Grounding in Law

The Nature of Explanatory Projects in Legal Philosophy and their Relevance for Scots Law

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Research Context

Modern societies could not function without a great variety of legal facts: that a certain action constitutes a crime, which is to be penalised by the state; that certain conditions validate a contract, which imposes obligations on the parties; or that human beings have certain rights, which everybody needs to respect. We commonly take it for granted that there are such legal facts. But in jurisprudence and philosophy of law, their status has long been a matter of debate. They are certainly not fundamental facts about the world, akin to facts about positions and masses of elementary particles. In one way or other, they must be derivative from facts of other kinds. But which other facts, and how?

The significance of these questions is not confined to the academic debate. In a democratic society, we should aim to articulate how the coercive apparatus of the legal system is justified; and it is not clear how we could do this without a story about how legal facts derive from other facts. Moreover, legal practice now and then throws up hard cases, where it is unclear what the legal facts are, not just what underlies them. Often, a judge is not allowed to remain agnostic about what the law is in such a case. Knowing what sort of facts to take into account when arriving at an answer would surely prove useful to him or her.

Two kinds of facts, or putative facts, have been seen as particularly relevant to an account of legal facts. On the one hand, facts about the behaviour – including verbal behaviour – of officials, such as legislators or judges, and about social conventions. On the other hand, moral facts – about what is good and bad, and right and wrong. The key thesis of legal positivism is that law can be fully explained by reference to facts of the former kind. In contrast, anti-positivists – a broad camp that includes the historically influential school of natural law theorists – maintain that genuinely moral or normative facts must also figure in an adequate account of law.

The debate has suffered from a lack of precision in its key terms. H.L.A. Hart used “the hoary perennial known as ‘Natural Law versus Legal Positivism’” as an example of a “debate of vast and vaguely defined issues”. Our project aims to remedy this, by drawing on the resources of contemporary metaphysics – specifically, the concept of “grounding”. That concept has recently been used to articulate a structured view of reality, according to which facts and entities of different kinds – physical, chemical, biological, psychological, social, economic, legal, and so on – are linked across different levels. The idea is that non-fundamental facts are grounded in, or obtain in virtue of, facts that are more fundamental than they themselves are. The recent literature has greatly clarified the logic of the concept of grounding, making it a useful in understanding how the fundamental is linked to the derivative (see the essays contained in Correia and Schnieder (2012), Fine (2001), Leuenberger (2014), Rosen (2010), and Schaffer (2009)).

The concept has already proved its fruitfulness in the application to a number of debates – concerning physicalism, monism, the historically influential “Principle of Sufficient Reason”, and certain debates in metaethics. It seems tailor-made to be deployed in jurisprudence and philosophy of law, and in particular to clarify the debate about positivism. But while such an application has been suggested in the

literature (see Plunkett (2012), Rosen (2010), Shapiro (2011), and Stavropoulos (2014)), nobody has developed this idea yet – and this is what we propose to do in this project.

Ground-theoretic interpretations of theories of law provide an especially rigorous framework to evaluate approaches to legal interpretation and analyse the structure of law creation in particular legal systems. The overall goal of developing such a framework encompasses three more specific sub-projects, concerning the metaphysics of law, the epistemology of law, and the role of academic writings in Scots law.

Sub-project 1: The Metaphysics of Law

To a first approximation, legal positivism can be formulated as the thesis that all legal facts are grounded in social facts. It turns out, however, that this simple formulation does not do justice to all forms of positivism, specifically so-called ‘soft’ or ‘inclusive’ varieties of positivism. We will examine refined versions aimed at capturing that distinction, and examine whether it is robust.

Sub-project 2: The Epistemology of Law

Law is peculiar in that, unlike in other domains, the primary way in which we acquire knowledge of it is by considering its determinants (or sources). When a lawyer or a judge (or any legal interpreter) wants to find out what the law on a particular issue is, it is not as if they could acquire such legal knowledge directly (e.g. perceptually). Rather, they have to infer it, to work it out, from its sources. Because of this, the metaphysics of law has a special relevance for its epistemology: a model of law-determination is ultimately responsible for the truth of an interpretative theory (where this is meant as the primary way of acquiring legal knowledge), and any interpretative hypothesis is bound to (tacitly or overtly) presuppose a theory of law-determination. Conversely, the epistemology of law as a special relevance for its metaphysics. It is plausible that legal facts cannot be “brutely” grounded: the connection needs to be intelligible, with the grounds rationally determining the grounded facts (Greenberg 2003, Pavlakos 2017).

By shedding light on the costs and benefits of various metaphysical views, the grounding framework developed will be used to evaluate the interpretative approaches to law. The research will first single out operative interpretive methods, and then examine them by scrutinizing the views about the grounds of law that they presuppose.

Sub-project 3: The Explanatory Relevance of Scots Law

While the philosophical part of the project substantiates the thesis that the epistemology of law has to track its metaphysics, it leaves open the question of what should be included among the sources of the law. For the epistemic requirement that we work out the content of the law from its determinants does not settle the question of which candidate facts do actually contribute to the content of the law. The unique explanatory power of this result is that it allows us to study legal systems with formalised sources alongside those that rely on more pluralistic (or diffused) understandings of sources (e.g. international law). In this context, Scots Law points toward a pluralistic conception of what may count as a source of law, beyond legislation and reported cases.

According to many Scots jurists, the law of Scotland has lacked such primary legal sources for centuries. For this reason, Scots lawyers played an important role during this period through their written work, selection of sources and creativity as jurists. Such problems continued into the modern period, and so for centuries Scots law relied upon the brilliance of its jurists. In reality, if not official recognition, modern Scots jurists have established an important role for the legal expert and the authority of the jurist.

However, it is still unclear exactly which role academic writings play in the creation of Scots law. In particular, it is controversial whether they play a causal and indirect role or rather a constitutive and direct one. On the former hypothesis, doctrinal writings by institutional writers would affect judicial decisions (by causing them to be a certain way), which in turn would themselves be the real legal sources. On the latter hypothesis, doctrinal writings are themselves sources or grounds of law, and judicial decisions serve rather to acknowledge their status as such.

The findings of this research will make a decisive contribution to an understanding of the sources of Scots Law but also exploit the historical uniqueness of Scots law to stimulate more fine-grained explanations of the pluralistic legal phenomena, which are increasingly emerging in our post-national age.

References

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