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The Question for the Description of the Law, by Reider Edvinsson

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Book reviews

The Question for the Description of the Law

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When H.L.A. Hart published his very influential *Concept of Law* in 1961, he was seeking to revive an intellectual tradition that began with Jeremy Bentham and Thomas Hobbes. Their efforts to explain law were based on views we would now call naturalistic or positivistic. In the words of Bentham, the ultimate aim of such approaches was ‘to extend the experimental method of reasoning from the physical branch to the moral’ (quoted in Schofield, 1991, p. 59), and this meant (as it meant to all good scientists) ‘not letting value judgments into their analyses’ (Hardin, 2007, p. 2, referring to the work of Hobbes and Hume). Hence the need to separate the question what the law was, of identifying the object of inquiry, from the question what it should be. Thus was born the view now known as *legal* positivism.

In the hands of Hobbes, Hume and Bentham, as we have just seen, this idea was connected to broader concerns about the methodology of inquiry, but in the work of John Austin, the next torch bearer of the legal positivist cause in Britain, the focus has subtly shifted. Though his work was still praised for its ‘scientific’ credentials (Cosgrove, 1981, p. 49), the links with the natural sciences have become less visible. The attempt was no longer to explain the place of legal and political institutions as emerging from claims about human nature. Rather, the science in question was the conceptualist ‘legal science’ that he borrowed from the writings of contemporary German scholars. Austin’s famous separation’s of

law-as-it-is from law-as-it-ought-to-be immediate tie was with a position that saw law as an autonomous discipline ruled by its own internal logic (Stein, 1988, pp. 223–24, 239–41; cf. Lobban, 1991, pp. 230–31).¹ In a way, then, Austin’s reasons for keeping the two apart were derived from ideas that were diametrically opposed to those earlier holders of the legal positivist mantle. This has led to a shift in the focus of legal positivism itself: the focus now turned away from an attempt to apply scientific methodology to the law to a thesis about the separation of law from morality.

It was *this* idea that Hart seemed to focus on in the first edition of *The Concept of Law*, and it was this idea that drew most attention in the first few decades following the publication of the book. While Hart clearly rejected the scientific approach of Hobbes and Bentham, he still thought that there was a way of maintaining a position that would avoid what he thought to be the pitfalls of scientific attempts to explain social practices, while at the same time holding to the idea of a value-neutral description of the law.² At first, most discussions of Hart’s work accepted his methodology, and focused more on the question of whether the account he provided was successful. Slowly and subtly, however, the focus has shifted towards the methodological concern with the meaning, possibility and significance of descriptive jurisprudence. Perhaps a sign of the shift is the much greater attention to questions of methodology in the Postscript to the book than the original text had seen. Similar trends can be found in the work of critics of legal positivism: though one can find hints of the critique of the descriptivist project even in Dworkin’s early critiques of Hart’s legal positivism, there is a marked shift in his more recent writings towards questioning Hart’s (and other positivists’) methodological assumptions.³

In the years since the publication of the second edition of Hart’s *Concept of Law*, it sometimes looks as

1 In the hands of many contemporary subscribers to the view of law as an autonomous discipline, this view translates to suspicion towards ideas coming from civil-law jurisdictions. It is more than a little ironic that this position derives from a German import.

2 These matters are discussed at greater length in Priel (2013).

3 See especially Dworkin (2006).

though questions of methodology, and in particular the possibility of descriptivism, are the main area of debate (for surveys, see Dickson, 2004; Halpin, 2006). Much of the debate, however, has been conducted on rather narrow grounds, being usually limited to works published after 1961, and in some cases (e.g. Dickson, 2001), focused almost exclusively on the works of scholars from a single university. Reidar Edvinsson is to be commended for trying to broaden the scope of the debate by considering the works of theorists not working within the analytic tradition and thus often ignored in recent debates on the methodology of jurisprudence. Unfortunately, his discussion of the issues suffers from many weaknesses.

Edvinsson's book contains two parts, the first considers the works of Jeremy Bentham, John Austin, H.L.A. Hart, Joseph Raz and Ronald Dworkin. In this part, then, the focus is still on the usual suspects of analytic jurisprudence. The ideas of each of these scholars is discussed and criticised, but the discussion here is often superficial. Bentham gets a single page, as does Austin; Raz's views are described and criticized in six. Some of what Edvinsson says in this part hints at some interesting ideas. For example, Edvinsson makes some valid points against Hart's account of the normativity of law based on Hart's famous distinction between being obliged and being under an obligation (pp. 24–26). Similarly, I think he offers potentially valuable criticisms in his discussion of Raz's account of legal reasoning and his distinction between the law-applying and law-creating functions of courts (pp. 31–32). But the points made are so underdeveloped – often little more than rhetorical questions or assertions rather than arguments – that they are unsatisfactory.

Usually, Edvinsson provides the most rudimentary summary to the work of a certain philosopher without consideration of any of the vast existing secondary literature on the work of these theorists, in fact without even considering all the relevant work of the theorist in question. Raz's work is considered from only one of his books (1979), and even here some of Edvinsson's criticisms suggest unfamiliarity with all of that book. Edvinsson criticizes Raz for 'focusing on one function of the law' and rhetorically wonders '[w]hat about the more general function of providing reasonable solutions to questions and disputes' (p. 32). But, in the very same book that Edvinsson criticises, Raz has a chapter dedicated to the functions of law, in which the function of 'dispute resolution' is discussed at some length (Raz, 1979, pp. 172–75).

No doubt Edvinsson means the first part of his book only to set the ground for the discussion in the second,

where he tries to develop some arguments against the idea of descriptivism. And this may be why he confines his discussion to only the basics. But this cannot be a justification for discussions that do not take seriously the work of the theorists one criticises. It is not that I think these authors are beyond reproach, but I think all of them have legitimate grounds for complaint for misrepresentation and gross simplification of their ideas. Furthermore, even in the context of a basic discussion it is odd to treat the issues discussed as a virgin land when the works of all these theorists have been thoroughly, perhaps excessively, discussed in the secondary literature. Greater familiarity with at least some of the literature assessing their work would often have helped Edvinsson's ideas.

The second part turns to a critique of the underlying descriptivist assumptions of the ideas discussed in the first part. The general thrust of the argument is that the works discussed in the first part of the book represent a 'modernist approach' (p. 51), which Edvinsson presents and then criticises from a 'postmodernist approach' (p. 57). Here too, however, the superficiality of the discussion leaves much to be desired. The pages read like a crash course on some fundamentals of Western philosophy, with a page on metaphysics ('The philosophy that wants to answer questions about what exists, what is real, and what it is to exist, is called metaphysics', p. 52), a page on Descartes, and two paragraphs on realism and anti-realism (pp. 55–56).

The main characteristic of what Edvinsson calls the modernist approach is 'ontological realism', according to which 'there are real objects ... [whose] existence does not depend on our experience and knowledge of them' (p. 55). This modernist approach is then said to be the foundation of the very different theorists who were discussed in the first part of the book (pp. 79–80). But this claim is simply untrue with regard to at least some of the theorists discussed in the first part. Here, for example, is Raz (1995, p. 237): 'unlike concepts like "mass" or "electron", "the law" is a concept used by people to understand themselves'; and here is Dworkin (2006, pp. 150–54, 166): 'liberty has no DNA, [and] neither does law'. And in an earlier publication Dworkin explicitly challenged the descriptivist approach with which Edvinsson saddles him, saying that the 'flat distinction between description and evaluation ... has enfeebled legal theory' (1985, p. 148).

After his critique of the modernist approach Edvinsson sets out his alternative post-modernist approach. He draws on ideas from Nietzsche and Rorty about the perspectival truth and a rejection of

the idea that truth should be understood as a relation of correspondence between statements and reality. But it is difficult to be sure what exactly is the view he has in mind: at one point he presents his preferred view as implying that 'we should stop talking about what is objective and instead see that what we strive for is the justification of our beliefs' (p. 64); at another that in the modernist perspective '[t]here seems to be no place for the contention that we ourselves, to some extent, determine how we experience the world' (p. 64). The two claims are very different from each other: many more, I suspect, would accept the latter claim than the former.

But it often looks as though it is the former claim that seems to be closer to Edvinsson's heart. Thus, unlike some critics of descriptive jurisprudence who do not doubt the possibility of describing reality and seek to distinguish scientific description from the kind of description that legal philosophers aim at (Priel, 2012), Edvinsson's is a global challenge: 'objective truth appears to be a strange and even misleading conception' (p. 65). Edvinsson makes these claims while whisking through topics like truth, meaning, objectivity, interpretation and concepts, as well as contentious readings of the work of philosophers such as Nietzsche and Quine, and all this in the space of twenty pages. Suffice it to say that they do not receive exhaustive treatment.

In a way, though, despite Edvinsson's presentation of these ideas as central to his critique of descriptivism, they are not. Indeed, if Edvinsson's challenge to jurisprudential descriptivism were part of global scepticism – if, that is, description of law suffers from the same problems as description of trees – then most of the legal descriptivists he purports to challenge could reply: 'what you suggest is that we change the way we *understand* what we are doing, but we can go on doing it pretty much in the same way.' But, on closer inspection, many of his arguments do not fit in the 'post-modernist approach'. For example, Edvinsson follows Stanley Fish in denying the existence of a 'literal meaning' (pp. 74–76). But one may easily accept such a view without adopting any 'post-modernist' denial of truth as correspondence. John Searle, for example, has both argued against the idea of literal meaning (1978) and defended (1995, Chapters 7–9) a version of external realism and the correspondence theory of truth against 'post-modernist' challenges.

More importantly, when Edvinsson turns to his discussion of descriptive theories of law (in Chapters 9 and 11), he offers two lines of criticism (although they are not clearly distinguished), neither of which

is dependent on what he called post-modernism. The first is concerned with the possibility of describing the law applicable to particular cases (i.e. describing particular legal norms). Here, Edvinsson contends that it is impossible to identify a convention that would cover all the cases (p. 80), and suggests that this undermines the descriptivist project. But, although I think he is right in his claim about conventionalism, this does not pose a challenge to legal philosophers: both legal positivists (like Leslie Green) and non-legal positivists (like Ronald Dworkin) have rejected conventionalism.

His second line of criticism is concerned with the possibility of describing what he calls 'the idea of law' (p. 81), and he claims that description here is impossible, because there are competing accounts 'in need of supporting arguments' (p. 81). I am no friend of descriptivism of the 'idea' (or what others call the 'nature') of law, and that there are competing accounts can hardly be thought sufficient to show that no description is possible. What is missing from Edvinsson's suggestion is the explanation of why competing accounts might lead us to the conclusion that a description of the 'idea' of law is impossible. One suggestion Edvinsson does make is that describing law depends on value judgments. The question then is whether such judgments can be described. Hart, famously, thought that they can: 'Description', he said, 'may still be description, even when what is described is an evaluation' (Hart, 1994, p. 244), and this view is shared by many others. Edvinsson rejects this view: 'It appears impossible to specify any value judgement in a value-neutral way', because '[a]ny value judgement we conceive makes sense only within a sum of conceptions' (p. 85). But, unfortunately, here too the idea is not developed beyond this statement. He thus fails to address recent arguments made in defence of descriptivism. One suggestion found in the work of some descriptivists, for example, is a distinction between moral and theoretical or epistemic values. It is never mentioned, let alone discussed, by Edvinsson.

The book culminates in the suggestion that proponents of descriptive theories are mistaken in thinking that their theories can provide guidance in adjudication. But the truth is, says Edvinsson, that law comprises conflicting goals: 'A goal-theory of law describes law as a construction that attempts to serve multiple purposes that are sometimes at odds with each other' (p. 95). On this view, judicial decisions require making choices between these goals, thereby undermining the hope for much assistance from a descriptive theory of law. This, once again, gets the

views of the theorists mentioned in the first part of the book wrong. Hart and Raz thought that there is little or nothing their theories can tell judges about how cases should be decided; without an argument, which Edvinsson does not provide, that they are wrong about that, they can claim not to be affected by Edvinsson's challenges. Dworkin's view is indeed very different but, as already mentioned, he thinks that the sort of aid a general theory can provide in adjudication clearly cannot be considered a pure 'description' of law, so he too will not be targeted by Edvinsson's arguments. And there can be little doubt that neither he nor the other legal theorists Edvinsson targets would suggest that we can 'expect to avoid difficulties in adjudication by means of theories of law' (p. 97).

Apart from its superficiality, the book is also marred by a lack of a clear discernable structure and by inadequate editing. Chapter 10, dealing with Fish's views on interpretation, serves as an example of the former problem. It is tucked in between two chapters discussing jurisprudential descriptivism. I could not see what purpose that chapter serves.⁴ Sentences that were, at least to me, unintelligible are an example of the latter problem. For just one example, consider the following: 'Our notions of the application and the development of the law are alleged to provide part of the support. It is however not clear that we must use these terms in a way baring [sic] anything from being both development and application' (p. 31). On many other occasions, the book contains too many sentences that are unidiomatic or lack polish. Finally, I usually do not think that it is appropriate to discuss the price of the book in a review. One should not judge a book by its cover, nor by its cover price. But in this case I make an exception. There is no justification for selling a book containing fewer than a hundred pages of text for £99, especially when it is hard to discern that the book underwent even basic copy-editing by the publisher.

The scope of debates on the methodology of jurisprudence has been rather narrow, and no doubt they would have benefited from a broader perspective. In this regard, Edvinsson's book is a missed opportunity. The superficiality of the discussion, the lack of clearly developed arguments, the misrepresentation of the work of the theorists discussed, the complete disregard of the recent literature on the subject, the poor editing and the

exorbitant price make this a very difficult book to recommend.

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4 It should also be noted that the chapter ascribes to Fish the view that 'a judge (or reader) has no freedom to interpret. Only the interpretive communities to which the judge belongs determine the interpretation' (p. 90). This oversimplifies Fish's views.