CRÍTICA, Revista Hispanoamericana de Filosofía. Vol. 49, No. 147 (diciembre 2017): 5–10

THE INTERESTINGNESS OF THE NON-INTERESTINGNESS OBJECTION TO GENERAL JURISPRUDENCE

PAU LUQUE
Universidad Nacional Autónoma de México
Instituto de Investigaciones Filosóficas
pls2001@gmail.com

In 2001, Julie Dickson claimed that general jurisprudence "appears to be undergoing a perpetual identity crisis" (Dickson 2001, pp. 1–2).[1] Is that true? If we judge this by reference to what is probably the most important book in general jurisprudence of the second half of the twentieth century, that is, H.L.A. Hart's *The Concept of Law*, it is true that Hart's way of doing legal philosophy has been repeatedly under attack and, as a consequence, general jurisprudence's identity has been subject to critical discussion on several occasions.

In the Preface to *The Concept of Law*, Hart stated that his was a study "in analytical jurisprudence", by which he meant "the clarification of the general framework of legal thought, rather than [...] the criticism of law or legal policy" (Hart 1961, p. vi). Such a statement implies two different claims: a theory of law should be (i) general and (ii) non-evaluative. Regarding (i), jurisprudence should not be focused on the particular law of a specific country but rather on those traits that all legal systems share. As for (ii), the basic idea is that jurisprudence should avoid taking sides when conceptually reconstructing its target, i.e. the law.

So Hart's view of jurisprudence was a form of general, neutral, conceptual analysis of the law. It is not clear that Hart intended this to be the only way to do jurisprudence. But it is a fact that his view on the topic was so influential that it partitioned the discussion among jurisprudents between those who reject it and those who embrace it. In general terms, there seems to be no third way: either you are against Hart's core vision of jurisprudence or you join forces with him, committing yourself to the idea of general, neutral, conceptual analysis of the legal phenomenon.

[1] In these few pages, I will indistinctly use "general jurisprudence", "legal philosophy", and "legal theory". Take this clarification as a stipulative definition of General Jurisprudence for the sake of the presentation of this special issue.

Among those who have attacked Hart's vision on the nature of legal theory, Ronald Dworkin occupies a predominant place.[2] Dworkin famously rejected both (i) and (ii). A theory of law must be a constructive interpretation of a particular legal practice (Dworkin 1986). If we take this to be just a normative claim, then I think that Hart was obviously right when in the Postscript to his seminal book, he claimed that there seemed to be no conflict between his theory and Dworkin's because they just had different aims —whereas Dworkin's was justificatory, Hart's was descriptive (Hart 1994, pp. 242–243).

But Dworkin's justificatory claim was not an isolated critique of Hart's view. Dworkin thought it falls out of a general argument questioning the possibility of genuinely descriptive, neutral legal theories (Dworkin 1983, p. 247; 1986, chap. 1; 2006, pp. 152 ff.). In a nutshell, jurisprudence must take into account the perspective of participants in the law, and, in order to do so, jurisprudents are constrained to adopt the perspective of the participant. Given that participants necessarily take sides, jurisprudence cannot be neutral or purely descriptive when it adopts the perspective of the participant.[3]

Hart's reply was to concede that it is trivially true that participants in the law necessarily take sides. But he could not see this is as a problem, because it is possible to *understand* the non-neutral point of view of the participant in a limited, neutral fashion, that is, describing which norms participants in a legal system embrace and try to justify (Hart 1994, p. 242). Put differently, it is conceptually possible to describe neutrally both a norm and the acceptance of a norm by some participant in a social practice.

Other authors have reinforced Hart's view by refining it. Here I will mention just one.[4] According to Julie Dickson, there are two approaches to legal theory: the indirectly evaluative approach (that deals with questions like "what is law?" or "what is the special character of this type of social institution?") and the direct evaluative approach (that addresses questions like "which norms ought to be obeyed?" or "under which conditions are legal systems justified?") (Dickson 2001, p. 134).

[2] John Finnis would probably be another of Hart's major opponents regarding the status of legal theory. See Finnis 1980.

[3] Dworkin used a similar argument against the possibility of genuine, pure second order moral discourse (i.e. metaethics). See Dworkin 1996; 2011, chap. 1.

[4] Joseph Raz, among others, is also on Hart's side. See Raz 2009, chaps. 2 and 4.

I will leave aside the second approach because —as far as I know— nobody questions that it is possible to do openly normative theory of law.[5]

The indirectly evaluative approach claims propositions of the following kind: "the law's claim that it ought to be obeyed is an important feature of the law" (Dickson 2001, p. 52). To say that *X* is important "is not itself an ascription of goodness to that *X*, and nor does it entail a proposition which ascribes goodness to that *X*" (Dickson 2001, p. 53). This indirectly evaluative proposition attributes some evaluative property to *X* but it does not imply any directly evaluative property. In that sense, indirectly evaluative propositions are normatively neutral; to attribute some evaluative property to the law is not to take sides.[6]

I do not mean to be exhaustive regarding the evolution of the debate about the nature of jurisprudence. I have therefore limited myself to just a couple of representative examples of the discussion over the last fifty years in the Anglophone world as an indication of the importance of Hart's two conditions (generality and neutrality) on legal theory at the epicenter of controversies.

Lately, though, a new approach to this framework has emerged: even conceding that jurisprudence can be general and neutral, it is not interesting. This is David Enoch's claim —well, not exactly: his claim is that general jurisprudence is not interesting when *compared* to metaethics (Enoch, forthcoming).

Enoch's objection seems to be —at least in part— an immediate reaction to an article recently published by David Plunkett and Scott Shapiro (2017) in which they propose "a novel account of general jurisprudence by situating it within the broader project of metanormative inquiry" (Plunkett and Shapiro 2017, p. 37). Plunkett and Shapiro see the project of general jurisprudence as a parallel project to metaethics, in the sense that both analyze how two different types of normative language —legal and moral— fit into reality.

The first thing to say here is that it is not obvious to me that Plunkett and Shapiro's project amounts to a *novel* approach to general jurisprudence. They claim that jurisprudence is a metalegal inquiry which seeks to explain legal talk and thought whenever these are

[5] Whether we call this enterprise "General Jurisprudence" or "a part of general jurisprudence" is, I think, merely a verbal dispute.

[6] In two senses: it does not take sides, as I mention in the text, regarding whether this evaluative property is good or bad but it also does not take sides in any given particular legal case.

found in any given social/historical context (Plunkett and Shapiro 2017, p. 39). This explanation is a separate project from the normative project, so that general jurisprudence is descriptive whereas normative jurisprudence, well, is normative (Plunkett and Shapiro 2017, p. 45). Notice that this very much resembles Hart's two conditions for analytic jurisprudence: (i) generality and (ii) non-evaluativeness. It's hard to see, then, in what sense Shapiro and Plunkett's proposal is *novel*. This also means that Enoch's claim, if correct, would apply not only to the Shapiro and Plunkett's proposal but also to Hart's understanding of general jurisprudence.

But in what sense, according to Enoch, is general jurisprudence not interesting? As I have said, Enoch's specific claim is that general jurisprudence is not interesting when *compared* to metaethics. The main argument for such a claim comes from the distinction between full-blooded normativity and formal normativity (Enoch forthcoming, pp. 7 ff.). The latter only provides criteria of correctness. The former, if plausible, provides genuine reasons for action. Morality —if some form of moral realism is true— is full-bloodedly normative. Instead, from the fact that you have a legal reason to p, it does not necessarily follow that you have a real, all things considered, reason to p (Enoch, forthcoming, p. 12).[7] The law only provides criteria of correctness.[8] This makes general (analytical) jurisprudence much less interesting than metaethics. Conclusion: philosophers of law should stop imitating metaethicists. That's Enoch message.

Regardless of whether Enoch is right or wrong in his provocative and acute essay, it seems to me that his is an interesting objection and an original way to attack the framework of general jurisprudence as Hart shaped it more than fifty years ago.

This special issue is devoted to assessing the interestingness of the non-interestingness objection to the traditional way of doing general jurisprudence, which is why I invited Julie Dickson to discuss Enoch's complaint. Julie kindly accepted my invitation and told me that, on the one hand, she would try to refute Enoch's claim and, on the other hand, she would present her own, updated views on how we should understand general jurisprudence. The first essay of this vol-

[7] Actually, Enoch goes even further. He does not even believe that a pro tanto reason to p follows.

[8] Enoch admits that it is *possible* that the law provides genuine, all things considered, reasons for action. But general jurisprudence inquires into *necessary* features of the law, and full-blooded normativity is only a *contingent* fact within the law.

ume, eloquently titled "Why General Jurisprudence is Interesting", shows that this is exactly what she did.

But the aim of this special issue is not only to discuss the interestingness of the old-Hartian way of doing general jurisprudence, but also to test its liveliness, which is why three other essays are included that discuss, in an innovative vein, some classical problems of general jurisprudence.

The first of these other essays, "Down the Methodological Rabbit Hole", by David Frydrych, deals with some classical methodological issues of general jurisprudence. Among other things, Frydrych seeks to shed some light on how counterexamples affect rules or how we identify an instance of a "central case" in the law. Then, he shows how those questions affect the selection and clarification of concepts for philosophical accounts.

The last two papers of this special issue are mainly devoted to the same Razian topic —detached statements. According to Joseph Raz, detached statements are normative statements where the speaker uttering them does not express acceptance of the normative content (Raz 1999, p. 171). Besides, detached statements are the only statements that can meet the Hartian desiderata for jurisprudence.

In "Detached Statements", Mark McBride offers a refreshing analysis of such statements. According to this analysis, detached statements of the kind "You ought to p" should be deemed as statements uttered from a detached context, so that they have to be read as follows: "You ought: If you intend to conform with the law in L, to p".

In "Enunciados no comprometidos y punto de vista jurídico", Diego Dei Vecchi copes with some of the criticisms addressed to the Razian notion of detached statements and concludes that, even if we believe that that notion needs to be reformulated, it would still be necessary, in order to identify what is legally obligatory, to hold the standpoint of the utterer of a legal detached statement, namely, the *legal point of view*.

All the essays of this special issue show how lively the debate in and about general jurisprudence is.[9]

REFERENCES

Dickson, J., 2001, *Evaluation and Legal Theory*, Hart Publishing, Oxford/Portland.

[9] David Enoch and Pablo A. Rapetti read a previous version of this text. I would like to thank them for their comments.

Dworkin, R., 2011, *Justice for Hedgehogs*, Harvard University Press, Cambridge, Mass.
———, 2006, *Justice in Robes*, Belknap Press, Harvard University Press, Cambridge, Mass.
———, 1996, "Objectivity and Truth: You'd Better Believe It", *Philosophy and Public Affairs*, vol. 25, no. 2, pp. 87–139.
———, 1986, *Law's Empire*, Belknap Press, Harvard University Press, Cambridge, Mass.
———, 1983, "A Reply by Ronald Dworkin", in M. Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, Rowman and Allanheld, Totowa, pp. 247–300.
Enoch, D., forthcoming, "Is General Jurisprudence Interesting?", in D. Plunkett, S. Shapiro and K. Toh (eds.), *Dimensions of Normativity: New Essays on Metaethics and Jurisrpudence*, Oxford University Press, Oxford.
Finnis, J., 1980, *Natural Law and Natural Rights*, Clarendon Press, Oxford.
Hart, H.L.A., 1994 (2012), "Postscript" to Hart 1961, pp. 238–276.
———, 1961 (2012), *The Concept of Law*, 3rd ed., Oxford University Press, Oxford.
Plunkett, D., and S. Shapiro, 2017, "Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry", *Ethics*, vol. 127, no. 4, 2017, pp. 37–68.
Raz, J., 2009, *Between Authority and Interpretation. On the Theory of Law and Practical Reason*, Oxford University Press, Oxford.
———, 1999, *Practical Reason and Norms*, 2nd ed., Oxford University Press, Oxford.