Stockholms universitet

Having the law both ways: a defense of a quasi-cognitivist picture of internal legal statements

by

Michal Wieczorkowski

In this dissertation, the author defends what he refers to as a quasi-cognitivist picture of internal legal statements, according to which such statements have both a cognitive and a practical aspect. As regards the cognitive aspect, such statements express propositions and their semantic content concerns a doctrine of sources of law and a method of legal interpretation. The practical aspect, on the other hand, is not part of the semantic content of such statements, but is to be understood in terms of pragmatic processes, such as conversational implicatures à la Paul Grice. Most of the dissertation is, however, given over to a defense of the quasi-cognitivist account against three objections that all concern the implied reference in internal legal statements to a correct method of legal interpretation, namely, (i) the regress objection, (i) the underdetermination objection, and (iii) the incoherence objection. The focus of the dissertation is thus not really on internal legal statements as such, but on the question of whether there can be legally correct answers to interpretive questions in the law.

While I believe the author should have expended more energy on framing the problem(s) to be considered in the dissertation in a more exact way, and on motivating the title of the dissertation given the extended treatment of the possibility of correct methods of interpretation, his able treatment of the difficult questions and literature he considers, not least in Chapter 5, is to be commended; and the introduction of the difficult, but very interesting, ideas of Kripke, Brandom, and McDowell to a jurisprudential audience is a very fine thing. There is thus no doubt that the dissertation meets the requirements set for doctoral theses and that the author should be admitted to the subsequent stages of the doctoral process. I will come back to this at the end of my review, but will now turn to a consideration of the content of the dissertation, where I will discuss the chapters in turn.

INTRODUCTION

The author begins by saying that internal legal statements are asserted in legal discourse, and that they are made from the perspective of one who operates within a legal system and is endorsing a rule or deviating from it (p. 1). He does not, however, give many examples of such statements or say anything about who makes this type of statement and in what situations, or how common they are. For example, he does not, except very briefly, contrast internal legal statements with other types of legal statements, such as external legal statements, what Joseph Raz calls detached legal statements, or what

Svein Eng calls statements with a fused modality. Note also that the examples the author does give, such as "It is the law that capital punishment is forbidden", can easily be confused with external (descriptive) legal statements,[1] and that this is of some importance because one who reads them as external legal statements might be more inclined to accept the author's claim that they are truth-apt, embeddable, justification-apt, objective, etc. Finally, the author has very little to say about the normative force of internal legal statements, focusing as he does on their motivational force, which is another thing.

The author presents the quasi-cognitivist account in response to the (alleged) problem that a (pure) cognitivist account of internal legal statements cannot account for the practical aspect of such statements and argues that the practical aspect can be understood to be part of the pragmatics of internal legal statements. But if the practical aspect of internal legal statements can be handled by pragmatic tools, a cognitivist account of the semantic content of such statements seems quite unproblematic. And if this is right, there is no need to speak of a 'quasi-cognitivist' account, is there?

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[1] After all, certain formulations of legal statements are characteristically ambiguous between an internal and an external reading.

In any case, the author explains that the quasi-cognitivist account has three components: (i) a relational semantics, (ii) a claim that internal legal statements express propositions with a distinctive legal content, which is partly explained in terms of an implied reference to a doctrine of sources of law and a method of interpretation, and (iii) a pragmatic account of the desire-like state of mind expressed by internal legal statements. It seems to me, however, that (ii) is really an aspect of (i); and, as we shall see, the discussion of (i) is unclear as regards the precise relation between the semantic content of internal legal statements and the doctrine of sources of law and the method of interpretation.

It is also not clear what he author thinks of the objections he considers in chapters 5-7. But it would have been helpful to the reader to get some indication of the author's view on them already in the Introduction. Of course, one can assume that he rejects the objections, or at least does not consider them to be decisive; but if he does, he should say so clearly, and he should also say something about why he rejects them.

1. Preliminaries on Internal Legal Statements

The author explains that the account of internal legal statements that he will be defending in the dissertation has it (i) that participants in legal discourse implicitly make use of rules of interpretation and a doctrine of the sources of law when making internal

legal statements; and that such statements express (ii) propositions with a legal content that make up the content of the speaker's belief and (iii) a desire-like state of mind via conversational implicatures.

I believe the author's discussion of the Humean puzzle (pp. 19-21) could and should have been deepened. The difficulty is supposed to be that internal legal statements are *practical* in the sense that an individual who makes a sincere internal legal statement is, or tends to be, motivated to act accordingly, and that a cognitivist account of such statements cannot account for their practicality. As is well known, moral philosophers debate the practicality of moral statements and differ on whether to accept motivational internalism or motivational externalism (on this, see, e.g., Brink 1989; van Roojen 2015). Noncognitivists typically defend internalism and argue that only noncognitivism is compatible with internalism. Cognitivists, on the other hand, tend to be externalists and hold that there are many ways to account for the practicality of moral statements.

How does this debate play out in the field of law? Is it relevant at all? It seems to me that the question of the nature of law comes into the picture here. For one who defends legal positivism, as the author appears to do, would very likely accept externalism, whereas one who holds instead that law is necessarily moral might, but would not have to, accept internalism. In our case the author clearly accepts externalism, saying "[i]f an individual makes a sincere internal legal statement, there is an expectation that they will

be at least somewhat motivated to act in accordance with that statement" (p. 18), and he proceeds to explain the practicality of internal legal statements in terms of conversational implicatures. I find this acceptable, but I also believe the author should have explained (i) what motivational internalism and externalism are, (ii) how the debate proceeds in the field of metaethics and why it is important, (iii) what the relevant differences are between morality and law as regards this debate, (iv) why he accepts externalism rather than internalism in law, and – most importantly – (v) why he needs quasi-cognitivism if he is an externalist.

2. A Quasi-Cognitivist Account of Internal Legal Statements

Here the author maintains that the semantic content of internal legal statements "is constituted by the interpretive procedure set by the method of interpretation M and sources of law S, with both M and S being contextually determined." (p. 25) He maintains, more specifically, that

> . . . internal legal statements rely on sources of law and interpretive procedures set by a particular method of interpretation. For instance, I argue that the statement "It is the law that capital punishment is prohibited" refers to the proper source of law . . . and the interpretive procedure established by the proper method of interpretation." Therefore, an internal legal statement "It is the law that N" should be explained in terms of N satisfying,

> in respect of sources of law S, the interpretive procedure set by the method of interpretation M, with both M and S contextually determined. (p. 29)

But the question, as I have indicated, is what 'is constituted by' means in this context. Consider the internal legal statement "One ought (legally) to hand in one's income-tax declaration no later than 2 May the year after one had the income." The author's idea, as I understand it, is that the semantic content of internal legal statements is such that they will be *true* if, and only if, they reflect a doctrine of sources of law, according to which there is a statute with the relevant content, and a correct method of interpretation that tells us how the statute is to be interpreted. So far so good. But, one wonders, what does this mean, more specifically? Does the author mean that one who makes an internal legal statement *is presupposing* a doctrine of the sources of law and a method of interpretation, or does he mean that references to these entities are somehow part of a complete version of an internal statement, something like, "given doctrine S_1 and method M_1, one ought to hand in . . ." or "in relation to S_1 and M_1, one ought to . . ." or "according to S_1 and M_1, one ought to . . .". Neither option seems attractive, however, at least on the face of it. For if the author chooses to say that S_1 and M_1 are being *presupposed* by the speaker references to them can hardly be part of the semantic content of internal legal statements. If instead the speaker chooses to incorporate references to S_1 and M_1 into the internal legal statements themselves, perhaps in the antecedent, he is running the risk of turning the statements into external and descriptive

legal statements: according to *A* and *B*, you ought to do *X*. This is an objection that has been raised against versions of moral relativism of the type Gilbert Harman defends. Here is Harman's (preliminary) characterization of the moral relativism he defends:

> For the purposes of assigning truth conditions, a judgment of the form, *it would be morally wrong of P to D*, has to be understood as elliptical for a judgment of the form, *in relation to moral framework M, it would be morally wrong of P to D*. Similarly for other moral judgments. (Harman 1998, 4)

I am not convinced that the objection is warranted, but I believe the problem deserves consideration in a discussion of the semantics of internal legal statements. The author does not, however, touch on it.

Note also that the distinction between presupposing *X* and asserting *X* has a bearing on whether the relevant statements will be false or meaningless in case *X* does not exist. Just think of the much-discussed statement "The present king of France is bald" said (today) when there is no king of France. Bertrand Russell argued that it is a false statement, which, properly construed, asserts the existence of a present king of France that does not exist, whereas Peter Strawson took the view that it is not false, but meaningless, on the grounds that it presupposes the existence of a king of France that does not exist, but does not assert the existence of one. Given that the author assumes that internal legal statements will be false when there is no proper method of

interpretation, thus siding with Russell against Strawson, one would have expected him to consider this difficulty.

In any case, the author points out that his quasi-cognitivism is committed (i) to epistemic interpretivism, the idea that the legal content of a source of law is accessed by legal interpretation; (ii) rationalist interpretivism, the idea that the inference from a source of law to its legal content is to be explained in terms of the rational capacities of the interpreter (response to reasons); and (iii) ontological interpretivism, the idea that the interpretation of a source of law constitutes the law and does not track it (p. 30-1). I find these commitments plausible.

The author also writes:

> The quasi-cognitivist nature of this approach is . . . revealed in the fact that the cognitive aspect of legal statements is primary, in two senses: firstly, it argues that the explanation of the content of legal statements necessarily involves the subject matter of the law. Second, it diagnoses their practical function as a result of post-semantic, pragmatic processes, rather than of their semantics. (p. 25)

But, again, what is 'quasi' about this? Why isn't this simply a cognitivist account of internal legal statements? Of course, what is important is not what you call the theory you defend, but the adequacy of the theory. Nevertheless, one may wonder about this.

3. Undermining Legal Quasi-Cognitivism

Here the author introduces three different objections to the quasi-cognitivist account of internal legal statements presented in Chapter 2. All three objections seize on the method of interpretation to which there is an implicit reference in all internal legal statements:

1) The infinite regress objection,
2) The underdetermination objection, and
3) The incoherence objection.

The author does not, however, consider the logical relation between the three objections. My impression is that he thinks of these objections as being independent of one another, which means that the defender of the quasi-cognitivist account must refute all three objections in order to successfully defend quasi-cognitivism. One may, however, wonder whether 2) and 3) add something significant to 1): if the rules in a method of interpretation, A, cannot be understood except in light of a distinct set of rules of interpretation, B, and if the rules of interpretation of set B cannot be understood except in light of an even further set of rules of interpretation, C, and so on, the method of interpretation in question cannot constrain the interpreters. Clearly, this would be a problem. If, however, the regress can be stopped, then there seems to be no room for

objections 2) and 3), as one would expect the further set(s) of rules of interpretation to handle objections 2) and 3), at least 2), as well. In any case, it would have been helpful to get author's view on this.

4. FACING SKEPTICISM

Here the author begins by observing that if the objections considered in Chapter 3 are successful, we must accept legal nihilism, according to which all internal legal statements are false, since they presuppose or assert what does not exist, namely, a proper method for legal interpretation. He then considers three possible ways of countering such nihilism, namely:

1) legal anti-realism,
2) legal non-interpretationism, and
3) legal expressivism.

He points out, however, that while promising, all three options introduce new and difficult problems that would have to be solved. The legal anti-realist option amounts to arguing that internal legal statements are judgment-dependent, in the sense that they reflect the position of an ideal observer who operates in ideal epistemic conditions. The author reasons that if we think of internal legal statements as being judgment-dependent,

we do not have to worry about legal interpretation. This is so because internal legal statements *constitute* legal reality and do not track it and so there will be no need for interpretation. But, one wonders, does not the ideal observer need to make use of a doctrine of sources of law and a proper method of legal interpretation when making his judgments? If not, what is his statements based on?

In any case, the author objects to such an ideal-observer account (i) that it would be very difficult to show that such ideal-observer accounts display the required uniformity, and (ii) that they blur the distinction between law-application and law-creation. I think the author may be right as regards (i), but I am less sure about (ii). As regards (i), it seems to me to turn on how richly the ideal observer is characterized. The richer the characterization the smaller the problem of non-uniform verdicts will be. However, the author appears to be content to speak of *cognitively* ideal conditions, and this suggests that as far as legal interpretation depends on value statements, such as "predictability is more important than legislative efficacy" or "systemic coherence is important", there might be a problem of disunity. If, however, legal interpretation turned out to be a value-neutral activity, the problem would likely disappear in a cognitively ideal situation. As regards (ii), the author does not explain why there would be a problem. Would it not be natural to say that a judgment-dependent analysis tells us what the law *is* and that there is therefore no law-creation going on? And if the correct interpretation is what the ideal observer says it is, would this raise problems of predictability, or what?

The non-interpretivist option is a bit difficult to assess, since it appears to be a matter of faith rather than argument. The idea is that no legal interpretation is needed, since one can comprehend the meaning of a legal rule without interpretation. According to the author, Andrei Marmor, for example, maintains that interpretation is the exception and that understanding is a condition for interpretation, rather than vice versa. The author objects to legal non-interpretivism, however, that one seeks more in the sources of law than just the non-inferential meaning of legal provisions, because one wishes to find out how to apply the rule in question to the facts. In this regard, he points out that some words have a different meaning in law than outside law. But while this seems true, the author does not explain why non-interpretive (or non-inferential) understanding have to concern linguistic meaning and nothing more. Is this simply a matter of definition? Also, given that the author accepts the principle of epistemic interpretivism, mentioned earlier, one would not expect him to be sympathetic to non-interpretivism. Why doesn't the author invoke the idea of epistemic interpretivism when considering the non-interpretivist option?

The point of choosing the expressivist option appears to be that since it does not think of legal rules as resting on facts or being truth-apt, one does not have to worry about methods of interpretation. But while this may be true, the problem of rationality in the sense of responding to reasons would nevertheless seem to arise in the expressivist case, too: if there are no facts to respond to, how could a decision be rational? In any case,

the author makes a distinction between semantic and meta-semantic versions of expressivism, but finds neither type of version attractive. Whereas semantic versions fail to express the cognitive aspect of internal legal statements, meta-semantic versions fail to account for the normative force of such statements. I find the objection aimed at meta-semantic versions suggestive, but would have liked to see it developed in more detail, given that the author has not touched on the normative force of internal statements before.

The author concludes that all three theories considered in this chapter are problematic, and that he needs to proceed to strengthen the quasi-cognitivist account introduced in Chapter 2 in response to the objections raised in Chapter 3. However, it would have been interesting to learn about the author's view of the relation between these three theories, which are meant to combat nihilism, and the author's objections to the three objections considered in Chapters 5-7. Why not discuss these theories, which are designed to consider and refute the three objections, in Chapters 5-7?

5. Refutation of the Regress Argument

The author proposes that we accept Hilary Putnam's idea that there is a division of linguistic labor in the sense that a majority of speakers choose to defer to what experts have to say about the meaning of certain words and expressions, and that this means

that the non-experts can use the relevant words with a (reasonably) clear and determinate meaning, that is, the expert meaning, and thus communicate competently, even though they themselves have only fuzzy ideas about the precise meaning of the relevant words. The author's idea, then, is that we can stop the regress objection from undermining the determinacy of our methods of interpretation by deferring to what the experts have to say about the meaning of the relevant words. Thus if there is a lack of clarity about what, say, 'coherence' or 'legislative intent' means, we can settle the issue by deferring to the experts. However, one may well wonder whether the experts are always clear on such questions and whether they agree with one another. This does not seem to be the case in law. The best one could hope for, it seems to me, is that the experts could be of help in a few cases here and there. It is also worth noting that we have heavily politicized words, such as 'discrimination', 'woke,' 'political correctness, 'racism', and perhaps 'harm', which might occur in legal arguments. Can experts really handle such cases?

The author observes that the so-called rule-following problem, discussed by Wittgenstein and others, is the problem that there is no fact of the matter as to what words mean in the mouth of an agent and that this invites a general skepticism about word meaning. Suppose, for example, that the agent uses the word 'plus' and says he means 'plus in the sense of addition' as we all do (we assume). A skeptic then objects that there is no fact of the matter that determines whether the agent really means 'plus

in the sense of addition' when he uses the word 'plus', and that this means that the meaning of words is fundamentally and unavoidably indeterminate.

Impressed by this problem, the author sets out to find a way to counter the skeptic's claim. He argues, however, that Kripke's so-called skeptical solution will not work, and that the same is true of Brandom's inferentialism. He believes, however, that John McDowell's conceptualism provides us with an answer to the skeptical problem. It is not, however, easy to understand McDowell's position on the basis of what the author tells us. As the author explains it, McDowell defends a position according to which experience has conceptual content, which is to say, I think, that if one does not possess concepts one cannot experience anything. As the author puts it,

> McDowell embraces a conceptualist position, implying that experiences are already equipped with conceptual content. /... / The key step performed by McDowell which allows him to abandon non-conceptualism is a claim that the relevant conceptual capacities are drawn on *in* receptivity. It is not that they are exercised *on* an extra-conceptual deliverance of receptivity. Accordingly, he argues that we should understand experiential intake not as a bare getting of an extra-conceptual Given, but as a kind of occurrence or state that has already has conceptual content. (p. 115)

The author maintains, in keeping with this, that "if we reject non-conceptualism, we entitle ourselves to this thought: shared membership in a linguistic community is not

just a matter of matching in aspects of an exterior that we present to anyone whatever, but equips us with the conceptual capacity to see *things as thus and so*. (p. 119) But, one wonders, how are we to use these insights to stop the regress? The author answers as follows:

> . . . McDowell introduces a surprising idea that we are capable of knowing one another's meaning without need to arrive at that knowledge by interpretation, implying that we have direct access not only to what we mean by "+", but also to what others mean by this sign. Based on this, McDowell refutes Kripke's skepticism by arguing that it stems from a non-conceptualist view of the mind. In response, McDowell contends that, by adopting a conceptualist stance, the problem dissolves, as the shared command of language equips us with conceptual capacities that make our minds available to one another. (p. 119)

Now this is difficult to understand, to say the least. Precisely how do I have "direct access" to what you mean by 'coherence' or 'legislative intent', 'harm', say? I cannot see that the author really explains this. Thus while McDowell's view is suggestive and intriguing, one may well wonder if it is really sufficient to halt the regress, if there is one.

6. Refutation of the Underdetermination Argument

The underdetermination argument, the author explains, has it that all internal legal statements are systematically false, and that this is so because the norms the statements refer to (presuppose or assert) do not satisfy the interpretive procedure established by the proper method of interpretation, as there is no such method. If the underdetermination argument is right, legal error theory is thus the proper theory about internal legal statements: they are systematically false (or meaningless). However, for a method of interpretation to be proper, he explains, it must have legally relevant support, and he proceeds to consider three ways of providing such support: (i) that there is a theory of meta-interpretation, or a method of interpretation, that is binding law; (ii) that there is a knock-down argument that establishes that all but one of the competing theories are wrong and that the remaining theory is therefore the right theory; and (iii) that there are several theories of meta-interpretation, that those theories are on a par, that is, there are unbiased, non-zero evaluative differences between the theories, and that this means that internal legal statements will refer to disjunctions of such theories that are on a par and will thus provide non-unique correct answers to interpretive questions.

The author rejects alternative (i) on the grounds that it is very rare for a theory of meta-interpretation, or a method of interpretation, to be established as binding law; and he

rejects alternative (ii) on the grounds that there simply is no such knock-down argument. The author does, however, accept alternative (iii). The idea defended, then, is that an internal legal statement may express a disjunctive proposition, such as Norm *N* satisfies method of interpretation *M1,* or method of interpretation *M2*, or method of interpretation *M3 all of which are on a par*. I believe the alternative defended by the author, following Ruth Chang, is interesting, plausible, and a nice contribution to the debates about legal statements and legal reasoning. Of course, in practice much would depend on whether the theories can really be said to be on a par? There will very likely be heated arguments about that.

7. Refutation of the Incoherence Argument

The incoherence argument has it that although the proper method of interpretation must obviously not include conflicting rules of interpretation, the truth of the matter is that for any rule of interpretation there is a conflicting rule of interpretation, and that this means that there will be no proper method of interpretation and thus no true internal legal statements, but only false (or meaningless) ones. The author considers two ways of countering this objection, namely, (i) that there are, or may be, higher-order rules of interpretation that will settle any conflict between first-order rules of interpretation, and (ii) that if the conflicting rules of interpretation are on a par, we may say that to this extent any method of interpretation will provide us with two or more non-unique correct

interpretations of the relevant legal norm. Like the author, I do not think alternative (i) can be successful. Alternative (ii) is, however, interesting. On this analysis, internal legal statements may express disjunctive propositions: Norm N satisfies Rule of interpretation A, or rule of interpretation B, or rule of interpretation C. If either of these alternatives work out, the quasi-cognitivist can refute the claim that internal legal statements are systematically false.

There is one problem that the author does not consider, however, but that deserves mention, namely that if each and every rule of interpretation (call it the main rule) has a counter-rule, as the author maintains, and if in all cases the main rule and the counter-rule are on par, so that one who makes an internal legal statement is expressing a disjunctive proposition, according to which the internal legal statement is in keeping with the main rule *or* the counter-rule, one seems to allow that in each and every case the proper interpretation of the legal materials would be something like "Do X" or "Do not X" or "X is legal" or "X is not legal"; but this appears to amount to an admission that law is completely indeterminate and so cannot guide behavior. This does not seem right, does it? And if it isn't right, the author has not succeeded in countering the incoherence objection; and if he has not succeeded in countering the incoherence objection, by his own reasoning, the quasi-cognitivist account of internal legal statement has been undermined.

My final comment is that I believe that the author should have said something about a possible objection to the organization of the dissertation, namely, that in discussing the three objections at length he is really discussing the possibility of there being a correct method of interpretation, an interesting topic, to be sure, but different from the nature of internal legal statements. If he is indeed discussing internal legal statements, he is focusing on the question of whether they can be true at all rather than the content of such statements. And if this is so, he should, as I have said, have considered the possibility that while they can be true, they can't be false, but only meaningless. The objection could be formulated thus: while the dissertation is, formally speaking, about internal legal statements, it is, substantively speaking, about legal interpretation. Why then maintain that it is about internal legal statements?

I find, however, that despite my various complaints, the dissertation is a serious and interesting work by an able legal scholar. There can be no doubt that the dissertation passes the bar and should be accepted. I thus confirm that the doctoral thesis by Michał Wieczorkowski entitled 'Having the Law Both Ways: A Defense of a Quasi-Cognitivist Picture of Internal Legal Statements' demonstrates the candidate's general theoretical knowledge in the field of legal sciences and his ability to conduct independent research, and presents an original solution to a scientific problem. It therefore meets the requirements set for doctoral theses as specified in the Act of July 20, 2018, The Law

on Higher Education and Science. Based on this, I recommend that the candidate be admitted to the subsequent stages of the doctoral process.