that those who accept the institution of promising add motivation to this neutral world. The linguistic evidence adduced by Searle suggests the opposite, however. The

world which people experience is not motivationally neutral, although it is possible to dissect it conceptually in a motivationally neutral part on the one hand, and projected motivation on the other hand. The issue at stake is whether this conceptual dissection is fruitful.

One reason why this dissection would be fruitful is that motivation is subjective, person-dependent, while the world is traditionally assumed to be objective in the sense of person-independent. This reason seems, for instance, to underlie much of Mackie's arguments for the error-theory [Mackie 1977, p. 36f.]. We want to question, however, whether the world is completely person-independent. In particular the social world seems to a large extent to depend on cultural phenomena which may be independent of individual persons, but certainly not of groups of persons [Lagerspetz 1995, Searle 1995]. Moreover, if one is prepared to recognise that the social world may be culture-dependent, one has taken the important step of recognising that not all parts of the world need to be person-independent. The room is created for the next step of recognising that some parts of the world may depend on personal judgement. Should this step be taken?

4.1 A digression to aesthetic evaluation

Again the major obstacle is the presumed objectivity of the world. Aesthetic evaluation is generally acknowledged to be subjective and therefore forms a suitable test bed for a theory that allows the world to be subjective. Suppose that two persons, P and Q, evaluate a painting by Picasso, say *Guernica*. P does not like the painting, and when asked why, he answers that the real world does not look like the way it is depicted in the painting. Q likes the painting, and when asked why, she answers that the painting expresses the terrors of war very vividly.

Whether P and Q like the painting is obviously a matter of personal taste. Matters seem to become different when they express their appreciations in the form of aesthetic judgements. According to P, *Guernica* is ugly, while according to Q it is beautiful. P and Q might have framed their judgements differently, for instance by saying that they *think* the painting to be ugly, respectively beautiful. By using the *verb* think instead of *is*, they express the relativity of their judgements. However, they need not use this relativistic expression. They can very well use the more objectivist *is*.

P and Q disagree whether *Guernica* is beautiful. P says it is not, while Q says it is. Let us assume that they agree about everything that does not involve evaluation. P and Q seem to contradict each other. One might argue, however, that the disagreement is merely verbal, that they agree about all the objective 'facts' and that their difference in evaluation depends on the different standards that they use for evaluating the painting's beauty. The issue at stake is whether the truth of this diagnosis leads to the conclusion that P and Q do not really disagree about the facts. Clearly they disagree about the standard to be used, but does this lead to a disagreement about the facts?

Theoretically the issue can be approached as follows. Many judgements presuppose the application of standards to classify fact situations. These judgements are the result of two factors: on the one hand the 'objective' facts, and on the other hand the 'subjective' standards. For instance, the classification of the thing before the writer as a computer monitor is based on brute facts and on standards for classification as a computer monitor. Nevertheless such judgements are called objective. Why does not the (inter)subjective nature of the standards for classification make such a judgement subjective? Probably because otherwise there would hardly be any room for objective judgements. Most if not all judgements presuppose standards, and if these would all be called subjective, the notion of objectivity would lose much of its meaning.⁷

One might argue, then that P and Q only seemingly disagree about the beauty of *Guernica*. P would 'really' mean that *Guernica* is not beautiful according to his standards, while Q would 'really' mean that it is beautiful according to his standards. However, this argument overlooks that the standard is not part of the judgement. The standard by means of which the facts are judged is presupposed. The judgement about *Guernica* is that this painting is (not) beautiful, and not that it is (not) beautiful given P's or Q's standards for evaluating paintings.

⁷ We disregard the important category of judgements which contain a subjective element comparable to standards, but where this subjective element cannot be formulated in the form of a standard. For instance, one can judge a painting to be beautiful without being able to formulate standards for beauty that the painting satisfies.

The picture that emerges from this discussion is that many judgements presuppose the application of standards to the world, where these standards are not part of the world in the same way as the facts are. This is in general not a reason to call these judgements subjective. Moreover, conflicting judgements that result from conflicting standards are really conflicting, because the judgements are not implicitly also about the standards that underlie them.

So, if P and Q disagree about the aesthetic qualities of Guernica, this might mean that for P there is an ugly painting, while for Q there is a beautiful painting. The aesthetic qualities of this painting are part of the world, but P and Q have different realities in this respect. *So we put forward the thesis that there can be personal versions of (part of) the world.*⁸

But what is the purpose of a discussion about aesthetic qualities then, if both can be right and nevertheless disagree? We think that such a discussion can serve two purposes. One is that the one side can convince the other side that he uses standards which he ought not to use given his other beliefs and standards. The other is that a discussion can causally (in the sense of a-rationally) bring about a change in standards. These two purposes correspond more or less with the analyses given by Hare [1963, 1981], respectively Stevenson [1944] of moral discourse.

Although we want to open the possibility for subjective, personal parts of the world in cases as the one mentioned above, we also want to stress that there are strong tendencies to avoid personal subjective realities. In the aesthetic case, where agreement is least likely, this is reflected in the dominance of relativised expressions of aesthetic judgements, such as 'I think this picture to be beautiful'. In the legal case the strive for legal security, realised by legislation, authoritative legal decisions, and legal argument, expresses the tendency to create agreement. And also in the moral case there is a strong tendency not to let disagreements rest, but to turn them into agreement by argument. The phenomenon of 'personal worlds' is therefore real, but also relatively rare.⁹

4.2 Personal moral worlds

If there can be something like a personal world, this opens the way to the solution of the moral problem. There can be facts with *built-in motivation*, so to speak. These are the personal reasons we wrote about above. Because motivation is a personal matter, the recognition of these facts is a personal matter. Nevertheless, personal facts are facts, parts of the world, and not personal attitudes towards a motivationally neutral world.

It is possible to believe that eating horse meat is morally wrong, and for a person who holds this belief sincerely, a particular case of eating horse meat is morally wrong. This person will, barring exceptions, be motivated not to eat horse meat, because of reasons that one the hand lie objectively in the world, and on the other hand depends on personal attitudes. The world of which these reasons are parts is a *personal moral world*.

A person who shares the common moral opinions about rudeness will find the fact that some action is rude (to be determined by means of commonly accepted standards for rudeness) both objective, and inherently a reason to refrain from this action. A person who partakes in the social practice of promising will find the fact that he made a promise both an objective part of the world, and inherently a reason to behave in accordance with her promise. Sharing the common moral opinions about rudeness and partaking in the social practice of promising are both personal matters, but that does not detract from the objectiveness of rudeness and the obligations arising out of promises.

5 The motivation to obey the law

If one adopts the view that there can be such a thing as personal, inherently motivating reality, the law's both factual and prescriptive nature is not so remarkable,. However, even if one is prepared in principle to acknowledge the existence of personal, motivating reality, the question remains to be an-

⁸ Following a different road, Goodman [1975] arrives at the same conclusion. Putnam has argued extensively along related lines against the ontological separation of facts and values. See Putnam 1981 and – in particular – 1990, p. 135f.

⁹ The issue of personal worlds has many ontological ramifications which fall outside the scope of this paper. In an appendix we added some more remarks on this topic, but we warn the reader that even an appendix does not offer sufficient space to give this difficult subject a satisfactory treatment.

swered whether the law exemplifies this hybrid phenomenon. We will answer this question affirmatively, but not without qualifications.

The first qualification concerns a distinction between three levels on which the law can be considered. The highest level is that of legal systems as a whole. The presence of a legal system manifests itself in a number of sociological and psychological phenomena. The precise nature of these phenomena may be disputed, but there is widespread agreement that for a legal system to exist, there will normally be:

- a set of rules,
- most of which are by and large effective,
- which ‘hang together’ in a system which is itself governed by (secondary) rules,
- which aspire to be right, and
- which are generally (and at least by the ‘officials’ of the system) considered as binding on the participants of the system.

This list does not consist of necessary or sufficient conditions for the presence of a legal system, but should rather be read as representing a stereotypical modern legal system. One question is whether such a system in the sociological sense can be recognised as a legal system by somebody who is in general not motivated to act in accordance with the rules of this system.

The intermediate level consists of the norms that are part of the legal systems. Legal systems have usually criteria (rules of recognition) by means of which a number of rules can be identified as legal rules belonging to the system in question.¹⁰ The norms of a legal system consist of these rules, and what can be derived from them in abstracto. For instance from the rule that debtors ought to pay their debts and that persons under force majeure are permitted temporarily not to fulfil their duties, it is possible to derive in abstracto the norms that debtors who are not under force majeure ought to pay their debts and that debtors under force majeure are legally permitted not to pay their debts. The second question is whether a norm based on rules identified by the criteria of a legal system can be classified as valid rule if one is in general not motivated to act in accordance with it.

The third, and ‘lowest’ level consists of legal judgements for individual cases. These judgements differ from legal norms in that norms by definition deal with types of cases, however concretely these types may be specified, while concrete judgements always deal with cases that actually occurred and which may belong to many different types.¹¹

Concrete legal ought judgements are the outcomes of the interaction between the (proven) facts of the case, with all the legal materials that are relevant for the case in question. These materials include the rules identified by the legal system under which the case falls, but also other legal rules and principles, and their interpretations etc. The third question is whether a concrete ought judgement can be classified as representing the law for a particular kind of case if one is not motivated to act on this judgement.

The second qualification concerns the distinction between in the terminology of Alexy [1992] the participant and spectator point of view.¹² Typically the participants in a legal system tend to be motivated to act in accordance with the system. Non-participants, spectators so to speak, need not be motivated in this way, however. It is, for instance, possible for an Englishman in England to recognise the system of China as a legal system without being motivated to act in accordance with Chinese law. While this holds for legal systems as a whole, that is on the highest level of aggregation, it is not immediately obvious that the same also holds for the levels of rules and of concrete legal judgements.

In the following sections we discuss the relation between recognising something as the law and the motivation to act in accordance with it. We will start from the case where the connection between the law and motivation is the most natural and work towards the case where the connection seems to be clearly absent, that is the spectator approach to legal systems as a whole.

¹⁰ This leaves open the possibility that there are also rules or principles in the system which are not identified by these criteria

¹¹ More on this distinction can be found in Hage and Brouwer 2000.

¹² This distinction is related to the Hartian distinction between the internal and the external point of view.

6 The participant's motivation to obey the law

6.1 The motivation to act in accordance with a legal system

The purpose of the law is to regulate human behaviour. A participant in a legal system accepts the law as a systems of norms that he is prepared to *in principle* to act on the rules of this system. The motivation of a participant to act in accordance with a rules of a legal system follows immediately from the facts that a legal system has the purpose to guide behaviour and that a participant is somebody who takes a legal system in accordance with its purpose.

6.2 The motivation to obey rules that belong to a legal system

The fact that some rule belongs to the legal system is normally a reason for a participant why he should obey this rule. There is no other sensible interpretation of the motivation to act in accordance with a legal system than to act in accordance with the rules that belong to this system. The recognition that one should behave in accordance with a legal system involves that one recognises in principle rules that belong to the system as binding, and as valid in this sense. To be more precise, a participant who recognises a system as the law, thereby accepts the principle that rules that belong to this system are valid in the sense of binding.

However, there may be exceptions. There may be other reasons to consider a rule that belongs to a recognised legal system as invalid. If this is the case, it depends on the relative weight of these reasons whether the rule is accepted as valid. Conscientious objections illustrates this point. A pacifist may recognise that the rule that men of a certain age ought to fight in wars belongs to the legal system, but is nevertheless not motivated to obey this rule. Although he recognises in general that rules in the legal system ought to be obeyed, in this special case he disregards the system and sees no reason to act in accordance with it.

It is even possible that, although one accepts a legal system, in a concrete case one does nevertheless not accept the fact that a rule belongs to the system as a reason for the rule's validity. (Notice that this is not the same as recognising it as a reason which is outweighed by countervailing reasons.) This would, for instance, be the case if the legislature uses a loophole in the procedure for legislation in order to make a statute that would normally not have passed the legislative procedure.

Although there are two kinds of exceptions, based on colliding reasons and on exceptions to the principle that a rule that belongs to a legal system is binding, there is in principle a transition from the acceptance that a rule belongs to a recognised legal system to the acceptance of the rule as binding. The exceptions make it possible, to allow for the invalidity of a particular rule, while accepting the system as a whole as valid law. However, the normal situation is that acceptance of a legal system involves the motivation to act in accordance with the rules that are part of it.

6.3 The motivation to act upon concrete legal judgements

It will not occur very often that a legal rule is not accepted as valid, while the system to which it belongs is recognised as (valid) law. It occurs very frequently, however, that a legal judgement that seems to follow from an applicable valid rule is unattractive. Sometimes, this unattractiveness goes so far that one does not want to act on it. Then there are two possible reactions. One may say: this is the law, but I am not prepared to obey it. This is by and large the Hartian point of view. Or one may say: this is not acceptable, so therefore it is not the law. This is the view that we adhere to.

If one concludes that a judgement based on a rule is not the law, this need not lead to the conclusion that the rule on which it was based is invalid. There are at least two ways to accomplish this. The first one, perhaps most familiar to lawyers, is to interpret the rule in such a way that it is not applicable and therefore does not lead to the unwanted conclusion. In a strict sense this is not even a case in which the application of a rule leads to an unwanted conclusion, because the rule is not even applied.

The second way is to make an exception to the rule. There are several ways to do so. One is to argue that the rule has 'hidden' conditions that are not satisfied in the present case. This is called 'narrowing down the rule'. Another way is to argue that the rule is in conflict with another rule or principle and that the conflict should be solved by leaving the present rule out of application. This view might in some cases be argued by reference to a conflict rule such as *Lex Specialis*. And finally it is always possible (though not very often feasible) to argue that the rule should not be applied because

the present case falls outside the purpose of the rule. (If the case falls under the purpose of the rule, the rule itself is wrong, and possibly as a consequence invalid.)

Although the law offers many possibilities to avoid the transition from the validity of a rule to the legal judgement that results from applying the rule to a concrete case, the normal situation is that if a valid rule is applicable to a case, the outcome of this application is valid legal ought judgement. Recognition of a rule as valid implies the disposition to be motivated to act in accordance with it, and this in turn implies the disposition to be motivated by the concrete legal judgements that result from applying the rule to cases in which it is applicable.

Suppose that a person A participates in the legal system of his country and subscribes to the judgement that according to this law, he ought to pay \$100 to B. This means that A subscribes to the view that he has a reason to pay \$100 to B. If A is not irrational in this respect, this also means that he feels motivated to pay B \$100.

This motivation does not exclude that A also feels motivated not to pay the \$100. It may for instance be the case that he has only \$100 and that he believes that he needs this money to give it to the poor. A considers it to be his moral duty to give the money to the poor, who need the money more than B. (Let us assume that the law does not recognise this 'moral duty' as legally relevant.) What A should do depends on the balance of all the (good) personal reasons which he knows to have, including the legal reason to pay the money to B and the moral reason to give the money to the poor. What A will ultimately be motivated to do depends on the joint effects of all the factors that motivate him. If A is fully rational, all known good reasons, and only these, will lead to motivating factors.

Let us change the example a little and replace the moral reason to give the money to the poor, which received no legal recognition, by a moral reason which also receives legal recognition. Suppose, for instance, that A needs the money to rescue a close relative who is being held hostage by criminals. In this situation the purely legal reason and the moral reason still need to be weighed, but in this case the weighing is internal to the law. The outcome determines what A ought to do legally and may be that A should legally not pay the money to B, at least not now, even though the obligation to pay B the \$100 remains valid. The legal category that takes account of this kind of situations is that of 'force majeure'

Apparently concrete legal ought judgements normally lead to personal reasons to do what the law prescribes. These reasons may have to be weighed against non-legal reasons that point in a different direction. The final outcome, a judgement what should be done all things considered, may, but need not be, in accordance with the law. It is this final outcome that determines the final motivation of the rational person.

Yet this analysis is not fully satisfactory. As we have seen from the examples above, the law is prepared to take non-legal reasons into consideration to determine what ought legally to be done. A, whose relative was threatened, did not have to pay his debt to B, even though he was under a legal obligation to do so. Why should the law take non-legal reasons into consideration in the determination of what should legally be done? Because the law does not merely aim to provide a legal reason for action, but, much more demanding, to determine what should be done all things considered. Raz [1975, p. 35f.] writes in this connection about exclusionary reasons. A legal ought aims to exclude all other reasons for action. Everything that is relevant is taken into account in the legal judgement, and this judgement then replaces all other reasons for action.¹³

In a similar fashion moral judgements tend to take other norms into account. Legal obligations are for instance normally relevant for what one ought morally to do. The reason for this is fundamentally the same. Just like the law, morality does not merely aim to provide a moral reason for action, but rather to determine what should, all things considered, be done. Both law and morality (and other normative points of view) aim to provide the ultimate directives for action. In this sense they have universal pretensions. However, since prescriptions from a point of view can by their very nature not do anything more than indicate what should be done from the point of view in question, e.g. legally or morally, the universal pretensions of the different points of view are not necessarily realised.

The tension between the universal aspirations and local accomplishment of ought judgements from a point of view will only be removed if all practical points of view to which an actor adheres, indicate

¹³ See also the account of replacing reasons in connection with exclusionary reasons in Hage 1997, p. 111.

that the same actions ought (not) to be done.¹⁴ Then this agent's practical reason will have achieved full coherence. To achieve such a coherence can for human being with limited mental capacities only remain an ideal that is to be pursued and to which the human mind is biologically directed. The pursuit of this ideal explains why moral considerations enter into legal decision making and why the moral ought depends to a large extent on the contents of the law.

Concerning the central question of this section, whether concrete legal ought judgements lead for a participator in a legal system to the motivation to act in accordance with these judgements, the answer can be brief: Yes, such a participator will normally, that is to the extent that she is rational, be motivated by what he judges that legally ought to be done in a concrete case. Moreover, there will be a tendency to take all factors that are motivationally relevant into account in determining concrete ought legal judgements, because this is necessary to satisfy the universal pretensions of the legal point of view.

7 Detached legal statements

In the previous sections we dealt with the question whether a participant of a legal system would be motivated to act in accordance with the law. A related question is whether the same holds for somebody who does not participate in the system, but is merely a spectator. This question is addressed by Raz [1977] under the heading of *detached legal statements*. According to Raz [1979, p. 153/4]

A detached legal statement is a statement of law, of what legal rights or duties people have, not a statement about their beliefs, attitudes, or actions, about the law. Yet a detached normative statement does not carry the full normative force of an ordinary normative statement. Its utterance does not commit the speaker to the normative view it expresses. ...

... the analysis of detached normative statements is a crucial test for every positivist theory of law. On the one hand their existence is a major source of strength. It shows that normative language can be used without a full normative commitment or force. But on the other hand it is far from easy to explain what sense normative utterances have when they do not carry their full normative force.

Raz goes then on to offer examples of these detached legal statements, including in particular statements of legal science in which a legal system is described without commitment to the contents of the system in question. He does not offer a full explanation of the possibility of detached legal statements, but points out that they are statements 'from a point of view'. It is possible to place oneself hypothetically in the position of somebody who adheres to some set of norms and then evaluate a case from that point of view. The outcome is an ought judgement from that particular point of view, without necessary commitment to the norms belonging to this point of view.

Is Raz correct when he writes that such detached legal judgements exist? Yes there exist some. It is for instance possible to say in a detached way that according to the law of some dictatorial state, those who committed high treason are liable to receive capital punishment, without thereby endorsing this kind of punishment for these people. Two things should be noted, however. First that such a judgement is not so much a judgement about a concrete case, but rather the description of a rule that exists in the legal system in question. As we will see, non-committed description of the rules of a legal system is more plausible than non-committed ought judgements for concrete cases. And second, if the description is meant to be non-committed, it can also be interpreted as a mere prediction of what might happen to those who are judged for high treason. Summarising, we find the status of such general detached legal status somewhat unclear. It is defensible, but not obvious that these statements are legal statements, rather than predictions of what might happen in the context of a legal system.

However, if Raz means to show by means of detached legal statements that the law can be described fully, that is up to the level of concrete cases, without commitment, we disagree. Let us assume, with Raz, that a legal system has a number of legal sources, the contents of which can be established without value judgements and without commitment to these contents. Let us also assume that these contents consist of a number of rules and principles. These rules and principles determine, through their condition parts, which facts in a case are legally relevant. All facts in a case that are not mentioned in the conditions of these rules and principles are legally irrelevant. It is then possible to describe without value judgements or commitment the legal consequences attached by the rules and

¹⁴ For a similar argument, see Peczenik 1989, p. 252.

principles in question to the cases to the extent that they are characterised by facts mentioned in the conditions of the rules and principles.

If, for instance, country D has the statutory rule that committers of high treason ought to receive capital punishment, it is possible to say in a detached way that in country C committers of high treason ought to receive capital punishment. If in country D also the rule exists that those who received pardon from the country's Great Leader, are not liable to be punished, the detached description should run that committers of high treason who did not receive pardon from the Great Leader ought to receive capital punishment. If there are no other relevant rules in the sources, the detached description must remain on this level.

However, in concrete cases there will sometimes be facts that are deemed relevant for how these cases should be handled, and which are not mentioned in the rules and principles that are included in the sources of the legal system in question. Although it is in theory possible to declare these facts legally irrelevant, this is not what happens in most legal systems. The usual approach is that somehow one attempts to achieve a certain harmony (coherence) between the contents of the law to the extent that this follows from the official sources of the legal system, and what one is motivated to do on other grounds. This is the mutual adaptation between law and morality (and other normative points of view) that was described and explained in the previous section. This mutual adaptation is not well possible for a spectator who gives detached legal judgements, because the point of this mutual adaptation is that the outcome is to commit to behaviour.

It seems therefore that detached legal statements are only possible on a level of abstraction on which factors that are deemed legally relevant but which are not mentioned in legal sources are disregarded. Such a description is not necessarily false, but its truth cannot be passed over, so to speak, to more concrete descriptions. Because on the more concrete levels, true descriptions take not only the abstract sources into account, but also the commitment to act in accordance with the description of the law. In other words, only abstract descriptions can be detached, concrete descriptions cannot. This leaves open the interesting question where the border between detached abstract description and committed concrete description lies.

8 Summary

In this paper we have argued for a connection between the judgement that a particular judgement expresses the law, and the motivation to act in accordance with this judgement. In the first part of the paper we addressed to this purpose a problem that has been central in the moral philosophy of this century. This problem concerns the seeming gap between believing and being motivated. When these two are (onto)logically distinct, as Humean psychology wants us to believe, it is hard to explain why there can be a connection between one's beliefs and one's motivation. Michael Smith called this problem, which is closely related to the gap between IS and OUGHT, the moral problem.

The solution to the moral problem for which we argued involves that some parts of reality, in particular those which are personal reasons, are conceptually tied to the motivation to act in accordance with these reasons. Our argument is based on a number of conceptual distinctions, amongst which the distinction between motivating and personal reasons. A consequence of our solution is that it must be accepted that reality is not completely independent of the persons for which this reality exists.

In the second part of the paper we addressed the question whether legal judgements describe (amongst others) parts of this personal reality, which may be motivation-loaded. Again we had to make some distinctions, between the participant and the spectator point of view and between three aggregation levels on which legal judgements can be given. Using these distinctions we argued that judgements from the participant point of view are always motivation-loaded, while judgements from the spectator point of view cannot be detached where concrete cases are involved, but can, respectively must be detached where legal norms and full legal systems are involved.

Appendix: Reality and worlds

The view that there are personal worlds, and its consequence that there is more than one world based on personal dispositions such as the disposition to be motivated by particular facts is rather counterintuitive. Therefore we want to say a bit more in its defence.

Intuitively there is one reality, independent of what we think it to be, independent of the language by means of which we describe the world, and certainly independent of our preferences. We also make this assumption and call this entity, which has some similarity to the noumenal world in the sense of Kant, *reality*.

Recent developments, both in the philosophy of science (e.g. Kuhn 1962) and in cognitive science provide support for the view that the world as we know it is not a mere reflection of an independent reality, but is also influenced by our cognitive apparatus, including the physical nature of our senses and our brains, and by available (pre-)scientific theories, including their conceptual frameworks.

A simple argument can provide further support for this view. There are several kinds of knowledge. Lehrer [1990, p. 3], distinguishes between knowing in the sense of a special competence (e.g. knowing how to play guitar), knowing in the sense of being acquainted with something or someone (e.g. knowing John), and knowing in the sense of recognizing something as information (knowing that, or propositional knowledge). In particular propositional knowledge presupposes a conceptual apparatus and a language in which it is embedded, by means of which the knowledge can be expressed. Propositional knowledge is knowledge of facts, and facts are closely tied to language and a conceptual scheme.

Facts are what corresponds to the phrase X in sentences like 'It is a fact that X'. There cannot be facts that are not expressible in some language. Since reality is assumed to be independent of any language or conceptual apparatus, reality as such cannot contain any facts.¹⁵ If knowledge is to be knowledge of facts, it cannot be knowledge of reality. It must be knowledge of something that results from the interaction between reality and (at least) a conceptual scheme.

We propose to call this something *a world*. According to the terminology proposed, the word 'reality' denotes the (noumenal) world 'in itself', an entity that cannot be the immediate object of knowledge. On the other hand, the worlds are the immediate object of our knowledge, in the sense that a sentence is true in a world. Worlds might be defined as sets of facts, where a fact is a state of affairs that obtains in a world. States of affairs are the 'real' counterparts of sentences, and are therefore dependent on language. More precisely, they are dependent on conceptual scheme.

Even more precisely: The notion of a conceptual scheme is a bit too narrow. It suggests that it is merely a set of concepts with meaning relations between them. We would like to broaden this to a set of concepts and a set of constraints on possible worlds. A constraint can be based on meaning. For instance, a world in which a circle is a square is ruled out by a meaning constraint. Other constraints are physical laws (or theories about them). However, constraints may also be rules. Consider, for example, the rule that thieves are punishable. This rule is a constraint that in principle rules out worlds in which thieves are not punishable. In principle, because the operation of constraints is defeasible¹⁶. Last but not least, evaluative standards are also constraints. Thus, for somebody who thinks that murder is wrong, worlds in which murder is right are in principle ruled out.

The view that there is one reality from which worlds are derived can be - and in fact is - expressed within many (theories about) worlds. And - obviously - it cannot be expressed in isolation from a theory about a world. Indeed, nothing at all can be expressed in isolation from a theory about the world. The important point in this connection is that the view that there is one reality, with worlds that are the outcome of applying a conceptual scheme to reality is, according to this view itself, a theory about what the world is like. It is a part of a theory about the world itself. Said differently, theories about the worlds can be broadened to theories that also deal with the relation between worlds and reality. Moreover, on these view of the world, a view of the world is *ipso facto* a view about reality, since the world is just a way to see reality.

When we speak about truth-values of moral judgements (and this is what matters in the present paper), we can say two things: They may have truth values in relation to reality, but this does not give us anything more than a metaphysical feeling of understanding, that some people need, and others do not need. At the same time, however, they have truth-values in a weaker sense, namely as compared with

¹⁵ Cf. Strawson 1950, p. 196. Strawson uses the word 'world' where we use 'reality'.

¹⁶ See Hage and Peczenik 2000.

the most coherent view within the assumed conceptual scheme. There are many such views, competing with each other. They can be called "many worlds".

In accordance with this ontological position, we wrote the following.¹⁷ We have assumed that the law is a part of the world. The law exists because people believe in the law, but the law is not identical from the beliefs. The rock-bottom of the law consists of conventional facts. Such facts are dependent on - but not identical with - the beliefs and action of relevant individuals. The law is the law because people are convinced that it is the law. In addition to conventional facts, the law also comprises institutional facts. Institutional entities exist because they are the conclusion of some rule that exists in a community (and ultimately, can be traced back to conventional facts). Finally, the morally binding personal interpretation of the law supervenes on two things together: on the individual's knowledge of legal institutions and on moral obligation. The first supervenes in its turn on mutual beliefs; the second supervenes on motivations and dispositions of the individual, provided that she is morally sensitive and rational. Personal interpretation of law converts into social law, if other persons on the basis of overriding reasons do not contest it. The morally binding social law supervenes on moral motivation that is triggered by institutions that supervene on mutual beliefs.

¹⁷ Peczenik and Hage 2000.

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