Constitutivism and the Normativity of Social Practices
The Case of Law

Triantafyllos Gouvas

Trying to unpack a notion as complex as that of the public and its socio-legal connotations gives me permission to ask a more meta-theoretical question which nonetheless is a corollary to what has been debated so far. The issue I would like to address concerns the philosophical implications of claims about the normative function of law. The way in which normativity and the public generically construed are interrelated is much more intimate than initially assumed. Unlike many other hotly disputed topics in philosophy there has been an emerging consensus that there can be no such thing as private normative reasons. There are many ways to understand the public nature of normativity, but it suffices for our purposes that normativity is understood as cutting across different agents. So, on this minimal understanding normativity is meant to rise from our interpersonal relations. I do not wish to add any more substantive content into my exposition as it will needlessly complicate the discussion which is specifically centered on the nature of legal normativity rather than normativity as a whole.

The structure of the paper will be simple. In the first part I shall give a brief overview of the current meta-normative inquiry. This section is more or less dedicated to painting a relatively informative map of some important distinctions operative within the domain of normative metaphysics. The key elements in this section include the alleged metaphysical primitiveness of reasons and the nature of normative explanations. Particular emphasis will be placed on the structure of constitutive explanations as they figure prominently in arguments regarding the normativity of

social practices, including law. In the second part I shall put forward the claim that 'the normativity of all that is normative' may not be exhausted by the concept of reasons. I intend to keep my claim weak enough so as to allow space for a more quietist understanding of normativity. More precisely, I shall suggest that there are two classes of rational requirements—requirements of coherence between mental states and explanatory requirements—that seem to be recalcitrant to reasons analysis and yet are capable of providing informative explanations as to how various normative phenomena operate. The remainder of the paper serves to elaborate on the relevance of two aforementioned points. The first point regards the distortive impact of constitutive explanations in the domain of social practices. The second point serves to amend the inadequacy of constitutivism as an explanatory tool. The suggestion I hope to be able to take through is that the normative nature of participatory social practices like games or etiquette is better thought of as inviting the application of coherence requirements, whereas legal normativity is properly understood as a source of explanatory requirements. If this strategy is shown to make some sense, then many interesting conclusions may follow regarding the nature of normativity *tout court* and its relation to institutional activity.

1.1 Normativity for Beginners

Our most intuitive grasp of normativity is, queerly enough, descriptive. What I mean by descriptive is that our usual affirmative appeals to the normative are enumerative in the sense that we attach normativity to anything that stems from our use of concepts like norms, values, oughts, reasons, goodness, rightness, correctness, rationality etc. A more philosophically nuanced approach to normativity tries to bring

some order into the normative universe by drawing a wedge between evaluative and deontic properties. The former are typically instantiated in judgments about what is good or valuable whereas the latter are usually understood as introducing constraints in our judgments about what is the right thing to do, believe or feel. A final classificatory construal divides the normative repertoire into thick and thin properties. A mark of thick concepts is, as Bernard Williams has suggested, that they seem to be simultaneously both evaluative and descriptive. Trait concepts like 'courageous' or 'lewd' are typically classified as bearing a thick structure. The thought is that the property of being courageous has two different by nature yet interdependent components. It's not just the case that a courageous man is brave *and* good, but brave and good *for being* brave. In that sense the descriptive part is rendered intelligible in light of the attitude that is deemed fitting for the bearer of such a property. By contrast thin properties like that of being right, wrong, good or desirable, are considered as lacking the descriptive depth or specificity of thick predicates in the sense that we use them across widely variable contexts to evaluate all sorts of persons, states of affairs, or actions.

1.2 The Reign of Reasons?

So far talk about normativity is more like swirling around the core of a concept whose essence remains uncapturable. I do not aspire to put an end to this agonizing quest. Nevertheless, it is possible to gain further insight into the metaphysics of normativity by exploring the possibility of adding, at least, some structure to the normative universe on the basis of relations of derivative properties to a fundamental normative category. Many philosophers tend to answer the primitiveness or fundamentality

question by accepting a more or less robust version of the claim that the ultimate source of normativity consists in an intricate network of relations to *reasons* for actions or for attitudes. This latter claim need not amount to the purely conceptual remark that the concept of a reason is definitionally primitive in the sense that all other normative concepts can be defined in its terms. Defining one concept in terms of another does not always settle the question of what is the direction of metaphysical dependence in the bi-conditional with the concept of a reason as definiens. The claim is rather metaphysical in that the nature of normative properties—not just normative concepts—consists in their relations to reasons. Although I shall not espouse the optimism of those who defend the metaphysical primitiveness of reasons, I shall expand on this reductive hypothesis as it provides the most powerful contrast with the picture I wish to develop.

1.3 Reason-Giving Facts and their Explanation

Assuming for the moment that reasons enjoy metaphysical priority in the normative cosmos a few remarks are in order regarding the logical structure of reason statements of the form 'A has a reason to φ in C' or 'there is a reason for A to φ in C'. There is close to consensus that the property of being a reason is relational in the sense that it denotes a relation between a proposition or a fact, a set of contextual conditions and an action or attitude. Reason-giving facts can have non-normative as well as normative contents. They can be facts about our world—as when the fact that my best friend is sick is a reason for me to visit him—, they can be facts about our propositional attitudes—as when the fact that I desire to eat ice cream is a reason to

buy some—or, they can be normatively laden facts—as when the fact that it would be good to be friendly to a new colleague is a reason for me to assist him.

Nevertheless, facts do not merely figure as a convenient placeholder in the left-side of the reasons relation. It is a further question whether the normative fact that something is a reason for something else is itself an item that calls for some further unpacking. It is an almost common conviction that reason statements are not true *simpliciter* but hold in virtue of some other more fundamental truths or grounds. What is important to notice is that the relation of a reason relation to a grounding fact or proposition is not merely metaphysical but *explanatory*. To illustrate my point, when we say such things as that John ought to return Peter's book because he promised to do so, we are naturally taken to suggest that the moral principle that *ceteris paribus* promises ought to be kept not merely makes it the case that giving the book back to Peter is the right thing to do but also makes it *intelligible why* this is the case.

What matters the most for our purposes, however, is not what figures as the proper content of a normative explanation. Rather it is the way the explanans is related to the explanandum that calls for attention. Put more succinctly, figuring out what explains the fact that killing people is wrong might be cashed out in terms of a further reason statement or evaluative verdict depending on our favoured metaethical perspective. By contrast, the issue I am addressing is, so to speak, meta-explanatory in the sense that the way we formalize an explanatory relation may significantly impact the adequacy of our explanans.

Although I do not profess to be capable of providing an exhaustive map of explanatory modalities, I am confident enough that the two modes of normative explanation I am about to describe can more than adequately enhance our grasp of normative phenomena including social practices.

The first type of normative explanation is *foundationalist*. On this approach, the fact that there is a reason for me to φ is explained in virtue of some categorical generalization that requires to π such that φ-ing is an *instance* of the generic activity of π-ing prescribed in the explanans. On this view, the normative fact that one is required to π must be prior to and independent of any dispositional fact on pain of vicious circularity. Adopting this explanatory model is not without consequences; a voluntarist theory of practical reasons like Williams' account of internal reasons is incapable of accommodating this mode of explanation. To figure out why, recall that an internal reasons proponent believes that one's having a reason to do something holds *in virtue of* the content of her psychological attitudes that she would come to acquire if she deliberated properly. To put it more graphically, Keith has an internal reason to help his financially devastated friend in virtue of the fact that he has acquired the desire to help him and has no false beliefs about the actual conditions of his friend's destitution. For this explanation to fit the foundationalist type of normative explanation, it must appeal to some further thing that everyone has a reason to do, such that *ceteris paribus* everyone ought to provide assistance to friends and not just because one has acquired the desire to do so. Appealing to the latter fact makes the explanation circular. A Williams-like reasons internalism cannot accommodate universalizable imperatives, hence the foundationalist explanatory model is unlikely to work in this case.

The second type of normative explanation is constitutive. The constitutivist strategy aims at explaining the normative authority of reasons or values in terms of the nature or essence of a generic property or state of affairs. To illustrate my point, proponents of moral constructivism try to explain the binding force of rational principles by interpreting them as standards of correctness derivable from the nature

of agency or intentional action. On this model explaining the normative validity of a principle or norm is not a matter of *subsuming* it under an independently valid categorical rule; rather it comes down to showing that the relevant norm is a partial description of agency itself. On this construal constitutivism is *reductive* by default in the sense that by saying that being under an obligation to φ is *just what it is* to be an agent one is committed to the idea that normative principles can be explained in terms of other normative—or non-normative—notions.

2.1 Rational Requirements and the Bootstrapping Problem

The view that normativity is more or less amenable to the operation of reasons is not unobjectionable. Apart from arguments internal to the normativity debate, I am particularly inclined to feel suspicious of the tenability of this thesis as it seems to generate grossly unintuitive results when applied to the domain of social practices I aim to explore. The alternative view I would like to espouse favours a kind of normative pluralism in the sense that it postulates the existence of mutually irreducible normative concepts each one performing a distinct practical or epistemic function. Granted that a theory of normativity amenable to being characterized as plural could be any theory that postulates the existence of at least two mutually irreducible normative concepts, I shall try to keep things as simple as possible by choosing to employ one theoretical version of normative pluralism according to which apart from the concept of a reason there are *rational requirements* serve a distinct normative function.

Rational requirements are standardly taken to specify which conflicts between our various propositional attitudes ought to be resolved or avoided if we are still lacking

one of the conflicting attitudes. A typical example is the rational requirement not to have inconsistent intentions or beliefs, as in the case of someone who simultaneously believes that she ought to attend a class reunion and she does not intend to attend it. Another case is when someone does not intend what she believes to be the necessary means to her intended ends. In the cases above as well as in various others, rationality requires a certain kind of coherence among mental states. Some of our acquired attitudes will intuitively not fit to our current shape of mental states and thus need to be properly adjusted or even abandoned if one is to avoid conflict.

The leading intuition behind the theory about the distinctness of rational requirements is that our mental capacities are frequently the source of incoherent or morally objectionable claims. Philosophers of normativity tend to describe the relevant phenomena as 'bootstrapping'. Typical cases of bootstrapping include paradigmatic instances of immoral instrumental reasoning as when I desire to kill my mother-in-law and believe that a sufficient means for achieving this end is to hire an assassin. Is it intelligible—the 'bootstrapping' objector goes—to say that I have a reason of some kind to hire an assassin? To put it differently, it's simply not the case that simply by holding a desire or a normative belief we *ipso facto* acquire a respective reason as a matter of metaphysical necessity.

2.2 Wide or Narrow Scope?

Just how precisely a rational requirement is normative is a highly contestable issue. My main concern is not to provide a comprehensive map of candidate accounts defending the normativity of rational requirements. I am more interested in showcasing the structural dimension of the relevant controversy. It is rather accurate

to say that proponents of the normative nature of rational requirements generally tend to favour the so-called wide-scope model[1], whereas those wishing to debunk their normative import usually employ a narrow-scope formula.

To cut a long story short, 'wide-scopers' believe that an indispensable step towards vindicating the normativity of rational requirements is to offer a plausible solution to the bootstrapping problem whilst retaining a normative story about the norms of rationality. The solution offered by wide-scopers as a means of avoiding unwanted reasons detachments amounts to the claim that one can equally satisfy a rational requirement by revising any one of the relevant conflicting attitude-states. There is no preference either as to what *outcome* among the permissible ones should be brought about or as to what is the ideal *means* for reaching an outcome. All that rational requirements call for is the avoidance of certain combinations of mental states no matter what means one employs in trying to satisfy the requirement. The normativity—thin as it may be—of a rational requirement is not of the same genre as the normative guidance provided by all-things-considered obligations. Wide-scope requirements perform the more modest task of specifying the permissible ways of resolving rational inconsistencies. Or reversely, their normative function is *negative* in the sense that it only forbids one precise combination of attitudes to hold leaving it up to the deliberator to choose the alternative ways of resolving the tension.

On the contrary, 'narrow-scopers' try to account for the apparent normativity of rational requirements by explaining it away. That is, they offer an eliminative reduction base for requirements of coherence by cashing them out in terms of descriptive claims about the beliefs we have about what there is a reason to do, feel or believe. On the narrow-scope view, having a state-given reason—a normative belief

[1] For a more extensive defence of the wide-scope formulation see, among many, John Broome, 'Normative requirements', (1999) 12 *Ratio* 398–419 and 'Wide or Narrow Scope?', (2007) 116 *Mind* 359–70.

or a desire-based reason—has no genuine normative implications. If the bearer of such a reason still experiences a sentiment of rational failure by desisting from acting on her believed reason, that fact merely amounts to a failure from a point of view. Perspectival failures are not normative in any robust sense though. Hence, for a narrow-scoper the normativity of rational requirements is just out of the question.

2.3 Requirements of Coherence and Explanatory Requirements

Insofar as one is willing to subscribe to the view that there is a point of substance in preserving a function for rational requirements, there arises the further question of what serves as a criterion in classifying rational requirements.

A large—maybe the largest—class of rational requirements contains requirements of *formal coherence* among mental states. Coherence requirements are formal in the sense that they do not guide our deliberation as to what pair of attitudes to choose among other alternatives. The intuitive idea is that formally incoherent attitudes generate some kind of normative tension which can be resolved by revising one of the conflicting attitudes. Hence, understanding the non-contradiction principle in terms of formal coherence entails that one is rationally required to avoid believing that p and non-p at the same time. It is equally coherent to say that one satisfies this requirement by dropping her initial belief that p or by not believing that not-p. So, on this construal, formal coherence does not amount to the virtue of achieving the best possible combination of attitudes. Consequently, formal coherence is content-independent or agent-neutral in the sense that it is not conditional on one's particular situation.

The second class of rational requirements deals with another type of normative problem which seems to remain unresolved by merely applying a requirement of formal coherence. There are some cases of relations between attitudes that we are intuitively guided to regard as introducing a certain kind of *asymmetry* between the relata. For instance, the instrumental requirement to intend what one believes is a sufficient means for achieving an intended end provides a characteristic example of asymmetric rational relations between attitudes. Suppose that I intend to φ. Intuitively, it would be rational to intend π because I believe that π is a means for achieving φ, but irrational to drop the belief that π is a means to φ *just because* I do not intend to π. The asymmetry I am suggesting refers to the way one attitude is *explained* by another; it does not refer to the quite different 'asymmetry' that seems to emerge when absent some independent reason to drop my intention to φ, I stop intending to φ rather than considering the possibility of acquiring the intention to adopt π as a means to achieving my initial end. The later apparent asymmetry[2] concerns the intuitive unequal distribution of 'attractive power' among the two ways of satisfying the wide-scope instrumental requirement. To return back to my preferred understanding of the relevant asymmetry, explanatory requirements seem to disfavour a particular explanatory connection. That is to say, I may disbelieve π is a means to φ, but I am not to disbelieve it because I do not intend to π. Consequently explanatory requirements have also a wide-scope structure in the sense that it is not the case that I *ought* to believe that π is a means to φ because I intend to φ.

[2] This different kind of asymmetry has been considered by defenders of the narrow-scope view as a fatal flaw of the wide-scope formula. See, Mark Schroeder, 'The Scope of Instrumental Reason', (2004) 18 *Philosophical Perspectives* p 352 and Matthew Bedke, 'The Iffiest Oughts: A Guise of Reasons Account of End-Given Conditionals', (2009) 119 *Ethics* p 687-9.

3.1 Constitutivity and Constitutive Explanations in the Domain of Social Practices

There is a plethora of occasions where we feel the intuitive urge to say that someone participating in some sort of conventional practice should abide by its rules. Thus, if I decide to move my bishop sideways one may retort that this is not how chess is played and that I should reconsider my move. Likewise, if I have adopted the practice of etiquette, I should not put the wine glass on the left side of the plate. The question is: how are we to explain the normative pressure exerted in such cases? The problem is that even if I have extremely weak reason or no reason at all to engage in a practice, the practice itself seems to generate very rigid requirements. The former remark does not suggest that practice-immanent requirements have the mystical capacity of overriding or silencing the reasons for or against participating in the practice. The asymmetry I want to capture is not a matter of *weight*.

The most familiar strategy for explaining the apparent asymmetry between the external and internal aspects of practice-agency is a direct application of the constitutive explanatory model I have described in section 1.3. The usual argument comes down to the claim that moving my castle in a straight line is *just what it is* to be a chess player. One might stop here thinking that this is the most convincing answer he can get. But the normative question still lingers and this can be easily shown by reformulating it as: 'In virtue of what do I have a *reason* to abide by the rule that demands my moving the castle in a straight line?' Why is *the fact* that moving the castle in a straight line is a constitutive rule of chess a reason to conform to it? One plausible reply is to say that literally speaking there is no *real* reason to act in accordance with this rule; it's just a game. But if this is our best answer, we *ipso facto*

abandon the intuitive idea that there is something non-trivially normative in the case of playing chess. Another answer could be that insofar as it is somehow valuable to play chess in the first place you have a reason to play by its rules. But this reply is at pains to explain the intuitive asymmetry between the value of participation and the conclusiveness of practice-requirements.

The alternative answer I tend to favour is premised on the remark that the way in which a set of rules is constitutive of a conventional practice like chess *is not reducible* to the way a proper constitutive normative explanation works. The point is that being a constitutive rule is a *metaphysical* property of abstract objects (rules) that has no *explanatory* function vis-à-vis the normative implications of being a practice participant. To be a constitutive rule is not an elliptical answer to the question of why I ought to follow the rule; it is a property that *partially*[3] makes it the case that this practice is chess and not checkers. It is precisely because a constitutive rule has no independent explanatory power that it is perfectly intelligible to ask whether I have a reason to participate in the practice in the first place. That is to say, the aforementioned asymmetry is a manifestation of the limited—non-explanatory—role of 'constitution' in the case of conventional practices.

[3] I say 'partially' because it is inaccurate to claim that only the rules determine the identity of a practice. As Andrei Marmor explains, 'the identity of such a practice, like chess, is partly path dependent' (A Marmor, *Social Conventions: From Language to Law*, Princeton: Princeton University Press, 2009, p 42 n 16). There is always a 'metaphysical residue' that is extraneous to the concept of a rule that specifies how the behavior in accordance with those rules is to be regarded. A Wittgensteinian proper way to say this is to refer to the 'grammar' of a practice as that which determines what sorts of things it makes sense to say with respect to chess. This meta-rule dimension is particularly relevant in strategic utterances like 'that was a silly move' or 'well played'. For an incisive approach see H Schwyzer, 'Rules and Practices' (1969) 78 *Philosophical Review* 451-67.

3.2 Formal Coherence and the Normative Asymmetry of Participatory Practices

All I have claimed in the previous section is that in the case of participatory practices a constitutive explanation cannot work *insofar as* it is premised on the concept of constitutive rules. I have said nothing about whether it is possible to articulate another constitutive explanation that obviates the pitfalls of the former account. Nevertheless I do not intend to elaborate any further on the prospects of constitutive explanations in the domain of social practices. The reason I wanted to exclude this particular version of constitutive explanation was rather tactical; I wanted to show that constitutive explanations of this particular kind have been standardly employed as an answer to the question of why I have a *reason* to abide by the constitutive rules of a practice. That is to say, my real target was a statement like 'you have a *reason* to abide by this rule *because* following it is *constitutive* of this practice'. Moreover, I am agnostic about how a constitutive explanation could work without the concept of a reason occupying the position of the explanandum.

That being said, we are left with no guidance as to how to describe the normative function of a social practice like chess. A way to move forward is—I believe—to reformulate the structure of the asymmetry described above and try to see whether it can be captured by a wide-scope rational requirement formula. A promising way to proceed is by utilizing an ingenious distinction suggested by John Broome with regard to the logical properties of requirements in general. Broome distinguishes between the *property* sense and the *source* sense of requirements of morality, rationality or

prudence.[4] The property sense of morality manifests itself in utterances such as humans are moral animals or John is a moral person. In this sense the property of being moral denotes an *attainment* of some sort which is ascribable to a person. So, when we understand morality in the property sense a statement like 'Morality requires of John that φ' entails that necessarily, if John bears the property of being moral, he φ-s.[5] Property requirements display an interesting gradability in the sense that it is intelligible to say that there a more moral way to achieve this end. What is interesting about the degrees of property requirements is that they do not provide guidance as to *what* one ought to do. Broome uses a very illustrative example to depict this incongruity. If I can be moral either by using less energy or by giving more money to Oxfam, a property understanding of the relevant requirement could legitimize the statement that it is not the case that morality requires that I use less energy. But as Broome remarks, that is intuitively wrong. It is rather the case that morality requires both that I use less energy and that I give more money to Oxfam.

What counterbalances the unintuitive implications of the property construal of requirements is the *source* approach or, as I would like to term it, the 'action-guiding' approach. Source requirements are better understood as individual propositions specifying what is required in a particular circumstance. Thus source requirements are

---

4 For a cogent overview of the distinction see John Broome, 'Requirements' in Toni Rønnow-Rasmussen, Björn Petersson, Jonas Josefsson and Dan Egonsson (eds), *Homage à Wlodek: Philosophical Papers Dedicated to Wlodek Rabinowicz*, Lund University, 2007.

5 Notice that the meaning of the necessity operator does not cover every metaphysical possibility but is context-dependent. That is to say, it is not the case that necessarily if John does not φ, he is immoral. There might be a context within which φ-ing is a morally sub-optimal choice. This is something that a strong counterfactual interpretation of the property sense of a requirement cannot capture. A reverse implication of this strictly modal interpretation is that the possibility of being moral has to be secured in the sense that it would be counterintuitive to address a requirement to someone when it is counterfactually impossible for her to bear the respective property.

operative within a particular possible world at which the corresponding required proposition is true. So whereas at the actual world w I am required—in the source sense—to be kind to strangers, at another possible world where I am not sociophobic it is not the case that I am required to be kind to strangers. On the source construal, requirements I am under may not be the same at all worlds. This is a feature that the property construal cannot capture. Being moral is too 'insatiable' a property to guide us in particular situations—where we are inevitably fallible somehow—in the sense that what is required of me is an infinite set of propositions that are necessary conditions for my qualifying as being moral.

How can we utilize this distinction in our present case? First of all, I have to designate somehow the corresponding terms for the property and source sense for practices of the sort we've been discussing so far. I deliberately choose to use the property term 'being a participant' in order to provide a generic characterization for members of a practice. The property of being a participant can be more 'thickly' described depending on the particular practice we are dealing with. So we can say that by following the rules of chess one bears the property of being a chess player and so forth. We can further thicken those properties by adding some reference to the value of the practice or some features that rigidly designate it. As for the source sense it suffices to talk about practice requirements.

What makes the property-source distinction particularly useful for our purposes is a very interesting *disanalogy* between the standard uses of this distinction for sources of requirements like morality, prudence or rationality, and its potential use in the domain of social practices. In the former case the source sense and the property sense are *necessarily co-instantiated* in the sense that when morality requires you, in the source sense, to φ, it follows—by strict implication—that morality also requires, in

the property sense, to φ. Otherwise put, you cannot satisfy each particular requirement without bearing the property of, say, being moral. But that is not the case in practice requirements. I can get rid of the property of being a participant without so failing to satisfy a practice requirement. For example, I may decide not to play chess without violating in any sense its rules. Whereas in the former cases source requirements necessarily set the boundaries of their property correlatives, in the case of a participatory practice source and property sense come *entirely apart* without incurring criticism of any kind.

Now I would like to argue that this is not a trivial remark; on the contrary it serves as the major incentive for applying a wide-scope formula in order to explicate the normative function of a large set of practices, namely those that are participatory in some substantive sense. To see how this works allow me once again to contrast our case with the domain of rationality where the wide-scope strategy is more explicitly deployed. In the latter case the wide-scope formula does not govern the relation between the source and the property sense of rational requirements. As it has already been said, these two senses are inseparable. The disjunctive ways of satisfying a rational requirement refer, instead, to our propositional attitudes, not to the requirement itself that regulates their relation. To recall a classical example, I can satisfy the instrumental requirement either by dropping my intention to fulfill an end or by intending to take the appropriate means for its achievement. By sharp contrast, I can satisfy the chess requirement either by conforming to its local source requirements (rules) or by not participating or withdrawing participation, that is, by not bearing or revoking the property of being a participant.

On this new picture, a plausible answer to the normative question with regard to participatory practices comes down to this:

One is practice required [either to follow its rules or to cease to participate/not bear the property of a partcipant]

The above requirement has wide scope in the sense that it can be satisfied in two equivalent ways. The normative prohibition implied by this proposition is that one should not be a participant and, at the same time, not abide by the relevant rules. This negative proviso is the *core* of the normativity of participatory practices. On this construal, requirements pertaining to participatory practices are actually requirements of formal coherence just like the majority of requirements of individual rationality. In our present case, formal coherence is understood as coherence between the source and property sense of a practice requirement *as opposed to* the rationality case where formal coherence is supposed to govern the relation between our relevant attitudes.

3.3 Law as a Source of Wide-Scope Explanatory Requirements

Is all the previous analysis somehow informative as to how law performs its normative operation? My aspiration is to show that what has preceded this last section of my paper was not an unnecessary digression but an indispensable background against which I may be able to advance an original argument about legal normativity. The three key concepts I shall be employing throughout this last section are already familiar: the wide-scope formula, the distinction between coherence and explanatory requirements as well as the distinction between the property and the source sense of requirements.

I shall begin my analysis by examining whether it is possible to apply the property-source distinction to the legal case. My answer will be negative and here's why: if I were to pick out one specific property that is distinctive of law that would most

plausible be the property of being *legal*. Thus, we say, for example, that this is the legal way to notarize a contract or that it is illegal to drive under the age of 16. I deliberately choose to keep the property of legality as thin as possible in order to avoid question-begging commitments regarding the nature of law. That is, if I were to choose a thicker property as that of being lawful or fair I would be presupposing something that I had not presupposed in the previous cases. In the case of morality or rationality the property sense of their respective requirements is not informative in any robust sense as to what is the *nature* of morality or rationality. Being moral or rational is just the property correlative of being under a moral or rational requirement. A more informative approach would be to 'thicken' the respective properties by saying something like 'being such that maximizes utility' or 'being such that preserves coherence'. But these descriptions do not seem to follow immediately from the concept of being moral or rational. They are further substantive elaborations of the initial, generic property of being moral or rational. Likewise in the case of law, choosing to thicken the property of legality is to presuppose too much already. Therefore, I shall stick to the initial thin version of being legal as interpreted in the examples mentioned above.

Now supposing that what I have said so far is more or less unobjectionable I move to a crucial observation that follows from my last remark. Once again John Broome has astutely remarked that law is never the name of a property that can be possessed by a person. Being legal is always the property of acts or normative propositions but it cannot be informatively ascribed to a person. A point of caution is in order: one could respond to this remark by saying that *being law-abiding* is the respective property possessed by law subjects. But that is plainly wrong. The latter property is simply trivial as it is a mere adjectivization of the respective *source* requirement. To say that

one is a law-abiding citizen is just to say that she satisfies the relevant legal requirements. But, as explained above, to be a requirement in the property sense is much more 'global' than merely satisfying the requirements one is under in a particular situation. Therefore, law-abidingness won't work as an informative property correlative of legal source requirements.

The crucial point now is: what follows from the fact that law can be understood only as generating requirements in the *source* sense? I believe that what ensues from this remark is far from trivial. First, the fact that persons cannot claim the property of being legal as being entailed by the respective source requirements reveals a conceptual truth about law that many political and legal philosophers tend to recognize. Law is not a participatory conventional practice in the sense that the acquisition or loss of legal status is not a genuinely voluntary act of individuals. The status of a citizen or a legal person within a certain legal jurisdiction is constituted by the law and cannot be freely disposed of irrespective of the relevant rules governing one's legal status. It is important to notice that this is not a moral truth about law but a conceptual feature about its institutional operation. Second, given that persons cannot genuinely bear the property of being legal, their individual beliefs or intentions with regard to the law *qua* source requirement are not robustly relevant. To illustrate my point, recall that coherence requirements are premised on the assumption that for every system of source requirements there is a corresponding property that denotes some sort of attainment with regard to the total satisfaction of the respective source requirements. If I satisfy all relevant source requirements either by revising my initial attitude (belief or intention) or by acquiring the respective belief or intention, I *ipso facto* acquire the property of being rational, moral or prudent. Thus, being moral or

rational is directly related to the ways in which I go about revising or acting upon individual beliefs or intentions.

So, in virtue of what kind of attitudes are we related to law as a source of requirements with no respective property ascription? Normativity cannot be entirely severed from our attitudinal responses to normative demands, so something must be the case regarding our relation *qua agents* towards the law. A helpful thought is to argue that the way we are related to the law is not matter of our psychological dispositions vis-à-vis the relevant legal requirements. Being a member of a legal community is neither the result nor the condition of a psychological property of its actual members. That is to say, it is not the case that revising or readjusting our beliefs or intentions about the law is what is needed in order to say that we are on the correct normative track with regard to law. My suggestion is that our relevant attitudes towards the law as a system of source requirements are explanatory and not brutely psychological. It is not simply the fact that by formulating an explanation as to whether we have a reason to act in accordance with the law we are thereby engaged in some sort of intentional activity. That's rather self-obvious. What I aim to stress is that the very act of explaining is a type of attitude that is constitutively directed to making things intelligible to oneself.[6] When I am trying to understand what is the case when I am confronted with a legal obligation of some kind, I am not merely projecting my beliefs about what ought to be the case or my motivating intentions that causally explain my law-abiding or law-breaking behavior. Making sense of our relation to the law is a genuine explanatory attitude that is not reducible to our individual dispositions regarding the content or the formal validity of the law. At the

[6] For an attitudinal interpretation of explanation, see Frederick Stoutland, Determinism, Intentional Action, and Bodily Movements in Constantine Sandis (ed), *New Essays on the Explanation of Action*, Palgrave Macmillan, 2009, pp 322 ff.

same time, assuming an explanatory stance towards the law is first-personal in the sense that we are deliberatively engaged in a process of figuring out whether a legal proposition has a normative impact on us *qua* agents. Therefore, the relevant explanatory attitude[7] I am trying to showcase should not be confused with third-personal nomic explanations whereby we set out to discover independently existing natural patterns by formulating nomic generalizations as to how or why certain things came or ceased to be, or changed.

A final step before concluding with my account of law's normative function is to realize that adopting an explanatory attitude towards the law is not co-extensional with trying to interpret the content of the law in a way that makes it morally or 'legally' justifiable. Neither the process not the outcome of figuring out what the law requires in a particular case is *what* furnishes (or not) a reason to act accordingly. That is not to deny that the epistemology of law may track down what makes law normatively relevant, but that is a rather different issue. To illustrate my point, think of a judge who gives reasons for her conclusions about what the law is in a particular case. To sharpen the contrast I shall adopt, for the sake of argument, the view that what makes law what it is itself a normative matter, that is, it requires some sort of

[7] A relevant argument is made by Ronald Dworkin for whom the mutual concern displayed within the context of a 'true' community is not a matter of psychological conditions, rather it is '[t]he concern they require is an interpretive property of the group's practices of asserting and acknowledging responsibilities—these must be practices that people with the right level of concern would adopt—not a psychological property of some fixed number of the actual members' (Law's Empire, p 201). My contrast with Dworkin's conception is that his interpretive attitude is already guided by a robust conception of legality *qua* integrity. An interpretive attitude is more like trying to fine-tune the content of the law so that it fits a morally proper scheme of principle. By contrast, the explanatory attitude I am putting forward is not aimed at calibrating the content of the law to an ideal of some sort, but starts from a point where the determination of the content of the law has already taken place. No matter which interpretive method or type of legal reasoning is used, it is still intelligible to ask what types of reasons for action are furnished by a particular legal fact or proposition.

moral reasoning to detect the reasons that contribute to making the law what it is. I am taking the strongest scenario where a fact about the content of the law is—at least for no hardcore legal positivists—the conclusion of a reasoning process that includes moral reasons as well as non-normative legal considerations. Even if we assume that it is precisely those reasons—that is, this proper deliberative route—that make law *what it is* and not, say, contingent facts about the attitudes of law-makers or law-appliers, this conclusion is far from qualifying as an answer to the question of whether a legal proposition so construed *is* a reason-giving fact in the sense I have explained in the first part of this paper. Even if, *arguendo*, the fact that something qualifies as the content of the law is determined by a moral reasoning process, it is not this very same fact that makes it the case that we have a reason to act accordingly. My point is that even if we assume that given the moral soundness of our reasoning our conclusion about what the law requires is a normative one, it is not the properly normative one to answer the question of whether there is a normative reason to act on this conclusion. What provides the answer to the latter question are rather the relevant moral principles or features of the particular situation *whether or* not they all figure as premises in our legal reasoning.

What lies behind the subtle distinction I am trying to defend is that neither the quality of our legal reasoning nor general facts about the content of the law—that is, true propositions like 'everyone ought to pay capital gains taxes'—do themselves *provide* the explanation as to whether an agent has a reason to conform or not; what they do instead is to *enable* the explanation which is furnished by the proper moral or prudential reasons that may figure or not in the legal reasoning process. The distinction I am making is already familiar from the thought-provoking work of Jonathan Dancy whose argument—within a different context—is analyzed into

interrelated claims: (i) moral explanations are functions of features that perform the role of favouring a particular act and of features that enable the favouring considerations to perform their role, (ii) the normativity of moral explanations—that is, what makes an action right—is a function of the favouring considerations and not of the so-called enablers.[8] Thus, among the following considerations, that is, the fact that I have promised to φ and the fact that my promise was not given under duress, only the former qualifies as the fact that provides a reason to φ. The latter consideration helps to determine whether all things considered this basic reason is operative in the particular case. My way of applying this distinction in the legal case is to take a fact about the content of the law as functioning as the *enabler* of an explanation as to why one has a reason to conform or not to this content. Whereas I am agnostic about whether moral principles—that is, overall judgements about what there is a reason to do—can combine the favouring and the enabling notions into one function, I am rather confident that legal facts are not normatively fundamental in any robust sense so as to qualify themselves as reason-giving facts. On my understanding, legal facts are universal enablers in the sense that they do not constitute the *grounds* on which action in accordance with the law is normatively required or not but they are *always* an enabling condition of the corresponding normative explanation.

That brings me to my final thesis regarding the way law performs its normative function. I believe that legal normativity has a peculiar operative canon that makes it distinct without undermining in any sense our moral judgement. My point is that law operates on the basis of a general wide-scope explanatory requirement that has the following structure:

---

[8] See, Jonathan Dancy, *Ethics Without Principles*, Oxford: Oxford University Press, 2004, pp 38-43.

(i) Facts about what the law is in a particular case are not the facts that properly *ground* the relevant reasons for (or against) acting in accordance with the law

(ii) The facts that favour or disfavour compliance with the law are ordinary moral or prudential considerations pertaining to a particular case

(iii) Facts about what the law is in a particular case enable the explanation of whether one has a reason to act in accordance with the law or not.

(iv) What explains the fact that legal facts are enabling conditions is the very practice of legal judgment

The above points can be condensed into the following explanatory requirement formula:

One is not to confound two different kinds of explanatory attitudes towards the law, that is, the explanation of whether one has a normative *reason* to comply and the explanation of why legal facts *enable* the former explanation.

The requirement is negative is the sense that all that is prohibited is to explain why law is a universal enabler by citing the grounds of the explanation as to whether one has a moral or prudential reason to act in accordance with the law. This explanatory requirement is second-order in the sense that it refers to the proper relations among two different explanatory attitudes.

The crucial element in this argument is that moral or prudential grounds cannot be invoked in explaining why facts about legal content are *enabling conditions* of normative explanations, not in explaining why a particular proposition is a *legal* fact. Irrespective of what legal reasoning methodology one applies, the outcome is always a verdictive judgment about what the law requires. That judgment may be morally or legally fallible but somehow there has to be a *closure* beyond which the normative

question arises as to whether one has a normative reason to act on this judgment. Usually the most ultimate way to reach this closure within a legal system is to reach a final judicial decision at a supreme-court level. It is not that intermediary—even extra-judiciary—legal judgments cannot equally enable normative explanations; they surely can. It's just that their impact may not be dispositive of a particular case in the way that a final judgment is. Hence, the explanation of why a legal fact is an enabling condition always comes after a more or less veridictive judgment as to what the law requires. The answer to the question of why a legal fact is an enabler is constitutive in the sense that it is *just what it is* for a legal fact to qualify as enabler that it has been determined as such as a result of a certain official practice. What makes law what it is and what explains it enabling function are not identical questions.