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*Indirectly and Directly Evaluative Legal Theory: a Reply to Julie Dickson*

ABSTRACT:

Owing to its methodological approach legal theory is usually divided into descriptive, presumably non-evaluative, and normative, i.e. evaluative and justificatory, legal theory. In her *Evaluation and Legal Theory* Julie Dickson rejects this dichotomy. She argues that all legal theory is evaluative in one way or another. Therefore, she introduces a dichotomy between indirectly evaluative and directly evaluative legal theory. Whereas directly evaluative legal theory has the task of evaluating law morally, indirectly evaluative legal theory makes evaluative judgements as to what features of law are most important and significant to explain. In my paper I first set out Dickson's account of the "evaluative-but-not-morally-evaluative" view of legal theory and then critically examine this account. Finally, I make some remarks concerning the fruitfulness of Dickson's dichotomy between indirectly and directly evaluative legal theory.

KEYWORDS:

methodology of legal theory, indirectly evaluative legal theory, Dickson, judgements of importance

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*1. Misleading Distinction between Descriptive and Normative Legal Theory – 2. (Kinds of) Values in Legal Theory – 3. Nature of the Value of Importance – 4. Directly and Indirectly Evaluative Legal Theory – 5. Dichotomy Directly/Indirectly Evaluative Legal Theory Reconsidered – 6. Fruitfulness of Directly/Indirectly Evaluative Legal Theory Dichotomy*

*1. Misleading Distinction between Descriptive and Normative Legal Theory*

Descriptive legal theory is traditionally understood as the theory of law which, seeking to be explanatorily adequate, aims to accurately identify and explain the necessary or essential features of law, i.e. it aims to give an account of law “as it is”, in contrast to normative legal theory which, in order to construct an explanatorily adequate theory of law, morally evaluates and justifies law (according to principles of political morality), i.e. it aims to give an account of law

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“as it ought to be”<sup>1</sup>. Given its central task – that of identifying and explaining the essential (necessary) features of law (or identifying and explaining the nature of law) – it is said that descriptive legal theory only describes law, i.e. that it is purely descriptive in character or value-free (value-neutral)<sup>2</sup>. On the other hand, normative legal theory, which takes as its starting point the fact that there cannot be an adequate account of law “as it is” which is distinct from an account of how it “ought to be”, evaluates law (especially morally) and tries to show when law is morally justified and is therefore seen as a value-laden theory of law<sup>3</sup>.

J. Dickson rejects the descriptive/normative dichotomy. She finds it problematic, unhelpful and misleading for several reasons<sup>4</sup>. First, the dichotomy gives the impression that the answer to the question of whether it is possible to have an adequate account of law “as it is” which is distinct from an account of how it “ought to be” can be provided by just two methodological camps<sup>5</sup>. Second, it «fails to do justice to the complexity of the meta-theoretical issues which the question is intended to address, and often leads to serious misrepresentations of the views of some legal theorists»<sup>6</sup>.

<sup>1</sup> See PRIEL 2008a, 644-649; COLEMAN 2001, 179; HART 1997, 239-244; DICKSON 2001, 4 and 30; DICKSON 2009; RODRIGUEZ-BLANCO 2006, 26-28.

<sup>2</sup> See DICKSON 2009, 1-2; PRIEL 2008a, 644-646. For an example of this methodological view, see HART 1997, 239-244.

<sup>3</sup> See DICKSON 2009, 2-3; PRIEL 2008a, 645, 646 and 649. For an example of this methodological view, see FINNIS 1984, 3-22; FINNIS 2003, 107-129; DWORKIN 2004, 1-37.

<sup>4</sup> For other criticisms of the use of the descriptive/normative dichotomy in presenting methodological positions in legal theory, see, e.g., COLEMAN 2001, 175 ff.

<sup>5</sup> See DICKSON 2001, 30.

<sup>6</sup> DICKSON 2001, 30; DICKSON 2004, 137.

Third, it is «overly simplistic and fails to capture some important distinctions between theories and theorists as regards their views on correct jurisprudential methodology»<sup>7</sup>. And fourth, it 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»<sup>8</sup>.

Therefore, Dickson suggests a different approach to methodological issues in the field of legal theory. These issues, as Dickson claims,

«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?»<sup>9</sup>.

However, regarding the corner-stone of Dickson's new approach to methodological issues – namely, the role of evaluation as «one particular meta-theoretical theme»<sup>10</sup> – one should already at this early stage raise the question of whether “evaluation” might represent the grounds for identi-

<sup>7</sup> DICKSON 2001, 31. «For example, the “two tribes” view glosses over such matters as the difference between the moral evaluation and moral justification theses and the difference between both of these and the beneficial moral consequences thesis, and may also encourage the obfuscatory myth that some approaches to legal theory – in particular legal positivism – attempt to present an account of law which is value-free» (DICKSON 2001, 133-134).

<sup>8</sup> DICKSON 2001, 31.

<sup>9</sup> DICKSON 2001, 8.

<sup>10</sup> DICKSON 2001, 3.

fyng different (and, in a stronger sense, perhaps opposite), non-overlapping methodological positions. In order to represent such grounds, “evaluation” should be a necessary and sufficient or at least the most important condition for identifying different methodological approaches. Despite her illuminating effort to emphasize various kinds of evaluation in legal theory, on whether “evaluation” truly is such a condition – and I certainly do not conclusively say that it is not – Dickson seemingly remains silent.

## 2. *(Kinds of) Values in Legal Theory*

As has already been mentioned, the starting point of Dickson’s discussions about methodology issues in legal theory is the question «to what extent, and in what sense, must a legal theorist make value judgements about the law in order to construct a successful analytical jurisprudential theory?»<sup>11</sup>. In trying to answer this question Dickson first identifies three 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 and c) moral values.

The first kind of values consists of purely meta-theoretical (or epistemic) values. Any theory of a concept, be it in social or natural sciences, is governed by a range of epistemic norms (values, virtues), such as simplicity, coherence, clarity, comprehensiveness and consilience, and any theory of a concept which aims at being a successful theory of its subject matter is committed to these norms<sup>12</sup>. This being the case,

<sup>11</sup> DICKSON 2001, 29.

<sup>12</sup> See DICKSON 2001, 32; DICKSON 2004, 125; COLEMAN 2001, xxii and 3; Leiter 2003, 34-35.

legal theorists «as much as theorists of any other sort, must necessarily be in the business of making evaluative judgements in the course of constructing their theories so as to ensure that they exhibit these virtues to the highest possible degree»<sup>13</sup>. This kind of values Dickson terms “purely meta-theoretical” since the values theorists try to achieve in constructing their theories «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»<sup>14</sup>. Due to the fact that legal theory, as any other theory, necessarily engages in this purely meta-theoretical (epistemic) evaluation, Dickson claims that legal theory cannot be value-free at least in this rather “banal sense”<sup>15</sup>.

The second kind of values, and the most important for Dickson’s new methodological approach to legal theory, consists of just one value, i.e. of one type of values of importance. This value, according to Dickson, is applied in the course of making judgements of importance or significance regarding a particular social practice studied by theories of law<sup>16</sup>.

In addressing the issue of judgements of importance or significance Dickson first recalls Finnis’s claim that «there is no escaping the theoretical requirement that a judgment of *significance* and *importance* must be made if theory is to be more than a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies»<sup>17</sup>. It is plain from Finnis’s quotation that judgements of importance and

<sup>13</sup> DICKSON 2001, 33.

<sup>14</sup> DICKSON 2001, 34-35.

<sup>15</sup> DICKSON 2001, 31-33. For this point, see also COLEMAN 2001, 177-178.

<sup>16</sup> See DICKSON 2004, 125-126.

<sup>17</sup> FINNIS 1984, 17; DICKSON 2001, 38-39.

significance made in this sense are just one theoretical requirement relating to any theory of a concept which is striving to be a successful theory of its subject matter. Therefore, Dickson labels this sort of judgements of importance as

«purely meta-theoretical value-judgements which are applicable to theories concerning any subject matter whatsoever and which do not yet tell us anything particularly interesting about the task of *legal* theory. Indeed, as presented by Finnis in this passage, the requirement seems no more than an elucidation of what it is for something to *be* a theory at all, rather than the presentation of a “rubbish heap” of facts»<sup>18</sup>.

However, Dickson goes on to claim that Finnis also distinguishes one other way in which judgements of importance and significance «are woven into the particular type of enterprise which *legal* theorists are engaged upon, owing to the nature of the data with which legal theory is concerned»<sup>19</sup>. In support of her interpretation of Finnis's stance, she quotes the following passage from the first chapter of Finnis's *Natural Law and Natural Rights*:

«So when we say that the descriptive theorist (whose purposes are not practical) must proceed, in his indispensable selection and formation of concepts, by adopting a practical point of view, we mean that he must assess importance or significance in similarities and differences within his subject-matter by asking what would be considered important or significant in that field by those whose concerns, decisions, and activities create or constitute the subject-matter»<sup>20</sup>.

<sup>18</sup> DICKSON 2001, 39.

<sup>19</sup> DICKSON 2001, 39.

<sup>20</sup> FINNIS 1984, 12. See DICKSON 2001, 39.

This point, according to Dickson, is also supported by the following passage from J. Raz:

«Legal theory contributes [...] to an improved understanding of society. But it would be wrong to conclude [...] that one judges the success of an analysis of the concept of law by its theoretical sociological fruitfulness. To do so is to miss the point that, unlike concepts like “mass” or “electron”, “the law” is a concept used by people to understand themselves. We are not free to pick on any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us to understand how people understand themselves. To do so it does engage in evaluative judgement, for such judgement is inescapable in trying to sort out what is central and significant in the common understanding of the concept of law»<sup>21</sup>.

For Dickson, then,

«what both Raz and Finnis seek to bring to our attention is that the data or subject matter which legal theory addresses is itself already shot through with evaluations of what is important and significant about it, because that data partly consists in beliefs and attitudes about the law and actions in light of the law on the part of those subject to it»<sup>22</sup>.

Because law is a type of concept already used by people to understand themselves – as opposed to concepts that do not have this function (like natural concepts of “mass” or “electron” or the concept of “ritualism” from the field of criminology) –

<sup>21</sup> RAZ 1994, 237. See DICKSON 2001, 40.

<sup>22</sup> DICKSON 2001, 40.

«any explanatorily adequate legal theory must, in evaluating which of law's features are the most important and significant to explain, be sufficiently sensitive to, or to take adequate account of, what is regarded as important or significant, good or bad about the law, by those whose beliefs, attitudes, behaviour, etc. are under consideration»<sup>23</sup>.

«The legal theorist», says Dickson, «is thus not merely engaging in evaluative judgements regarding that which is important and significant about his data, as any theorist must, but is making evaluative judgements regarding what is important and significant about law which take account of, and attempt to explain, the way in which it is viewed by those living under it»<sup>24</sup>.

And in doing so, he does not merely “record and reproduce”, but *evaluates* «the self-understandings of participants in explaining law's important and significant features»<sup>25</sup>.

Finally, the third kind of values applied in constructing some of the theories of law (i.e. normative theories of law) – theories which Dickson herself is not a proponent of – consists of moral values, i.e. «values that bear on the questions of practical reasonableness»<sup>26</sup>. Some legal theorists, says Dickson, endorse the view that in order to evaluate which features of law are important, and to explain them, it is not merely enough to apply a meta-theoretical evaluation, but also to morally evaluate the law<sup>27</sup>.

<sup>23</sup> DICKSON 2001, 43.

<sup>24</sup> DICKSON 2001, 43.

<sup>25</sup> DICKSON 2004, 139. See also DICKSON 2011, 493-495.

<sup>26</sup> LEITER 2003, 35.

<sup>27</sup> DICKSON 2011, 36 and 45-47. For an example of this view, PERRY 1998, 462-466; FINNIS 1984, 3.

### 3. *Nature of the Value of Importance*

As the role of meta-theoretical values is not controversial, and moral evaluation is not something in which Dickson's new methodological approach to legal theory, i.e. the so-called indirectly evaluative legal theory, is engaged, I will advance some remarks on the second kind of values on Dickson's value-list, specifically, on the nature of the value of importance.

Dickson, as we have seen, places the value of importance somewhere between meta-theoretical (epistemic) and moral values<sup>28</sup>. However, as McBride has correctly noticed, she does not specify the precise nature of the value of importance<sup>29</sup>.

After having quoted Finnis and Raz, Dickson concludes that there are two types of judgements of importance – those that relate to any theory of a concept, thus falling within the ambit of general meta-theoretical requirements, and those that relate exclusively to *legal* theory, for they bear upon the nature of the particular data with which legal theory deals. However, it is not apparent that this conclusion ensues from what Finnis and Raz say. In the quotation Dickson takes from Finnis, Finnis does not specifically emphasize the nature of data with which legal theory deals nor does he denote the alleged nature of data as something peculiar to *legal* theory

<sup>28</sup> For the view that «there exists a mode of evaluation which is neither “purely meta-theoretical” nor a form of moral evaluation», see HENDRIX 2003, 339. For the view that judgements of importance are not «typical meta-theoretic, epistemic values» because «the kinds of values lying behind judgments of the relative importance or centrality of features of law [...] are substantive, human goods, practical values», see POSTEMA 1998, 334.

<sup>29</sup> See MCBRIDE 2003, 664. For the same point, see HIMMA 2001, 569.

which, therefore, according to Dickson, apart from applying the value of importance as a meta-theoretical value, also makes different use of this value, namely, as a means for determining what is important for the participants of legal practice. Quite the opposite, it seems, follows from another quotation from Finnis's *Natural Law and Natural Rights*:

«analytical jurisprudence in particular and (at least the major part of) *all the social sciences in general* can have no critically justified criteria for the formulation of general concepts peculiar to particular peoples and/or to the particular theorists who concern themselves with those people» (emphasis added)<sup>30</sup>.

Similarly, neither does Dickson's conclusion follow from Raz's quotation taken from the same essay (*Authority, Law and Morality*) from which Dickson singles out Raz's claim quoted above:

«The argument [of this essay]», says Raz, «is indeed evaluative, but in the sense that *any good theory of society* is based on evaluative considerations in that its success is in highlighting important social structures and processes, and every judgment of importance is evaluative» (emphasis added)<sup>31</sup>.

One might, therefore, claim that there are not two different senses in which one ought to understand the value of importance when used in constructing a theory of law. The alleged second "meaning" of the value of importance, or another "way" of determining the important and significant features of an analysed concept, is no more than a meta-theoretical

<sup>30</sup> FINNIS 1984, 18.

<sup>31</sup> RAZ 1994, 235.

value applied by a theorist in the course of demarcating his object of inquiry from other similar phenomena<sup>32</sup>. And this holds irrespective of whether we speak of a concept that people use or of a concept people do not use to understand themselves. As any theorist who wishes to provide an adequate account of a concept that people do not use to understand themselves has to determine the important features of the concept by choosing from among a number of features those he holds important in order for his theory to be coherent, thus also any theorist who wishes to provide an adequate account of a concept people do use to understand themselves has to determine the important features of the concept by choosing those features that are central to and important for the people to whom the concept applies (in our case, important for those subject to law). A concept of law is certainly not the only concept people use to understand themselves. For example, morality, religion or custom are the same type of concept.

However, meta-theoretical values (including the value of importance if understood as a meta-theoretical value) cannot be part of a classification aiming to distinguish between value judgements a theorist makes about the *phenomena he seeks to*

<sup>32</sup> For a similar argument, see LEITER 2003, 32-37 and 40-43. That the judgement of importance is a meta-theoretical value, see HART 1989, 39; MCBRIDE 2003, 664; HIMMA 2001, 569. For an argument concerning the meta-theoretical nature of considerations (judgements) of importance («Can a theory be comprehensive if it does not include everything of importance about our object of inquiry?») but also for a possible distinction between considerations of importance («[...] decisions about importance should be thought of as *setting out the questions prior to the beginning of our inquiry*») and other theory-construction considerations («[...] they are taken into account (logically, if not practically) only after some raw conclusions about our object of inquiry have been drawn»), see PRIEL 2007, 192-193.

*characterise* in order to construct a successful theory of law. The criteria for this classification should include the way in which a legal theorist evaluates his object of inquiry (the phenomena he seeks to characterise), i.e. how he evaluates law (and its features), and not the way in which one should evaluate methodological correctness of the theory itself.

#### 4. *Directly and Indirectly Evaluative Legal Theory*

The value of importance and moral values play a central role in what Dickson labels indirectly and directly evaluative propositions which are the basis of her newly introduced methodological dichotomy between directly and indirectly evaluative legal theory.

According to Dickson, directly evaluative propositions are «those propositions which ascribe value or worth to something in [the] fundamental sense of accounting it as good»<sup>33</sup>. Of course, subject to the condition that there are other basic categories of value, «then the form of this proposition will be the disjunct of all of the basic categories of value, for example “X is good or right or obligatory” etc.»<sup>34</sup>. Directly evaluative propositions, says Dickson, «are those which are of the form, or which entail propositions which are of the form “X is good”»<sup>35</sup>. When referring to law, they include, for example, the following propositions: «“obedience to law is good”; “there is a general obligation to obey the law”; “law necessarily possesses legitimate moral authority over its subjects”, and “the law is morally justified”»<sup>36</sup>. The other type of propositions are

<sup>33</sup> DICKSON 2001, 51-52.

<sup>34</sup> DICKSON 2001, 52, n. 1.

<sup>35</sup> DICKSON 2001, 52.

<sup>36</sup> DICKSON 2001, 52.

the so-called indirectly evaluative propositions. These propositions, claims Dickson,

«state that a given X has evaluative properties but do not entail directly evaluative propositions stating this same X is good (or bad). An indirectly evaluative proposition of the form “X is an important feature of the law”, is thus a proposition which attributes some evaluative property to that feature of the law, but which does not entail a directly evaluative proposition that the feature of the law in question is good (or bad). Another way of putting this might be to say that in the case of a proposition like “X is an important feature”, the evaluation concerned does not go to the substance or content of the subject of the proposition in the same way as is the case with a directly evaluative proposition. In asserting that “X is an important feature”, we are accounting the *existence* of some X as significant and hence worthy of explanation, not directly evaluating as good or bad the substance or content of that X»<sup>37</sup>.

The distinction between directly and indirectly evaluative propositions, as Dickson believes, is capable of solving the following puzzle:

«how is it possible for a legal theory to make evaluative judgements about its *subject matter* in the way which it must in order to be explanatorily adequate, and yet simultaneously to hold that it is not engaging in judgements of the moral merit of features of the law?» (emphasis added)<sup>38</sup>.

However, as it follows from the distinction Dickson makes

<sup>37</sup> DICKSON 2001, 53.

<sup>38</sup> DICKSON 2001, 51.

between directly and indirectly evaluative propositions, directly evaluative propositions are propositions about the *substance* of the subject matter of a theory – hence also propositions about the subject matter itself, while indirectly evaluative propositions are propositions about the *existence* of the subject matter of a theory – hence not also propositions about the subject matter itself. To merely say that the object of inquiry exists and that its existence is important does not itself tell us anything about what the object of inquiry really is, which, according to Dickson, is the main task of explanatorily adequate legal theory: «attempting to identify and explain the nature of law» by searching for and explaining «those properties of law which make it into what it is»<sup>39</sup>.

Setting aside for a moment this initial remark regarding the distinction between types of propositions, let us first see what are the bases on which one should determine that something is important to explain and on which one should then make indirectly evaluative propositions regarding law<sup>40</sup>. For that is, says Dickson, «vital to a proper understanding of the methodological approach» which she labels *indirectly evaluative legal theory*<sup>41</sup>.

According to Dickson, «indirectly evaluative propositions such as that some X is significant and important to explain *can* be supported or justified by directly evaluative propositions concerning that same X»<sup>42</sup>. For example, on the basis of knowledge that a feature of law is good and justified, we can infer that this same feature is important to explain. However, as Dickson claims, this is certainly not the *only* way of infer-

<sup>39</sup> DICKSON 2001, 17-18 and 89.

<sup>40</sup> For criticisms of Dickson's list of the bases for determining which features of law are important to explain, see BAYÓN 2010, 16-17.

<sup>41</sup> See DICKSON 2001, 58.

<sup>42</sup> DICKSON 2001, 58.

ring the importance of some feature of law and of identifying those «which best reveal the distinctive character of law as a special method of social organisation»<sup>43</sup>. There are four other ways of supporting indirectly evaluative propositions which ultimately form the grounds for the enterprise of the so-called indirectly evaluative legal theory:

«indirectly evaluative propositions which state that some feature of the law, X, is important to explain may also be supported by the fact that X is a feature which law invariably exhibits, and which hence reveals the distinctive mode of law's operation; by the prevalence and consequences of certain beliefs on the part of those subject to law concerning X, indicating its centrality to our self-understandings; by the fact that the X in question bears upon matters of practical concern to us; and/or by the way in which X is relevant to or has a bearing upon various directly evaluative questions concerning whether it and the social institution which exhibits it are good or bad things»<sup>44</sup>.

Building on the distinction between directly and indirectly evaluative propositions, Dickson sets out a new dichotomy of jurisprudential methodological approaches, i.e. a dichotomy between directly and indirectly evaluative legal theory, thus eventually seeking to show that all theories of law *are* evaluative, although perhaps in different ways.

Directly evaluative legal theory, as defined by Dickson, is a theory «which contains at least one proposition which is a directly evaluative proposition concerning features of the law (or which contains at least one proposition which entails a directly evaluative proposition concerning features of the

<sup>43</sup> DICKSON 2001, 58.

<sup>44</sup> DICKSON 2001, 64.

law)»<sup>45</sup>. As an example of such a methodological approach, she takes Finnis's theory of law because «his account contains directly evaluative propositions which make judgements about the goodness of the law and the moral obligations which it creates, in the course of identifying and explaining law's important features»<sup>46</sup>. On the other hand, indirectly evaluative legal theory, as Dickson defines it, is

«an account of law which is supported by indirectly evaluative propositions concerning the importance and significance of certain features of the law, but which does not itself have to enter into the business of making directly evaluative judgements concerning whether those features, and the social institution which exhibits them, are good or bad, justified or unjustified»<sup>47</sup>.

As an example of this methodological approach, she cites Raz's theory of law, for Raz's jurisprudential inquiry is of a kind «primarily concerned not with the moral or immoral content or substance of what the law is up to, but rather with the institutional mode of law's operation» and has as its major task

«to pick out and explain which are the most important features of that mode of operation, including the institutional routes via which law operates, and the distinctive ways in which the law impinges upon and shapes our practical reasoning processes, and bears upon matters which are of practical concern to us»<sup>48</sup>.

<sup>45</sup> DICKSON 2001, 65.

<sup>46</sup> DICKSON 2001, 65.

<sup>47</sup> DICKSON 2001, 66-67.

<sup>48</sup> DICKSON 2001, 126.

Therefore, to distinguish between directly and indirectly evaluative legal theory is to distinguish between a theory «which picks out certain features of the law as central to our social experience and hence important to explain on the one hand» and a theory «which returns a moral judgement on the goodness or otherwise of those features of the law» on the other<sup>49</sup>. Engaging in the enterprise of directly evaluative legal theory in itself requires of a legal theorist to engage in direct or moral evaluation of important features of law. However, according to Dickson, a legal theorist engaged in the enterprise of indirectly evaluative legal theory is also required to make value judgements, i.e. to engage in an «indirect evaluation of the importance of certain structural features of the law and of legal institutions which are central to our self-understanding»<sup>50</sup>. And this is the reason why Dickson asserts that it is «quite clear why “value-free” is a totally inaccurate characterisation of such an approach, and why “descriptive” is misleading at best»<sup>51</sup>.

##### 5. *Dichotomy Directly/Indirectly Evaluative Legal Theory Reconsidered*

The question arising from Dickson’s distinction between directly and indirectly evaluative legal theory is the following: are the terms *direct* and *indirect* (evaluation) or *directly* and *indirectly* (evaluative legal theory), as they are supposedly taken to mean, used as adjectives or adverbials expressing manner?

If Dickson uses them with the meaning of adjectives, then with her use of words “direct”/“indirect” (evaluation)

<sup>49</sup> DICKSON 2001, 121.

<sup>50</sup> DICKSON 2001, 126.

<sup>51</sup> DICKSON 2001, 67.

or “directly”/”indirectly” (evaluative legal theory) Dickson more closely describes (determines) the evaluation made by the evaluator. In this case, direct evaluation (e.g. X is a *moral/justified* feature of Y) would, then, be an evaluation behind which no judgement of the evaluator on some other value of the object of inquiry is hidden. In contrast, indirect evaluation (X is an *important* feature of Y) would, then, be an evaluation entailing, in addition to the judgement of importance of some feature, the evaluator’s judgement on some other value of the object of inquiry or this same feature (e.g. to the effect that the object of inquiry or one of its features is also good or bad, moral or immoral). However, it seems that Dickson does not support this interpretation of indirect evaluation<sup>52</sup>.

If, on the other hand, she uses words “direct”/”indirect” or “directly”/”indirectly” with the meaning of adverbials expressing manner, this then means that the evaluator is undertaking an evaluation of the object of inquiry in an indirect way, i.e. that he is evaluating indirectly. When referring to an evaluation as ‘indirect’ in terms of an adverbial expressing manner, two possible interpretations obtain. First, by making a judgement of importance the evaluator is indirectly (in an indirect way) expressing his judgement on some other value of the object of inquiry or one of its features (e.g. that the object of inquiry or one of its features is also good or bad, moral or immoral), which interpretation Dickson explicitly excludes as a possibility<sup>53</sup>. Second, the evaluator is making his judgements of importance indirectly (in an indirect way) by taking as their basis evaluations made by the participants of the evaluated practice. And this interpretation of indirect evaluation is what Dickson seem-

<sup>52</sup> See DICKSON 2001, 53.

<sup>53</sup> See DICKSON 2001, 68-69.

ingly hints at<sup>54</sup>. However, not all possible ways of supporting indirectly evaluative propositions that Dickson lists entail participants' evaluations (for example, the fact that some features law invariably exhibits).

It follows from the above that Dickson uses the terms "direct"/"indirect" (evaluation) and "directly"/"indirectly" (evaluative legal theory) as adverbials expressing manner, i.e. in order to denote a way in which a legal theorist makes judgements on the values of his object of inquiry or some of its features<sup>55</sup>.

However, cannot a legal theorist who considers it his task to evaluate the subject matter of his theory as moral or immoral, good or bad, and whom Dickson, therefore, puts within the ambit of directly evaluative legal theory, also make judgements on these values 'indirectly' (e.g. on the basis of evaluations made by participants of the practice under evaluation)? The answer to this question could be borne out by a quotation from Finnis: «the actions, practices, etc., can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, *as conceived by the people who performed them, engaged in them, etc...*» (emphasis added)<sup>56</sup>. Or, *vice versa*, could not a legal theorist who evaluates some feature of the subject matter of his theory as important and significant to

<sup>54</sup> See the example of an agnostic observer who wants to understand the Roman Catholic mass which he is attending, in DICKSON 2001, 68-69.

<sup>55</sup> On the problematic and «unhelpful "directly"/"indirectly" terminology», see KRAMER 2003, 210-211. For the view that «it would be simpler and more accurate to describe» indirect evaluation «as a direct evaluation of the practice from a particular theoretical position» because «it represents what that theoretical perspective sees of value in the practice», see HALPIN 2006, 78-79.

<sup>56</sup> FINNIS 1984, 3.

explain, thus, according to Dickson, engaging in the enterprise of indirectly evaluative legal theory, make the evaluation “directly” (e.g. through introspection and on the basis of intuition)<sup>57</sup>? This would then be a defensible sense in which the making of judgements of importance by the legal theorist could be interpreted as his own act of evaluation<sup>58</sup>. For indirect evaluation, as expounded by Dickson, requires of a theorist only to describe (and not to evaluate) what those subject to law consider as important<sup>59</sup>.

Furthermore, if taken in the sense in which Dickson defines it, the dichotomy indirectly/directly evaluative legal theory seems inadequate for several reasons. First, it lacks discriminating thrust. Certain important legal theorists (whom Dickson herself describes as proponents of a particular methodological approach to legal theory), such as Dworkin and Finnis, would, according to this dichotomy, be assigned to the category of directly evaluative legal theory. However, before setting out to evaluate law morally (“directly”), they first have to determine (“indirectly”) which features of law are important to explain<sup>60</sup>. Hence, on the methodological level they satisfy the criteria for both indirectly and directly evaluative legal theory. To that extent it seems that the dichotomy indirectly/directly evaluative legal theory is inadequate for it, in fact, represents two degrees (steps) of the methodological approach the order of which is fixed (namely, 1. indirectly, 2. directly), thereby dividing legal theorists into those who stop at the second step and those who go through both steps when constructing their theoretical un-

<sup>57</sup> On the use of introspection and intuition, rather than the participants’ attitudes (beliefs, judgements, views) in the course of, for example, identifying samples of law, see PRIEL 2007, 178-179.

<sup>58</sup> For an alternative view of this point, see HALPIN 2006, 78-79.

<sup>59</sup> See PRIEL 2007, 186.

<sup>60</sup> See DICKSON 2009, 2-3; DICKSON 2004, 123-124.

derstandings of the nature of law. Second, the dichotomy indirectly/directly evaluative legal theory seems misleading for it implies that there exist two clearly demarcated, internally homogenous, mutually exclusive, and opposed methodological positions, which, as it has already been shown, is not the case<sup>61</sup>. Third, the so-called indirectly evaluative legal theory does not seem to articulate a particular methodological approach to *legal* theory. A legal theorist engaging in the enterprise of indirectly evaluative legal theory uses indirect evaluation (i.e. the making of judgements of importance) only to determine and demarcate the subject matter of his theory in the way any other theorist, not exclusively a *legal* theorist, does. In explaining the subject matter of his theory (i.e. in explaining those features he has evaluated as important), he no longer uses evaluation but rather, merely describes the subject matter<sup>62</sup>. On the other hand, a legal theorist engaging in the enterprise of directly evaluative legal theory uses direct evaluation (i.e. moral evaluation) also when explaining the subject matter of his theory. Fourth, it is not justified to denote a dichotomy by adverbials expressing the manner in which evaluation is conducted and then to attach a single value (i.e. importance) to one part of the dichotomy (i.e. indirectly evaluative legal theory) and a multitude of values (moral/immoral, good/bad, correct/incorrect, justified/unjustified, right/wrong, etc.) to the other (i.e. directly evaluative legal theory). Not to mention that in this way the dichotomy misleadingly levels the value of importance with values such as morality, justice and correctness<sup>63</sup>.

<sup>61</sup> For the same argument concerning the dichotomy descriptive/normative legal theory, see BAYÓN 2010, 3.

<sup>62</sup> See MARMOR 2006, 683-704.

<sup>63</sup> For the view that the distinction between direct and indirect evaluation «lends credence to the view that there is no fundamental

However, even if we were to accept Dickson's dichotomy, there is still the problem of the role of judgements of importance in the enterprise of indirectly evaluative legal theory. Some legal theorists emphasize relativity<sup>64</sup> and insufficient objectivity of judgements of importance<sup>65</sup>; others point to their incapability of specifying the object of inquiry<sup>66</sup>. Furthermore, as judgements of importance bear upon insufficiently objective standards for determining what is important, there is also the problem of deciding on competing judgements of importance<sup>67</sup>.

difference between so-called direct and indirect evaluation», see PRIEL 2008b, 439.

<sup>64</sup> According to Bix, «if the construction of a theory comes down to judgments of “importance” and “significance”, this hardly seems the most stable or objective basis for a discussion. “Importance” and “significance” seem like relative terms – “important” for whom? “significant” relative to which purpose? These evaluations seem likely to be matters over which reasonable observers could disagree – and disagree sharply» (BIX 2003, 236).

<sup>65</sup> According to Bix, «importance may be best seen as a statement of utility – an appropriate answer to the question “why is X important?” is “because it helps to obtain Y” – when we still need to find some agreement about proper ends. If we disagree about the purposes of the practice, we are also likely to disagree about which aspects of the practice are important or significant (and why they are so)» (BIX 2006, 53). See also PRIEL 2010, 11.

<sup>66</sup> See PRIEL 2007, 191; PRIEL 2010, 12, n. 5.

<sup>67</sup> According to Priel, «if the aim of the legal philosopher is to give an account of the nature of law by explicating all the important features of it, then there are bound to be disagreements among philosophers as to the important questions of jurisprudence, and if we do not have a way of resolving disputes regarding questions of importance, then disputes among legal philosophers are bound not to have a resolution, and so long as we do not have a standard of assessing importance, there is no way of resolving disagreements about the nature of

## 6. *Fruitfulness of Directly/Indirectly Evaluative Legal Theory Dichotomy*

According to Dickson, the problem with the descriptive/normative dichotomy lies in the fact that *descriptive* is commonly understood in the sense that the legal theorist «need not make any value judgements at all concerning that which he seeks to characterise in his theory» (account of law “as it is”), while *normative* is commonly understood in the sense that the legal theorist will «necessarily be involved in making judgements about the moral value, point or function of the law in order to characterise it adequately» (account of law “as it ought to be”)<sup>68</sup>. This problem, claims Dickson, ensues from the fact «that the is/ought distinction in fact encompasses several different issues which are often confused and/or inadequately understood»<sup>69</sup>. Hence, Dickson proposes a new approach to the is/ought distinction

«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?»<sup>70</sup>.

On the basis of her analysis, Dickson concludes that the so-called descriptivists also have to make value judgements, these being, apart from meta-theoretical judgements (evaluation in the banal sense), judgements on the importance of observed features of law which, when identified as

law» (PRIEL 2007, 195). See also PRIEL 2010, 15; BAYÓN 2010, 15.

<sup>68</sup> DICKSON 2001, 8-9.

<sup>69</sup> DICKSON 2001, 8.

<sup>70</sup> DICKSON 2001, 8.

important, become relevant for determining the nature of law as the subject matter of legal theory.

However, Dickson does not seem to take into account the difference between the two tasks of the legal theorist: 1) to determine (identify) his object of inquiry (i.e. law) and 2) to give an adequate account (explanation) of his object of inquiry. The first task is twofold: a) to identify samples of law and b) to determine the necessary, or necessary and important, or important but not necessarily necessary features of law. This task, in its second stage, requires of the legal theorist, among other things, to make value judgements relating to the construction of any theory whatsoever, namely meta-theoretical or epistemic value judgements. These value judgements certainly include value judgements on the importance of a particular feature of the object of inquiry. In view of the fact that judgements of importance belong to the category of meta-theoretical judgements, they are made by both the so-called descriptivists and the so-called normativists. The difference between descriptivists and normativists emerges, however, in the course of the legal theorist's pursuit of his second task, that is to say in the course of his giving an adequate account (of the nature) of law as the subject matter of his theory. In the case of descriptivists, an adequate account (of the nature) of law is a description and explanation of law "as it is", while in the case of normativists, an adequate account (of the nature) of law "as it is" necessarily implies the taking of a stance «on the moral merit or demerit of the law»<sup>71</sup>.

Therefore, descriptivists are still descriptivists when it comes to the giving of an adequate account of their object of inquiry (and not with regard to the determination/identification of their object of inquiry), while normativists are normativists

<sup>71</sup> DICKSON 2001, 7.

even when it comes to the giving of an adequate account of their object of inquiry (i.e. the nature of law) because in giving this account they also have to make value judgements (as a rule, moral ones) about their object of inquiry. This, therefore, does not mean that descriptive legal theory is value-free. But neither is it value-laden when it comes to its second task – that of giving an adequate account of the nature of law. And this is what distinguishes descriptive and normative theory of law.

Dickson's dichotomy between directly and indirectly evaluative legal theory is, therefore, inadequate because the first of its parts (indirectly evaluative legal theory) is determined on the basis of one element (i.e. on the basis of evaluation included in the first task of legal theory, namely the identification of the object of inquiry, which is common to all theories), and the other (directly evaluative legal theory) on the basis of a different element (i.e. on the basis of evaluation included in the second task of legal theory, namely the giving of an adequate account of law, which varies depending on whether it is carried out by descriptivists or normativists). An adequate dichotomy of methodological approaches, even if one wanted to formulate it exclusively with regard to the role of evaluation, should be grounded in just one of the above types of evaluation. It should proceed either from the type of evaluation used in the course of carrying out the first task of legal theory (i.e. the making of judgements of importance) or from the type of evaluation which can be used in the course of carrying out the second task of legal theory (i.e. the making of moral judgements). However, as both methodological approaches that are traditionally labelled as "descriptive" and "normative" engage in the same type of evaluation, this type of evaluation does not reveal itself as an adequate discriminating element between the two methodological approaches. Therefore, the dichotomy between methodological approaches which is based on the role of evaluation in legal

theory is only possible as dichotomy with regard to the role of evaluation in the second task of legal theory, i.e. in the giving of an adequate account of law.

However, with regard to the latter, Dickson's dichotomy between directly and indirectly evaluative legal theory seems unfruitful. In the course of giving an account of law one methodological approach (i.e. normative legal theory) employs evaluation, while the other (i.e. descriptive legal theory) does not. Hence, it would be correct to speak only of dichotomy between evaluative and non-evaluative legal theory, which eventually does not add anything to what is already implied by the descriptive/normative dichotomy.

In conclusion, Leiter is right in claiming that indirectly evaluative legal theory «is just an instance of descriptive jurisprudence and its application of what Dickson calls “meta-theoretical” [...] values» and that there is «no conceptual space between descriptive jurisprudence (once the Banal Truth is acknowledged) and the normative conception of jurisprudence»<sup>72</sup>.

<sup>72</sup> LEITER 2003, 40. For Dickson's reply to Leiter, see DICKSON 2004, 134-139. For Leiter's reply to Dickson, see LEITER 2007, 194-196.

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