BOOK REVIEW*

Epistemic Uncertainty and Legal Theory
Brian Burge-Hendrix
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Max Weber famously observed in *Economy and Society* that due to the collapse of credible natural law accounts, 'legal positivism has, at least for the time being, advanced irresistibly'.[1] This ascendancy can be seen today in the general acceptance by many legal theorists of Hart's analysis of the rule of recognition, namely, that every legal system will have a way of identifying valid law and that these rules of recognition will be grounded in actual social practices, not in other legal or, more to the point, moral criteria. But positivists continue to disagree among themselves about the proper way to conceptualise the separation (and connection) of law and morals. For example, for a number of years there has been a dispute between legal positivists as to how to understand the apparent role of moral criteria in practical determinations of legal validity (what might be termed the Hart/Raz debate). Exclusive or hard positivists regard any appeal by decision-makers to moral criteria as inevitably a resort to extra-legal standards. As such these decisions should not be thought of as applications of existing law but as creations of new law. Inclusive or soft positivists argue that moral principles can be and are incorporated into legal systems; for example the posited constitutional rights found in states with a charter of rights. The exclusivists do not doubt that there are charter states. These are states, like Canada, which by way of their primary legal text incorporate and entrench basic norms with moral content that purport to be legal norms – for example, a right to equality or a right to free speech – and which, if applied, work to invalidate legal norms. But exclusivists question the self-understanding of charter decision-makers who see themselves as working with and applying legal rather than extra-legal criteria.

The law/morals relationship has also featured in a more recent debate concerning the methodology of legal theory. The debate asks if it is possible to construct a purely descriptive account of the nature of law; a description and explanation of the nature of law that does not at some point rely on moral or political evaluations (for example, a consideration of what law is supposedly good for)? More concretely, can a descriptive account be given of law's bindingness (its normative force for at least some of its subjects) without drawing upon a moral justification for regarding law in this way?

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1 Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich (eds), 1978 ed) 874 [trans of: *Wirtschaft und Gesellschaft*].

This book discusses and brings together the debate between exclusive and inclusive positivists with the meta-theoretical dispute over the possibility of providing a descriptive account of the nature of law. As the title to the book makes clear, the author perceives 'epistemic uncertainty' at the heart of modern discussions of legal positivism. He puts this idea to work, arguing that inclusive positivism and those arguing for the possibility of a descriptive/explanatory account of law are best placed to deal with this uncertainty.

'Epistemic uncertainty' is shorthand for the fact that positivist legal theorists are in debate. There is, it is argued, collective uncertainty about the boundaries of the concept of law. For example, are charter rights legal norms, special legal norms or extra-legal norms mistakenly seen to be legal norms? Further and more basically, there is a lack of consensus as to how legal theory should understand its task. Is a descriptive account of law possible and desirable? At various stages of the argument the author refers to other matters that are in contention which also generate for him 'epistemic uncertainty': the proper way to understand the rule of recognition – conventional (Hart) or interpretive (Dworkin);[2] the moral worthiness or otherwise of accepting law's bindingness;[3] and the true character of legal authority.[4] 'Epistemic uncertainty' described in this way clearly exists but possibly too much is claimed when the author describes them as tumultuous[5] or 'complete disagreements'[6] that have led to the 'present chaos in analytic legal philosophy'.[7]

The author discusses the writings of numerous contemporary legal theorists; most notably, Joseph Raz, Wil Waluchow, Liam Murphy, Julie Dickson, Stephen Perry, Brian Leiter and Michael Giudice. The overall aim of the work: 'is to illuminate the strengths of inclusive legal positivism and in particular the explanatory power of its descriptive explanation of constitutional adjudication involving substantive moral-political rights'.[8]

In the early chapters, through criticism of Murphy and Perry, the author seeks to establish the possibility of a descriptive theory of law. It is not claimed that a descriptive theory of law will be free of evaluation. For one thing, the descriptive theorist will have to decide just which features of law are basic and which are not. For another, the subject matter for the theoretical account, law, will have moral and political significance. But, drawing upon the work of Waluchow and Dickson, the author shows how we can evaluate legal theories by criteria that are not moral criteria – descriptive accuracy, simplicity, coherence, explanatory power, for instance – and how we can describe basic features of law that have normative significance without evaluating the political or moral merits of these

2 Brian Burge-Hendrix, *Epistemic Uncertainty and Legal Theory* (2008) 91.
3 Ibid 97.
4 Ibid 156.
5 Ibid ix.
6 Ibid 149.
7 Ibid 182.
8 Ibid 4.

features. After all, institutions and norms are not only value oriented, they exist in the world as facts as well.

The later chapters of the book take up the topic of constitutional adjudication in charter states. This discussion allows the author to consolidate his claim for the possibility of a descriptive theory of law and to argue that inclusive positivism gives the better account of constitutional adjudication. Basically, inclusive positivism (unlike exclusive positivism) provides a superior description of this type of legal system, as it accords better with how the participants understand the application of rights-based constitutional norms. Participants within this constitutional practice do not see themselves, as exclusivists would have it, as applying extra-legal norms. And they do not regard court decisions as the place where moral standards are turned into case specific directives. Further, they do not understand a declaration of invalidity as retrospectively overturning a previously valid law. For participants, a law declared invalid was a nullity from the start.

This is a closely argued book that is well-informed by contemporary legal theory. It presents a convincing case for descriptive legal theory, and in the context of present-day analytic legal philosophy, who can say that this is not a worthwhile thing to do? However the book also claims that a descriptive legal theory is a powerful tool for understanding rights based constitutional interpretation.[9] Here I disagree. The comment 'important if true' is now perhaps a little over-used. But with this second claim it is more a matter of – it might be a true account, as compared with exclusive positivism, but is it important?

The question for inclusive positivism, like exclusive positivism, is how best to describe the grounds of law. 'The hallmark of inclusive legal positivism is its answer to the validity question'.[10] How can legal rules be delimited from other types of rules? Can moral criteria determine the validity of a legal rule?[11] The central explanatory concept for positivism is the rule of recognition.[12] And so on.

This type of approach will always struggle to give a convincing account of constitutional adjudication (or any type of adjudication for that matter) as it looks at the law/morals relationship in the wrong place. The central problem for participants in constitutional adjudication is not – does this legal rule meet the criteria for validity?[13] The problem is –what does this law, which is clearly valid as it is part of a binding constitution, mean in the circumstances of this case? Positivism focuses on the starting point of legal deliberation but the focus should rather be on the interpretive process of deliberation.

Positivism's contribution to accounts of adjudication is to clarify how the starting point of legal deliberation can be fixed without reference to the appropriateness of the law – here are the relevant constitutional provisions (and case reports). But in the process of applying these legal materials to the case at

9 Ibid 182.
10 Ibid 161.
11 Ibid 100, 101, 104, 156, 161.
12 Ibid 163.
13 Ibid 164.

hand the appropriateness of the law may come into question in a number of ways. For, granted the force or authority of the legal rule, the issue for constitutional adjudication might be and often is: how does this rule, whose authority cannot be questioned, apply to the salient facts? What is the appropriate way to understand this rule? Where there is a conflict between valid legal norms, how should these norms be ordered? And, as legal decision-making often occurs in a context of a number of separate but interconnected institutions, which among the various legal institutions – Parliament, the administrative agencies, the courts – should decide the issue in this case? When is it appropriate for one institution (the courts) to defer to the judgment of another? With these types of questions there can be no rule of recognition that easily stipulates what is to count as a legal concern and what is to be suppressed. Other accounts of adjudication are called for to explain this permeable boundary between legal and other considerations.[14]

14 For a succinct summary of various attempts to answer this question see Jürgen Habermas, *Between Facts and Norms* (1996) ch 5. See also Arthur Glass, 'Phronesis and Legal Deliberation' in John Grumley, Paul Crittenden and Pauline Johnson (eds), *Culture and Enlightenment* (2002).