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Legal Norms and Legal Decisions

Authorities and Decisions in an Age of Global Legal Pluralism

Summary of Doctoral Thesis

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I. Summary of the Research's Aims

The topic of my doctoral dissertation pertained to the normativity of law, specifically focusing on the reason-giving ability of law and the nature of legal reasons. When I was searching for a topic for my doctoral research in 2019, this was, one could say, a particularly *à la mode* topic within analytic legal philosophy. Numerous new monographs, edited volumes, and scholarly articles began to examine this subject, even though, especially following Joseph Raz, it was not an untouched area for legal philosophy. However, the increasing attention to metaethics led to the somewhat stagnant research programme of general jurisprudence acquiring new tools. As interest in reasons revived, the question of how to apply this expanding and ever more refined conceptual framework to jurisprudence immediately arose. Despite some excellent initial efforts, it would seem that four years hence, normativity of law was no longer a fashionable topic within analytic legal philosophy. Instead, the field has turned partly towards ontology (e.g., artifactual legal

theory),[1] partly towards explicitly normative theorising (how should the law handle certain issues), or particular of legal theory (e.g., theory of criminal law) – all in all retaining a strong fragmentation.

Unfortunately, these international trends scantly made an impact on Hungarian jurisprudence. This is partly due to the fact that the in the past few decades, reception of analytic legal philosophy post Hart (especially the works of Joseph Raz) has been sporadic at best.[2] Naturally, there are more recent works on analytic legal philosophy in Hungarian, but mainstream Hungarian legal theory (if

[1] Luka Burazin, Kenneth Einar Himma, and Corrado Roversi, ed., *Law as an Artifact* (Oxford: Oxford University Press, 2018), https://doi.org/10.1093/oso/9780198821977.001.0001; Luka Burazin et al., ed., *The Artifactual Nature of Law* (Chesham: Edward Elgar, 2022), https://doi.org/10.4337/9781800885929; For a systematic critique of this approach, see Brian Z. Tamanaha, *Sociological Approaches to Theories of Law*, Elements in Philosophy of Law (Cambridge: Cambridge University Press, 2022), https://doi.org/10.1017/9781009128193.

[2] The last significant research projects which explicitly aimed to help this reception are nearly two decades old.
Mátyás Bódig, Tamás Győrfi, and Miklós Szabó, ed., *A Hart utáni jogelmélet alapproblémái* (Miskolc: Bíbor, 2004); Naturally, some more recent works chose a broadly analytic methodology, but this does not mean that there would be a Hungarian School of analytic legal philosphy. See eg. Krisztina Ficsor, *Formalizmus a bírói gyakorlatban: A formalista bírói érvelés jogelméleti alapjai* (Budapest: Gondolat, 2015).

such a thing even exists) rather continues to build on its idiosyncratic traditions or on German social theory.[3] A good example of the former trend are the sociological tendencies of Hungarian jurisprudence, [4] exemplified, for example, by knowledge of law research.[5] Analytic legal philosophy thus seems to fade away from Hungarian jurisprudence, the causes of which would merit a separate study on their own. Nevertheless, wherever possible, I strove to tie my dissertation to the frayed threads of Hungarian legal theory, albeit the questions and sources of my research fit broadly with contemporary English-language analytic philosophy.

Going back to the analytic jurisprudential relevance of metanormativity, I believe that it would be a shame if this

[3] For a comprehensive overview, see: Miklós Szabó, „Jogelmélet és jogszociológia", in *A jog tudománya*, ed. András Jakab and Attila Menyhárd (Budapest: HVG-ORAC, 2015).

[4] Zoltán Fleck, „Szocialista jogelmélet és szociológia", *Világosság* 45, no. 4. (2004); Tamás Demeter argued that this sociological tendency is a feature of Hungarian philosophical tradition in general. While I do not think that this is true for Hungarian legal philosophy *en large*, Hungarian legal philosophy certainly has a strong sociological strand. Tamás Demeter, *A szociologizáló hagyomány: a magyar filozófia főárama a XX. században* (Budapest: Századvég, 2011).

[5] For an overview see: István H. Szilágyi, *Jogtudat-kutatások Magyarországon 1967–2017* (Budapest: Pázmány Press, 2018).

are of research received only cursory attention. Even if the normativity of law is a classic question in legal philosophy, it appears that renewed attention failed to lead to any breakthroughs. I believed that simply turning to other areas of legal philosophy would be wrong. I believed so because to me it seemed that the normativity of law is an excellent candidate for fusing philosophical and social scientific, empirical methods in a mutually beneficial way. The past few years have given us an increasingly refined picture of individual decision-making and the deliberation therein. These advancements in other fields ought to be funnelled into legal philosophy as well.

II. The Methodology of the Research

To be more specific, I argued that (philosophical) scholarship into which reasons one *ought to* act upon has not properly taken stock of our knowledge of which reasons one *actually acts* upon. Thus, I believe that it is rather unfortunate that research into the normativity of law has largely ignored social scientific perspectives on law. This, as I pointed out, is no coincidence, as the normativity of law is one of the questions traditionally reserved for

distinctly philosophical scholarship, which leads to suspicion towards other methods being used to answer this question. I argued that this is specifically why legal philosophy needs to take an open methodological stance, to avoid steering into a dead end.

Naturally, this presumes that I have a by and large positive view of analytic legal philosophy, as working in a field thought to be mostly futile would be rather questionable. Thus, I had to start with the assumption that analytic legal philosophy is fundamentally interesting and fruitful. This does not, however, mean that methodological critique of this tradition is misplaced. As I have shown in chapters I and II of my dissertation, the methodological qualms against analytic legal philosophy are real and deserving of our attention. As I judged this issue to be in need of detailed metatheoretical analysis, third of the dissertation is devoted to these issues.

Despite its roots being firmly planted in the analytic legal philosophical mainstream, the first part of the dissertation focuses on the methods and challenges of analytic legal philosophy. I believed such a lengthy methodological exposition to be necessary because I strove to bring

together rather different approaches, which without proper foundations would lead only to cacophony. First, I had to show why I believed the traditional methods of analytic legal philosophy are flawed and what revisions ought to be made. Second, I had to justify why my proposed approach is the best suited for such revisions. Consequently, chapter I details the critiques laid out against the questions and methods of analytic legal philosophy. In particular, I argued that philosophy needed to be more open to empirical insights. Then, in chapter II, I outlined my methodological suggestions, detailing how conceptual analysis in general and regarding normativity in particular might concede some ground in order to make it more amenable to social sciences.

In the metatheoretical chapters, I argued for two main claims: legal philosophy needs both new questions, on the one hand, and new methods, on the other, if it wants to remain relevant. As to former, I explained that theoretical questions examining the universal, essential properties of law have proven to be ineffective. This theoretical framework led to an excessive isolation of legal theory, giving rise to biting criticisms against general

jurisprudence. Consequently, some authors (MacCormick, Murphy, Bódig) questioned the point of general jurisprudence, albeit leaving the methods of philosophical inquiry undisturbed. These authors typically advocate for the integration of general jurisprudence into other philosophical subdisciplines, thereby reducing the scope of specifically 'legal philosophical' theorising.

While I agreed that legal philosophy indeed needs to seek new research topics, this does not necessarily entail the radical transformation of the field as some authors envisioned. I argued that legal philosophy is a relevant philosophical field in its own right: it cannot rely exclusively on insights from other subdisciplines, although it must always be attentive to these. In this regard, I found the idea of recasting general jurisprudence as a metanormative inquiry to be of great interest. This approach brings legal philosophy closer to other areas of practical philosophy without merging them outright. For these reasons, I considered the normativity of law as the question to be examined, through which analytic legal philosophy can move forward and overcome its jejune debates.

Nevertheless, I argued that new questions for legal philosophy are worthless without a revision of the conceptual analysis underpinning their examination. Developing the methods of legal philosophy is necessary, I argued, if we want to maintain that it can be produce relevant philosophical research on its own merits. Consequently, I identified three philosophical endeavours that could help provide the new questions of legal philosophy, specifically the normativity of law, with more stable foundations. On the one hand, I argued for the use of conceptual engineering, suggesting that the goal of legal philosophy should be to improve its concepts. I believed this is possible based not on substantive moral values, but through descriptive criteria. In this, I considered the greater incorporation of empirical findings into theorising necessary, recommending the methods of experimental jurisprudence and, more generally, a naturalised framework. Specifically, I outlined a substantively liberal naturalist, methodologically naturalist framework as the basis of the dissertation's analysis, as I believed this avoids excessive reductionism in legal philosophy.

In short, on a metatheoretical level, I argued that legal philosophy, in addition to being open to other areas of philosophy, must also be receptive to empirical sciences. I sought to find topics for legal philosophy that could effectively utilise the results of this framework. The normativity of law, I argued, beyond being recently brought into focus in legal philosophy, is a suitable subject for such an approach.

III. The Main Insights of the Research

Chapters III and IV of the thesis then examined the question of the normativity of law using the above methodological framework, which, as I have indicated, has been the subject of more intense theoretical interest in recent years. I argued that the normativity of law, based on the above methodological framework, could be an issue of continuing interest in analytic philosophy of law. In this context, I examined in more detail the justificatory capacity of law and the nature of legal justifications. Accordingly, I reviewed the theoretical categorisations along which reasons can be analysed. I argued that legal reasons should be treated as robust, sui generis reasons for

their proper understanding. While both prudential and moral reasons can play a role in obeying the law, I distinguished them from specifically legal reasons that actually influence our actions. However, this is only a starting point for a theory of legal reasons, as their authoritative character must be taken into account to gain a complete picture. Each of these claims requires a separate justification, which has so far not been done at all in the Hungarian literature, and only to a lesser extent in international literature.

The relevant question was therefore the entry of authoritative legal reasons into the decision-making process of the individual, for which I identified several theoretical frameworks in the literature. Of these, I examined the weighting model and Joseph Raz's preemption model in more detail, concluding that neither can adequately describe our practical experience. For this reason, I argued that we need to adopt Noam Gur's dispositional model in order to understand the relationship

between legal pluralism and normativity.[6] Under Gur's dispositional model, legal authority provides a reason for an individual to adopt a disposition to a habitual legal practice, provided that the legal system meets at least basic requirements. This model was well placed to explain the role of authoritative reasons in individual decision making and was sufficiently open to the integration of empirical insights.

In addition to the methodological problems mentioned above, another major challenge for analytic philosophy of law is the theoretical description of globalisation and the legal processes that it entails. In particular, the emergence of new forms of regulation, a phenomenon known as global legal pluralism, is posing increasingly intense challenges to analytic legal philosophy, which has hitherto focused primarily on state law. This dissertation is also part of this growing theoretical trend, which aims at expanding and revising the framework of analytical philosophy of law in order to keep up with the new

[6] Noam Gur, *Legal Directives and Practical Reasons* (Oxford: Oxford University Press, 2018), https://doi.org/10.1093/oso/9780199659876.001.0001.

challenges of our changing world on a theoretical level.[7] However, once again, this calls for a rethinking of both the methodology and the research topics of the philosophy of law. Moreover, a review of recent literature suggests that the experience of different social and global peripheries can also help analytical philosophical theorising. Therefore, it is important that this discourse finds its way into Hungarian legal theory. This is what this thesis aims to contribute to, especially in Chapter V, which examines certain issues related to the normativity of law in the light of global legal pluralism.

The accounts of the normativity of law in general and Gur in particular do not take sufficient account of the fact that in the era of global legal pluralism, theoretical frameworks focusing on a single authority are no longer adequate. We are living in an era of relativisation and multiplication of authorities,[8] to which we must also

[7] Julie Dickson, „Who's Afraid of Transnational Legal Theory? Dangers and Desiderata", *Transnational Legal Theory* 6, No. 3–4. (2 October 2015): 565–85, https://doi.org/10.1080/20414005.2015.1120022.

[8] Frank Furedi, *Authority: A Sociological History* (Cambridge: Cambridge University Press, 2013), https://doi.org/10.1017/CBO9781139026338.

respond from a theoretical point of view. For this reason, Chapter V examines the reason-giving capacity of co-existing, relative legal authorities. I will build my account of relative authorities primarily on the theoretical framework of Nicole Roughan, but I believe that the question of the normativity of law does not appear with sufficient weight in her work either. To fill these gaps, I propose my own theoretical model, which I call the plural dispositional model. This approach, I hope, can bring together, on the one hand, the theoretical literature describing the legitimacy of relative legal authority, on the other hand, the theoretical literature describing the characteristics of legal justifications, and, thirdly, our empirical knowledge of the functioning of global legal pluralism.

In developing my own theoretical framework, I used Gur's dispositional model to describe the nature of the reasons given by each authority, which I combined with Roughan's theory of relative authority. The question immediately arises, however, in which context should an individual adopt such a disposition towards which authority? We can imagine three possible answers to this:

(1) Authority A_1 gives agents a reason R_1 to habitually obey its directives, but only in context C_1 constrained by other authorities (A_2, …, A_n), where authority A_1 can legitimately regulate the agent's actions. A_2 authority can do so in a similar way in context C_2, etc.

(2) Authority A_1 gives agents a reason R_2 to habitually obey its directives, but only in context C_1 constrained by other authorities (A_2, …, A_n), where authority A_1 can legitimately regulate the agent's action, and also gives a reason R_2 for following authority A_2 in context C_2, etc.

(3) Authority A_1 gives agents a reason R_2 to habitually obey its directives in any context C (although it would only be legitimate for authority A_1 to regulate in context C_1), but agents must override this habit in contexts C_2, …, C_n based on further reasons I_2, …, I_n given by authorities A_2, …, A_n.

From these three theoretical frameworks, it was therefore necessary to choose how to approach the normativity of plural law.

After examining and then rejecting several possible ways of linking them, I proposed the following thesis in formal terms:

Authority A_1 gives agents a reason R to habitually obey its directives, but only in context C_1 constrained by other authorities (A_2, ..., A_n), where authority A_1 can legitimately regulate the agent's actions. A_2 authority can do so in a similar way in context C_2, etc.

By context, I meant the reasons for whether authoritative decision-making is needed in a given area, and whether the authority adequately takes into account other relevant authorities. This theoretical framework can therefore more fully describe the errors that can arise when authorities give reasons.

I have grouped these possible mistakes authorities can make into three categories:

(1) It makes a fundamental error in considering the primary reasons or the context of its authority over the subject agent. In such a case, I have held, in tandem with Gur, that it cannot provide the agent with a reason for taking a law-abiding disposition.

(2) It makes a non-fundamental error in considering the primary reasons otherwise relevant to the agent. In such a case, although a law-abiding disposition is established, depending on the gravity of the error, the agent may override it.

(3) It makes a non-fundamental error as to the context of its decision. In such a case, although a law-abiding disposition is established with respect to the context of the error, the agent may override the erroneous disposition either by individual weighing of the applicable reasons or by using another disposition as a mask.

In the existing literature, the failure (3) has been insufficiently discussed at the theoretical level, but, as I have pointed out, the practical relevance of such problems is very high. This was supported by the plural dispositional analysis of "liquid" authorities. For all these reasons, the plural dispositional model I propose can convincingly synthesise both the available theoretical framework and our empirical results.

The objective of my dissertation was to bring the issues of analytic philosophy of law closer to our theoretical and

practical knowledge of legal pluralism. The dissertation provided a meta-theoretical framework for this project, and within this framework, it sought to further develop our theoretical knowledge of the provisions. If philosophy of law is to retain its increasingly challenged *raison d'être*, I think we need both of these. To do so, we must necessarily adopt new methods and enter new areas that transcend the traditional framework of legal philosophy.

In an age of global legal pluralism, 'the explosion of fact' is a source of 'legal anxiety'.[9] Ignoring this anxiety is a possible albeit unwise solution. The real task of legal philosophy in the 21st century must be to reduce this anxiety by advancing our theoretical framework. There are therefore good reasons, at least *pro tanto*, for continuing and extending research in the philosophy of law.

[9] Clifford Geertz, „Local Knowledge: Fact and Law in Comparative Perspective", in Local Knowledge: Further Essays in Interpretive Anthropology (New York: Basic Books, 1983) 171.

IV. Relevant Works by the Author

Fábián, Áron: „A fogalmi elemzés és a jog normativitása módszertani problémái a kortárs jogelméletben". *MTA Law Working Papers*, 2023/7. (2023).

Fábián, Áron and Márton Matyasovszky-Németh. „A jogi reagálóképesség pluralisztikus modellje". In *A magyar jogrendszer rezilienciája 2010–2020*, edited by Fruzsina Gárdos-Orosz. Budapest: Társadalomtudományi Kutatóközpont, ORAC, 2022.

Fábián, Áron: „Emotional Politics and Emotional Courts? A Theoretical Framework for the Analysis of Judicial Emotions in Populist Regimes". In *Populism, Popular Sovereignty, and Public Reason*, edited by Stefan Mayr, Andreas Orator.

Fábián, Áron: „Kenneth Einar Himma – Miodrag Jovanovic – Bojan Spaic (szerk.): Unpacking Normativity: Conceptual, Normative, and Descriptive Issues (Oxford: Hart, 2018) 262. (Review)". *Állam- és Jogtudomány*, 61/2. (2020).

Fábián, Áron: A joghézag problémája a pragmatika tükrében. *Állam- és Jogtudomány*, 61/1. (2020).

Márton, Matyasovszky-Németh and Áron Fábián: Brian Z. Tamanaha: „A Realistic Theory of Law (Review)". *Állam- és Jogtudomány*, 59/1. (2018).