Taking Control With Meta

Author : Andrew Halpin

Date : June 2, 2022

Kevin Toh, *Legal Positivism and Meta-Ethics*, *in* **The Cambridge Companion to Legal Positivism** 561 (T. Spaak & P. Mindus eds., 2021).

Often an article or essay proves valuable for the points it directly advances in promoting the author's view on the subject matter it covers. Sometimes, additional value is produced because the piece indirectly stimulates fresh thinking on that subject matter, irrespective of whether following those novel lines of thought proves to be compatible with or at variance with the author's own viewpoint. In these terms, Kevin Toh's essay on Legal Positivism and Meta-Ethics in *The Cambridge Companion to Legal Positivism* provides double value.

Toh is directly concerned to raise a number of important points related to the different levels legal theory operates on, and how an appreciation of meta-ethics might inform our understanding of the relationships between these levels and the fruit that might yield. Meta-ethics may assist both by analogy (P. 566), and by contributing its own perspective on an appropriate delineation of morals so as to inform legal theory's own preoccupation with the law/morality connection or divide (P. 570). That latter contribution is expanded by Toh into an endorsement of wider philosophical collaboration between different disciplines. And it is this use of "resources made available by other areas of philosophy and related empirical disciplines" (P. 570) that shapes Toh's own tentative contribution to understanding the nature of law. (P. 581.)

Indirectly, Toh's work here stimulates a number of reflections on the different levels of legal theory. Potentially there are three: first order, addressing what the law is on a particular issue (563); second-order, concerned with the nature of law (P. 563); and a metatheoretical level, derived from meta-ethics, whose own precise concerns and accomplishments are less clear. (Pp. 565-66, 571.) Considering the interaction between different levels should produce a fuller awareness of what can be expected from legal theory, including the possibility of establishing the "ultimate legal grounds" (Pp. 567-68, 581) for determining what the law is.

Toh covers a number of issues. Some are central to his principal objectives. Some are ancillary, even tangential, to his primary concerns. Throughout, he provides observations and insights that merit serious attention. A central issue is the "double duty presumption" (Pp. 563-65), whereby it is presumed that a general theory of law provides common criteria for answering the second-order question on the nature of law and the first-order question on the valid grounds for reaching a determination of what the law is. Toh draws on the example of meta-ethics to argue that such a *presumption* is unfounded. (Pp. 565-67.) An ancillary move here involves a rejection of the widespread reading of Hart as accepting the link between the two questions. (P. 565.)

The other issue of central importance to Toh is the possibility of establishing (rather than presuming) a connection between the two questions, and here the influence of meta-ethics is paramount. (P. 569.) Toh explores in a sophisticated manner the prospects of establishing "modal constraints" on what can count as "ultimate legal grounds" through second-order legal theory. (P. 569.) Initially, his argument takes inspiration from the work of Peter Railton, considering the possibility of a meta-ethical understanding providing general criteria for what counts as a morality. (P. 566.) At this point, we have only a second-order appreciation of the nature of morality. The suggestion is then made that a similar move within legal theory might yield first-order theoretical results on what can count as ultimate legal grounds for determining the law. (P. 571.) The substantive work in pursuing this strategy (Pp. 571-78) is adroitly undertaken by Toh. He engages with the familiar material of the internal attitude present in the acceptance of rules, enhanced by attempts to thicken the notion of acceptance, to the point of contemplating the existence of

“metaphysically contingent but naturally necessary” facts about human nature and the human condition. These are viewed as capable of shaping “the ultimate grounds of the law of any human legal system.” (P. 578.)

In a fair-minded critique of his own strategy (Pp. 578-81), Toh concedes that it has not, as yet, brought about a fulfillment of its promise. He acknowledges that the modal constraint as developed could be diluted to provide support for the laws of a particular legal system, even one we regarded as immoral, solely from the attitudes of its participants. (P. 581.) Nevertheless, he expresses the hope that the strategy he has explored here will impact upon the future course of theoretical debates on the nature of law, and legal positivism. (P. 581.)

There are good reasons to expect such an impact. However, in the remainder of this jot I want to draw attention to the indirect stimulation he has provided, to consider wider issues regarding different levels of legal theory, and what we can reasonably expect them to deliver. One immediate point to note is that the three distinct levels I mentioned in the introductory remarks above are not recognized in Toh’s discussion, either of legal theory or of ethics. This is apparent from Toh taking as a parallel to meta-ethics not a meta-theory of law but a second-order theory of law. Effectively, he treats meta-ethics as a second-order theory, and then a second-order theory of law as sharing its characteristics. He treats both as theorizing about the *nature* of morality (Pp. 566, 571) or of law. (Pp. 562, 570.)

For Toh, the pay-off from an understanding of the nature of morality or law is the ability to identify something as that, without necessarily endorsing it. (P. 566.) This applies both to the practices of a community (as amounting to morality or law) and to the specification of a theory (as a theory of morality or law). Yet, if this is the case, then there must be some distance between having a grasp of the nature of something so as to correctly identify it, and contesting with others working on the matter identified what exactly is its nature. That is to put the point in relation to competing theories of morality, such as Kantian or utilitarian (P. 566); or competing theories of law, such as positivist or anti-positivist. (P. 568.) In that case, it would be possible to recognize a metatheoretical specification of what counts as a second-order theory of law (or morality). Similarly, with the recognition of the practices of a community as morality or law, we might identify the practices as such, while still contesting what those practices should amount to. (Pp. 566, 581.)

If the role of a metatheoretical perspective is taken to be identification of the subject matter, leaving open theoretical divergence over its nature, its work is greatly diminished. Moreover, there is no reason to assume that this work should be given to meta-theory. Why not commence with a more finely grained appreciation of human experience and select from that those parts which warrant theoretical investigation as the same subject matter? In this light, Anthea, whose job it is to discover whether a community has law (Pp. 561-62) may choose not to email a philosopher friend but to call on the services of an ethnomethodologist.[1]

Toh clearly has a more significant role in mind for a metatheoretical approach, in controlling what counts as the substance of a theory of law, ultimately at a first-order level. (Pp. 568, 578.) In turn, that requires second-order legal theories to internalize a metatheoretic outlook, in this strong sense (P. 569). If competing second-order legal theories sign up for this, then what theoretical height must be scaled in order to judge between them?

It is far from clear that any general theories of the nature of law boast of the capacity to deliver according to these demands: second-order enlightenment on the nature of law, providing first-order clarity on the ultimate grounds for determining what the law is, while exhibiting a metatheoretical stricture ruling out opposing theoretical perspectives. Bentham comes to mind, but that would only hold for his ethical theory.[2] Even Ronald Dworkin, with his insistence on the importance of theory for practitioners, fails to explain how Gray J. in his dissent in *Riggs v Palmer* got hold of the wrong theory.

Questioning the credibility of a metatheoretical perspective to take control of legal theory, so as to ensure results at the level of determining what the law is, then raises a basic question of whether that expectation for legal theory was ever realistic. If this question is answered in the negative, we might have recourse to other disciplines, as Toh encourages, but not in order to strengthen the construction of legal theory across its interlocking levels. Rather, to acknowledge its

limitations and the need for those to be complemented by other resources.

1. Baudouin Dupret, **Adjudication in Action: An Ethnomethodology of Law, Morality and Justice** (2011).
2. Jeremy Bentham, **Deontology together with A Table of the Springs of Action and the Article on Utilitarianism** (Amnon Goldworth ed., 1983).

Cite as: Andrew Halpin, *Taking Control With Meta*, JOTWELL (June 2, 2022) (reviewing Kevin Toh, *Legal Positivism and Meta-Ethics*, *in* **The Cambridge Companion to Legal Positivism** 561 (T. Spaak & P. Mindus eds., 2021)), https://juris.jotwell.com/taking-control-with-meta/.