

INDIRECTLY AND
DIRECTLY EVALUATIVE
LEGAL THEORY

DESCRIPTIVE AND NORMATIVE LEGAL THEORY

- descriptive legal theory
 - aims to accurately identify and explain the necessary or essential features of law
 - an account of law ‘as it is’
 - purely **descriptive** in character and **value-free**
- normative legal theory
 - morally evaluates and justifies law
 - an account of law ‘as it ought to be’
 - a **value-laden** theory of law

DESCRIPTIVE AND NORMATIVE LEGAL THEORY

- misleading dichotomy (Dickson):
 - gives the impression that there are only two methodological camps
 - often leads to serious misrepresentations of the views of some legal theorists
 - overly simplistic
 - misleadingly leads one to believe ‘that the difference between these alleged two camps is the difference between value-free legal theories on the one hand, and value-laden legal theories on the other’

THE ROLE OF EVALUATION

- according to Dickson, methodological issues in the field of legal theory

‘can best be approached via the theme of the role of evaluation in legal theory, and more specifically, via the question: to what extent, and in what sense, must a legal theorist make value judgements about the phenomena which he seeks to characterise in order to construct a successful theory of law?’

KINDS OF VALUES

- kinds of values which can be applied in the course of constructing an adequate account (of the nature) of law:
 - a) purely meta-theoretical values
 - b) the value of importance
 - c) moral values

KINDS OF VALUES

- purely meta-theoretical values
 - ‘relate only to the nature of theories in general, rather than to the nature of the particular data or explananda with which a given theory or type of theory deals’ (Dickson)
 - epistemic values (norms, virtues)
 - apply to any theory (including legal theory)
 - e.g. simplicity, coherence, clarity, comprehensiveness, consilience
 - legal theory cannot be value-free at least in this rather ‘banal sense’ (epistemic evaluation)

KINDS OF VALUES

- the value of importance
 - a) purely meta-theoretical judgements of importance (JI) applicable to any theory whatsoever
 - what it is for something to *be* a theory at all, rather than the presentation of a ‘rubbish heap’ of facts
 - b) JI relating exclusively to *legal* theory
 - bear upon the nature of the particular data with which legal theory deals
 - the data partly consists in subjects’ beliefs and attitudes about the law and their actions in light of the law
 - a means for determining what is important for the participants of legal practice
 - *evaluating* (and not just recording and reproducing!) the self-understandings of participants

KINDS OF VALUES

- moral values
 - values that bear on the questions of practical reasonableness
 - practical reason: the use of reason to decide how to act
 - practical reason requires ‘respect for every basic value in every act’ (Finnis)
 - in order to know which features of law are important, and to explain them, one should evaluate law morally
 - applied in constructing normative theories of law

DIRECTLY AND INDIRECTLY EVALUATIVE LEGAL THEORY

- directly evaluative propositions (DEP)
 - those that ascribe value or worth to something in the fundamental sense of accounting it as good
 - of the form ‘X is good or right’
 - e.g. ‘obedience to law is good’; ‘there is a general obligation to obey the law’; ‘law necessarily possesses legitimate moral authority over its subjects’; ‘the law is morally justified’

DIRECTLY AND INDIRECTLY EVALUATIVE LEGAL THEORY

- indirectly evaluative propositions (IEP)
 - state that a given X has evaluative properties but do not entail DEP stating this same X is good (or bad)
 - of the form ‘X is an important feature of law’
 - the evaluation concerned does not go to the substance or content of the subject of the proposition
 - account the *existence* of some X as significant and hence worthy of explanation

DIRECTLY AND INDIRECTLY EVALUATIVE LEGAL THEORY

- that some X is important to explain can be supported by:
 - a) DEPs concerning that same X
 - b) the fact that X is a feature which law invariably exhibits
 - c) the prevalence and consequences of certain beliefs on the part of those subject to law concerning X
 - d) the fact that X bears upon matters of practical concern to us
 - e) the way in which X is relevant to various directly evaluative questions whether it is a good or bad thing

DIRECTLY AND INDIRECTLY EVALUATIVE LEGAL THEORY

- directly evaluative legal theory
 - contains at least one DEP concerning features of law
 - e.g., in the course of identifying and explaining law's important features Finnis makes judgements about the goodness of law and the moral obligation which it creates
 - theory which returns a moral judgement on the goodness of law's important features
 - *direct or moral evaluation* of law's important features

DIRECTLY AND INDIRECTLY EVALUATIVE LEGAL THEORY

- indirectly evaluative legal theory
 - contains only IEP concerning the importance of certain features of law
 - e.g., Raz picks out and explains which are the most important features of the (distinctive) institutional mode of law's operation
 - theory which picks out certain features of law as central to our social experience and hence important to explain
 - *indirect evaluation of the importance of certain features of law*
 - value-free and descriptive?

Thank you for
your
attention!