Philosophical Analysis and Historical Inquiry: Theorising Normativity, Law and Legal Thought

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Introduction

What is the relationship between philosophical analysis and historical inquiry? Why is a partnership or tension between the two beneficial for the practice of theory? What specific virtues does historical inquiry bring, and thus what is lost when theorising is restricted to philosophical analysis? And why does all this matter specifically for theorising law and legal thought? It is the task of this chapter to offer some suggestive answers to these questions.

The questions themselves are not new. They have flared up at different times and places, and it would be a matter of interest to investigate why that occurs. The fight to establish the autonomy of philosophical analysis, and the pushback against this – from history, but also other disciplines – seems to be a recurring debate that each generation rediscovers for itself. It was there in the efforts of Jeremy Bentham and John Austin on behalf of analysis, and Sir Henry Maine and others on behalf of history, anthropology, and comparative studies. It was there in HLA Hart's 'perennial questions' and the armchair philosophy of his concept of law, and in Brian Simpson's, William Twining's and others' emphasis on law-in-context. And it is there in recent times, with some standing up for not only the autonomy but also priority of analysis (e.g. John Gardner), and others pushing back against this in various ways – sometimes via the history of ideas (e.g. Gerald Postema, Michael Lobban, Roger Cotterrell, Jeremy Waldron) and sometimes via a more general historical approach, often in tandem with sociology and anthropology or the humanities (e.g. see Nicola Lacey, Christopher Tomlins, Robert Gordon, Brian Tamanaha, Patrick Glenn, Fernanda Pirie).[2] Some areas of the law have seen particularly heated debates on the value and importance of history – international law is the stand out contemporary example[3] – and it would again be interesting to ask why some areas of law attract this debate more than others.

Some of these debates occur against the background of quarrels between philosophy and history – or, as some think of it, between analysis and context – outside of the legal domain. Even if just limit ourselves to the twentieth century, and mention but a few names – e.g. Isaiah Berlin, Alasdair MacIntyre, EP Thompson, Bernard Williams and Quentin Skinner – we can see this debate has been alive and well in the last century. Arguably, all these thinkers sought to find ways of showing how philosophy and history, analysis and context, can and ought to work together, sometimes collaborating and at other times generatively challenging each other. In addition, these, and other, thinkers have all offered powerful arguments for what is at stake – morally and politically – in not losing sight of the crucial value of historical inquiry (for both theory and practice).

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[1] Versions of this paper have been given before a variety of audiences, including at the National University of Singapore, University of Cartagena in Colombia, Jagellonian University in Poland, and the University of Edinburgh. I thank all my hosts and discussants. Special thanks to Michael Lobban, who has been my most patient and long-suffering interlocutor on these issues.

[2] See the Further Reading bibliography at the end of this chapter for some references.

[3] Bardo Fassbender, Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (2012).

And yet, within the legal academy, there continues to be resistance to history. Legal history is often side-lined in legal education, and most if not all topics in the legal syllabus are taught either without any historical sensitivity (e.g. often jurisprudence) or with but a passing nod to the 'origins' of some area of doctrine that is only ever at best recommended reading. How can this be, especially for a subject that so clearly lends itself to historical inquiry, and where there is arguably so much overlap between legal thought and the practice of history?

Part of the answer may be that a good many arguments for the value of historical inquiry for theorising law (both in general jurisprudence and in more doctrinally-oriented legal scholarship) are negative in character. We can challenge philosophical hypotheses historically, or history shows us the time-boundedness, and thus also dispensability, of what we might otherwise treat as perennial or universal questions and concepts. History thus becomes a bit of a spoilsport, a party pooper – it deflates and defuses philosophical enthusiasm. No wonder it is then avoided at all costs by hard-nosed philosophers, who feel anxious their assertions and systems will become but granules of sand and disperse into winds of dust in the glare of history. The challenge, then, is to show the theoretically generative character of historical inquiry. We must ask how thinking historically can both create objects of inquiry and explore them in particular ways – these being ways that cannot be reproduced through philosophical analysis. We must consider how the history of historical inquiry is itself a repository of theoretical insight, and just how much there is to gain – in terms of substance, but also in terms of acquiring certain virtues of thought – by theorising with historical sensitivity.

Needless to add, this is easier said than done. One of the shoals to be avoided in making the case for history is divorcing it too much from philosophy. Thus, it has sometimes been argued that history offers its own kind of irreducible explanation, but one that is essentially incommensurable with the kind of explanation offered by philosophy – e.g. the historical mode of knowing is 'configurational', which requires treating objects as elements in a single complex of concrete relationships, and this is entirely different to, and distinct from, the philosophical mode of knowing, which is 'theoretical', and according to which there are universal types, such that individual entities can be identified as instances of them.[4] Another version of this would be to say that whereas history deals with particulars – including, or perhaps especially, accidental particulars, the world of a million chance encounters – philosophy deals with universals or necessities (Platonic forms, changeless substances). The danger with these approaches is that at the cost of demonstrating the uniqueness of history, they move it further and further away from theoretical significance, including being unable to articulate how both philosophy and history can fruitfully relate to each other.

In what follows, then, I attempt to articulate how historical inquiry is generative theoretically and how it can exist, as part of the broader activity of theorising, in fruitful tension with philosophical analysis. The approach is based on a particular concept of historical inquiry and its resulting historical insights, which I shall present in the first part of the paper. Having done so, the second part of the paper will then offer some suggestive and necessarily sketchy illustrations of the value of historical inquiry for theorising law and legal thought.

[4] See Louis Mink, 'The Autonomy of Historical Understanding' in William Dray (ed.), *Philosophical Analysis and History* (1966). See also Thomas Kuhn, *The Essential Tension* (1977).

I. Historical Inquiry

I begin with two stipulative models (stipulative because I acknowledge this to be just one possible model of philosophical analysis and historical inquiry, respectively):

1. By philosophical analysis, I mean: the creation of an object of inquiry via the pursuit and identification of predominantly (though often exclusively) [5] necessary and sufficient features, which distinguish an object from amongst a pool of objects evaluated to be relevant comparators;

2. By historical inquiry, I mean: 1) the creation of an object of inquiry that a) exists in time; and (at least potentially and sometimes) b) persists through time (across times and places), and 2) a treatment of that object of inquiry as variable both internally and externally, where those variables are a) acknowledged to be contingent; and b) explored via multiple temporalities.

Broadly speaking, then, on these models, whereas philosophy is an art of distinction, of breaking apart and disassociating but also systematising, history is the art of variation, combining change and persistence in time, as well as associating and relating. The general argument, then, is that the practice of theory requires both – without analysis, we lose certain theoretical virtues, e.g. of some degree of consistency (in our language) and without historical inquiry, we lose other virtues, e.g. the reflexivity that comes with recognition of the complexity, including relationality, of an object. Without historical inquiry, the practice of theory is impoverished in all kinds of ways – it loses certain objects of inquiry, it misses out on various aspects of exploring them, and it operates without the benefit of certain theoretical virtues.

In what follows, I focus on unpacking the rather dense model of historical inquiry. In order to facilitate this, and not make it too abstract and obtuse, I will interweave a running example: normativity. This choice is hardly innocent – explaining normativity has been a prominent problem of theorising law. A treatment of this problem from the perspective of philosophical analysis would involve identifying the (necessarily and sufficiently) distinctive features of normativity by distinguishing it from, e.g. naturalism. Thus, as HLA Hart proposed, one may seek to carve out a distinctive space for the normative by distinguishing rules from habits, coercive orders and predictions. One might then argue that only normative, rule-governed behaviour is characterised by the presence of a critical reflective attitude, which consists in persons being aware of the standard of behaviour prescribed or proscribed by the rule, a disposition to criticise those who breach it, and an acknowledgement by others of the legitimacy of that criticism (on the occasion it is made). This attitude is missing from habits, coercive orders and predictions. The evidence for this would consist in, for instance, our ordinary use of the terms, e.g. ‘rule’ and ‘habit’, and several well-crafted examples that generate and support the associated intuition. The philosophical insight, generated by this philosophical analysis, is that normativity, unlike the naturalism of, say habit, is distinguished by the existence of this critical reflective attitude.

It is important to see that there are various judgments at work in the above philosophical analysis. One is that rule-governed behaviour is somehow paradigmatic

[5] For a defense of (legal) philosophical method that includes both necessary and contingent features, see Michael Giudice, *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation* (2015).

of the normative. When historicised, however, we realise that rules are a particular kind of expression of the normative, with their own progeny and cultural associations.[6] For example, we may readily associate (as Hart in fact does) rules with games. Contrast that with norms or values – to speak of norm-governed or value-governed behaviour is already quite different to speaking of rule-governed behaviour, e.g. norms are less likely to be written down than rules, and one might also expect looser inter-personal agreement on what a norm is than on what a rule is.[7] There is, therefore, a judgement being made here (perhaps not very reflexively) as to the importance of rules for the understanding of normativity. Similarly, there is a judgement that the relevant pool of comparators (for rules) are habits, coercive orders and predictions. It is important to see this pool could be quite different, and that the choice of objects to be included in the pool influences what one asserts is distinctive about rules. Once one also sees that this is a choice, one also comes to acknowledge the incompleteness of any philosophical analysis, e.g. comparing rules to, for instance, dispositions or desires, would generate other features one would then present as distinguishing about them. Philosophical analysis, then, is an incomplete process of comparisons judged to be relevant.[8]

The acknowledgment of these limitations of philosophical analysis already opens the door to other modes of inquiry, including historical. Let us then ask: what could historical inquiry bring to the study of normativity? To answer this, let us consider unpack each of the elements in the above stipulative model.

One element of the above model of historical inquiry is that it involves the creation of an object that exists in time. By this I mean, for instance, that the object of inquiry is temporally extended – it is not assumed to be merely existing, but is constructed as existing for a certain length of time, however short or long. Further, it would mean seeing that object as having a before-and-after, i.e. as situated in the course of time.

It is instructive to see how this might work with normativity. Something may be temporally extended in many different ways, for example as (potentially recurring) flickers or moments or as a longer process involving various distinct stages. If we treat normativity as temporally extended in the latter sense, we already begin to raise the possibility of its variability – thus, for example, normativity can come in degrees, which vary over time, whether that means being fragile early on and strengthening with time, or as burning with enthusiasm early on and waning with time. If we think of stages, we might further see aspects of normativity we might not see otherwise, e.g. contestability. Thus, at a first stage, someone might propose or signal something as unacceptable or as taboo; at a second stage, others may agree or not agree, or leave this undecided for some time; at a third stage, there may be a clash over what is to count as unacceptable or there may be tacit agreement, with silence being treated by most as acquiescence to the original proposal. The point is that if we treat our object of inquiry as temporally extended – and, once again, there is a multiplicity of ways in which that temporal extension can be modelled – then this is already theoretically generative. We no longer assume something merely exists – we now consider how it exists in time, whether it

[6] Lorraine Daston is at present at work on a history of rules – for a taste, see Lorraine Daston, 'The Premodern Rule: History of an Epistemic Category', 2016, Working Paper (last accessed online 11 May 2017: http://www.humcenter.pitt.edu/sites/default/files/PittsburghPremodernRulesNov2016.pdf).

[7] See Neil MacCormick, *Institutions of Law* (2007), who works with the example of a norm of queuing.

[8] Of course, the very selection of normativity as a problem requiring explanation is already a judgement – this too is one that can and ought to be historicised. For instance, this language of normativity arguably comes to the fore in the context of methodological debates as to the status of philosophy in a world of science.

can be stretched out over time into distinct stages, or whether it comes to exist ephemerally at ad hoc moments and if so, why.

Similarly, by creating an object of inquiry that exists in time, we do not take for granted its existence, but consider its before-and-after. What comes before normativity? What comes after it has expired? What does normativity tend to be preceded by, i.e. what collection of circumstances tends to create conditions in which it comes to be a question for a group of persons? For instance, do we ask questions about what is acceptable or not, what ought to be, after a period of violence amongst in-group members, or more when a newcomer enters an already stable world of ways of doing? How do these different 'before-s' affect the character of the normativity that arises, or might arise? What might it mean to ask about the 'after-s' of normativity? How does normativity expire? How does, say, a certain set of values come to be seen by members of a group as longer relevant or helpful, or how are norms simply forgotten? Again, the point here is to see that creating an object as existing in time generates possibilities and questions, all of which is theoretically generative.

The creation of objects in historical inquiry involves not only constructing them as existing in time, but as persisting through time and thus existing across times and places. These are, of course, compatible. Thus, one can treat normativity as (for example) a process with distinct stages, while also treating it as something that takes on a different character in different times and places. This latter task has not always been a feature of historical inquiry – for instance, some historians claim that they are providing a portrait of a particular time and place. On the model I am proposing, historical inquiry involves treating something as variable over time. To historicise is, then, to variabilise, for it is to treat something as having a history, in such a way that its character changes. This, naturally, raises the question of what about it changes and the ways in which it does so (internal variables), and what affects that (external variables). It is further important to see that the internal variables of an object of inquiry are not – in historical inquiry – its necessary and sufficient features (the features it must have to be what it is). They are merely contingent aspects of an object that are subject to change.

Thus, with respect to normativity, one of the internal variables may be the size and pool of normative forms, e.g. whether members of community speak only of values, or whether they also speak of (for instance) rules, norms, conventions, standards and principles. This is itself a question one is likely only to ask if one treats normativity as something that changes over time. The pool of relevant possible normative forms is not something static or forever etched into some Platonic heaven. How large that pool is and what kinds of distinctions between forms in the pool are made is contingent – it changes over time. Having proposed this as an internal variable of normativity, one can then explore its external variables, i.e. the variables that affect the size and pool of normative forms. For example, it may be that the size and heterogeneity of a population is likely to affect the size and pool of normative forms. Or it may be that the presence of writing affects (slowly or rapidly?) the emergence of a greater range of normative forms – for instance, we now begin to make distinctions between so-called 'implicit norms' and 'explicit rules'.

The thought that must be resisted here is that there is some underlying, changeless concept (composed of necessary and sufficient features) that enables this kind of variability. Thus, someone might argue: but all this assumes that normativity is essentially about, say, oughtness. Your very grouping of rules, norms, values, etc. has something in common which enables you to treat them as a group that can then vary across time. The problem with this is that 'oughtness' is itself a language that comes into being at a particular time and place, and has no more universal standing than any

other attempt to identify what is necessary or essential about normativity. In other words, to think historically is, in the negative sense, to be conscious of the historicity of any allegedly universal language, and, more positively, to variabilise all the way down. We may, of course, in the process of that inquiry treat something as paradigmatic or exemplary of the object – in the case of normativity, we may think of the rules of games or the virtues of saints – and this will help us in our variabilising. But these associations at the level of examples do not equate to, and are also not inferior (for instance, as a beginning point of theoretical inquiry) to any more systematic analysis of an object (e.g. something that, from the beginning, distinguishes normativity from, say, habits, coercive orders and predictions). On the contrary, beginning with a more systematic analysis already closes down what can be theorised (it takes as given or static certain distinctions, which in fact are not stable). To begin with systematic analysis may have the virtue of internal consistency, but, in the end, it is a less reflexive way of creating an object of inquiry. This does not mean a more systematic analysis cannot be a valuable part of theorising something – it can – but there is no priority here: it is not that analysis comes first, and then an exploration of variability comes second. When, in thinking historically, we treat an object as existing in time and persisting through time, we are also creating an object of inquiry. Further, we do so by treating it as variable over time, without having necessary and sufficient conditions that guarantee its diachronic identity. Historical inquiry resists the search for or need for those kinds of guarantees – instead, it begins with loose associations of examples and then, by variabilising, creates objects of inquiry.

Let me say more about how historical inquiry is sensitive to variability. Here, we come to the last two elements of the model, namely, to the acknowledgment of contingency and to the awareness of multiple temporalities. Both of these are key to the practice of history, and to its unique epistemic virtues.

The acknowledgement of contingency in historical inquiry is best approached by what it is not. It is not a view of the past as 'one damn thing after another', i.e. the acknowledgement of contingency is at odds with a chronicle view of the past. In a sense, this involves resistance to the very talk of 'the past', and a disposition to explore the multiplicity of pasts, including awareness that one can never exhaust that multiplicity. It is an attitude to the past that finds a middle path between two extremes: 1) the over-determination of the past; and 2) the under-determination of the past. To over-determine the past is to treat the past as already prefiguring the present, or a later time as already being implicit or emergent in an earlier time. It is, in short, to treat the past as not being able to have been other than it was. To under-determine the past is effectively to think that how the past occurred does not matter – that there could have been any number of ways in which the past was, but that differences between those ways do not affect our understanding of the present (or some later time). Acknowledgment of contingency steers between over-determination and under-determination, recognising that how the past has been matters, but that there is no way it had to be. This does not necessarily mean identifying chance, accident or coincidence (though it may sometimes); mostly, it means exploring how the past might have been – identifying the possible futures in the past. This attitude to the past comes along with a certain style of describing the past: a subjunctive style, which is attentive to what might have been, what almost occurred, what was nearby causally, what seemed possible and impossible.

If we return to our running example, if we think of normativity as something that exists in time, and thus has a before-and-after, and if we add the element of contingency, we become sensitive to describing how normativity might not have

emerged, and what else may have been possible. Again, the benefits of this sensitivity consist in large part in avoiding over-determination and under-determination. Thus, if one is sensitive to contingency, one will not describe the before of normativity by saying that some norm, say, was already implicit in some practice or activity, waiting only to be made explicit. To do that would be to over-determine the past – to describe an earlier time from the exclusive perspective of a later time. As a result, one will also notice, for instance, the power dynamics involved in the fragile emergence of normativity: someone, somewhere, at someplace, makes an initial judgement that something is unacceptable; that judgement may or may not be accepted by others; even if it is accepted, others may understand the object of the judgment in different ways; a lot needs to happen before a norm of sufficient interpersonal agreement comes to settle in a group of persons – and none of these things are bound to happen. In this context, to be sensitive to contingency – and to the many possible futures of an initial judgement – is to learn something about normativity, e.g. that it depends on certain power (perhaps also affective) dynamics within a group, that there is some arbitrariness to the initial judgment, and that various enabling social circumstances assist in the making of a norm. This element of the model of historical inquiry, then, is also theoretically generative.

It is important to see that acknowledgement of and sensitivity to contingency has come in many varieties in the practice of history, and that there have also been times when historians have been more prone to the over-determination of the past. It would be an interesting exercise to historicise this variation in the practice of history[9] – and thus to examine why, at certain times and places, languages of 'fate' or 'destiny' come to be popular, or why various civilizational or progress-based narratives dominate, or why genres such as prophecy or the apocalypse catch on. Similarly, the acknowledgement of contingency in historical practice can take on different forms, e.g. what-if or as-if histories, counter-factuality, precisely the use of subjunctive language when describing the past, and the self-undermining of the authority of the historian. I mention this because I want to make clear that the model of historical inquiry I propose, although a somewhat ideal model, nevertheless makes room for historical variation.

The final element of the model of historical inquiry is that of awareness of the multiplicity of temporality. Again, this is a crucial part of the model, for thanks to it we can see the history of historical practice as a rich depository of different ways of modelling time, each of which is theoretically generative in its own way.[10] I cannot describe all these possible ways here, nor give each the attention it deserves – the list below is therefore but indicative and suggestive. Here, then, are some different ways in which time has been and may be modelled for the purposes of historical inquiry:

1. Spatialisation of time: we can think of time as linear, cyclical or simultaneous / parallel – and, in the context of normativity, we could thus ask: what are the cycles of normativity? Do norms, in order to be efficacious, need to get renewed within the social dynamics of a group every now and then, and how does that occur? Are there parallel processes that occur alongside normativity – for instance, institutionalisation?

[9] For the Victorian period and its ways of historicising international law in this over-deterministic way, see Jennifer Pitts, 'International Law', in Mark Bevir (ed.), *Historicism and the Human Sciences in Victorian Britain* (2017).

[10] For a similar way of presenting the theoretical significance of history, see William Sewell, *Logics of History: Social Theory and Social Transformation* (2005). See also Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (2002).

2. Speed of time: whether variable or stable, or fast or slow, and whether accelerating or decelerating. Here, we have many languages of speed that are also quite familiar to legal theorists, e.g. gradualism and incrementalism, the use of various organic metaphors. We might then ask: what is it to think about the variable speeds of the normative? How might we compare the diffusion of conventions as distinct from values along this dimension of time? If conventions take longer to spread across a population, then what does this tell us about them? How does the spread of norms compare to, say, the spread of rumour or gossip?

3. Degree of occurrence: what happens only once, and what recurs? What needs to recur? Again, how might we map this dimension of time onto various normative forms, e.g. do reminders of norms (for instance, in the form of nudges) require a higher degree of occurrence within a community than reminders of values? Or is it the other way round: a community needs regular spectacles that remind them of what the values of the community are?

4. Direction of time: we can speak of progression or regression of processes, or processes in which there are two steps forward and one step back. Thus, we might speak of the conventionalisation of some practice or discourse, but we might also speak of de-conventionalisation. When does this occur and why? When does the normative space of some discourse tighten, so that the members of that discourse come to be highly judgmental and disciplined about the use of language, and when does it loosen?

5. Duration of time: do we speak of micro or macro time – of short-term actions and events or long-term processes? Do we speak of flickers of normativity or its longue duree? What do we learn about normativity when we experiment with different lenses of duration?

I have only mentioned a few possibilities here – one may speak, for instance, of models of time that are not easily captured along one dimension, e.g. bucolic or summer time, or emotional time (the time of regret or hope), and there are aspects of time that are not easily classifiable under any one dimensions, e.g. provisionality or potentiality. Here, the languages in which we model time outstrip any analytical model of time and its dimensions – e.g. the associations that members of a culture may have with turns, ages or moments (or, in law, with the 'time immemorial') will themselves influence both the writing and reading of history. To notice this is also to say – as above with contingency – that an interesting exercise here would be to historicise the dominance or popularity of certain ways of modelling time in historical practice in certain times and places. Thus, to give but one example, when Fernand Braudel emphasised the longue duree during the Nazi occupation in France, part of the reason for this may have been the desire to de-emphasise the significance of the occupation in the perspective of a longer stretch of time.

I have now articulated the various elements of the model of historical inquiry. On this model, historical inquiry is a highly reflexive mode of both creating objects of inquiry and investigating them. It is highly theoretically generative: it makes us consider aspects of what we study and how we study it that arguably no other mode of

inquiry does, or does not do as well. This does not mean it is incompatible with other modes, including the mode of philosophical analysis. When we think of normativity as existing in time and over time, and we do that in a way that acknowledges the contingency of the pasts of normativity, and we model the temporalities of normativity in multiple ways, we raise all kinds of questions about what to compare normativity to and how to distinguish it from those comparators. But we do more than that, for we then begin to relate and associate normativity to a wider range of phenomena, e.g. by thinking about the longue duree of normativity we ask what are the factors (external variables) that affect the persistence of certain forms of normative expression over long lengths of time (e.g. in the form of maxims or sayings), and we then set up a theoretically generative relation, namely between language and memory. Historical inquiry, then, as an art of variation, generates theoretically valuable associations or relations – and it does that in a way that is irreplaceable by, but also compatible with, the art of distinction and disassociation that characterises philosophical analysis.

II. Theorising Law and Legal Thought Historically

Let me now briefly illustrate the value of historical inquiry for theorising law and legal thought. What follows is not systematic, but rather suggestive – my aim is to offer some illustrations of the possibilities on offer when we theorise law and legal thought along the lines of the model of historical inquiry I have sketched above.

We can begin with law and ask: what might it mean to treat law as existing in time and across times and places, in a way that acknowledges its contingency and explores it in a multiplicity of temporalities? We might contrast this with an approach that is at odds with it, e.g. HLA Hart's account of the concept of law. On the face of it, it may seem that Hart's (in)famous fable of the emergence of law is a historical one, or at least pseudo-historical. After all, Hart speaks of how as a result of the 'defects' that characterise certain 'primitive communities' – i.e. uncertainty about what the rules are, inefficiency in the resolution of disputes, and the difficulty of changing the law – law emerges by 'curing' those 'defects' in the form of secondary rules, i.e. the rules of recognition, adjudication and change, respectively. Further, at times in his *The Concept of Law* (1961), Hart cites a range of historical sources, including from both historical anthropology (via the work of Malinowski, Diamond, Llewellyn and Hoebel, Evans-Pritchard and Gluckman) and Roman legal history (Schulz). He also occasionally makes claims like the following: 'there are many studies of primitive communities which not only claim that this possibility [of societies without secondary rules] is realised but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterised rules of obligation'.[11]

The problem with this approach – from the perspective of the model of historical inquiry I have proposed – is the absence of an acknowledgement of contingency. The very language used here of 'defects' and 'cures' or 'remedies', and of a former society 'lacking'[12] what a later society has, belies an attitude to the past that I have characterised as over-determined. On Hart's approach, the present (a legal system in the form of a union of primary and secondary rules) is already prefigured in the past, for the past is lacking that which the present will fill. Theorists writing after Hart –

[11] HLA Hart, *The Concept of Law* (1961), 91.
[12] Hart (n. 11), 291.

including those sympathetic to him – have recognised the historical awkwardness of Hart's account, and have sought to characterise it in a different way, biting the bullet on its a-historicism. Thus, Neil MacCormick said:

> Hart's treatment of the emergence of the 'remedies' to cure the 'defects' of the pre-legal social order is thematic and schematic rather than historical… It is perhaps best seen as a kind of ex post facto argument. We now have criteria for 'valid law'; we now have legislatures; we now have courts and associated law-enforcement agencies. How would we fare without them? Badly indeed; for we would have to fall back on uncertain emanations of positive morality to ground our common life, our standards would freeze into a static pattern, and we would have less efficiency methods of solving disputes of right, and no method of enforcing such conclusions as we reached.[13]

MacCormick here recognises that Hart's approach is historically problematic, and he asks us to treat it as a thought experiment about the present: what if we take X, Y and Z away? How would we, in the present, then fare? MacCormick, however, does not leave matters there, and goes on to argue that 'it remains more than a pity that he [Hart] did not take more account of the history of legal institutions in piecing together his story of the emergence of rules of recognition, change and adjudication.'[14]

I will return in a moment to MacCormick's suggestions for how to conduct this more historical account. Let me first, however, note two other characterisations of Hart's position – ones that not only characterise it as a-historical, but that also (unlike MacCormick) defend its a-historicism. Thus, Peter Hacker has argued that Hart deploys a 'time-honoured' method – the 'genetic-analytic method'.[15] According to Hacker, this method – which he also catalogues under the banner of 'conceptual analysis' – is liable to be misinterpreted if thought of as in any way subject to empirical verification. Instead, the method asks us 'to envisage a purely notional situation in order to perceive what crucial features characterise our own complex situation, and to understand the structure of the concepts with which we describe it.'[16] History, on this view, is entirely unnecessary to conceptual analysis – in fact, it might introduce irrelevant distractions, which make it harder to see 'crucial features' or the 'structure of concepts'. More recently, John Gardner put matters this way:

> Hart's story is a fable, an imaginary tale of the birth of a possible legal system. He does not care, and has no reason to care, whether this is how actual legal systems in general emerge, or whether even one legal system has ever so emerged. Nor does he care, or have reason to care, whether the 'pre-legal' conditions that he presents as obtaining at the start of the story, before law emerges, have ever obtained anywhere.[17]

History, once again, is irrelevant to this imaginary exercise. Constructing such fables is independent from historical consciousness – and rightly so, says Gardner. Elsewhere,

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[13] Neil MacCormick, *HLA Hart* (2008), 136.
[14] MacCormick (n. 13), 136.
[15] Peter Hacker, 'Hart's Philosophy of Law' in Peter Hacker, Joseph Raz (eds.), *Law, Morality, and Society: Essays in Honour of HLA Hart* (1977), 11.
[16] Hacker (n. 15), 12.
[17] John Gardner, 'Why Law Might Emerge: Hart's Problematic Fable', in Luis Duarte d'Almeida, James Edwards, Andrea Dolcetti (eds.), *Reading HLA Hart's The Concept of Law* (2013), 82.

Gardner has gone further to assert the priority of philosophy over history (and other kinds of empirical inquiry), saying that 'one must already know what counts as law before one can make either empirical or evaluative observations of it *qua* law.'[18]

But let us consider for a moment what is obscured from view – and what is taken for granted – as a result of this a-historical approach to law. I mentioned above MacCormick's lament that Hart did not have take history more seriously. For MacCormick, Hart takes for granted or assumes as necessary a certain amount of formalism for the existence of secondary rules. MacCormick gives the following example:

> Suppose it is against our primary social standards for anyone to use or eat a cow unless it is his own, it being understood that anyone who has had and openly used a cow for two years owns it and also its offspring, and that anyone who has been given a cow by its owner becomes in turn the owner of it. Especially where general social pressure and self-help are the only 'sanctions' behind such standards, there would be good reason for any 'giving' of a cow to be attended by public solemnities and formalities to let everyone know whose cow it now is. Otherwise the recipient may have fear of being subsequently accused of stealing it. Primitive legal ceremonies like the elaborate Roman procedure of *mancipatio* which had to be performed to transfer ownership of domesticated animals have all the look of practices descended from remote antiquity and quite probably from a time when the Latins lived 'pre-legally'. There is no reason at all to suppose that such formal requirements cannot arise by simple custom and convention hallowed by tradition and usage.[19]

MacCormick here questions the idea that primary rules must have preceded secondary rules, showing how some primary rules might in fact be dependent on certain secondary-rule like customs. This further suggests that there need not be a deliberate, formal introduction, e.g. in writing, of a secondary rule to cure defects of primary-rule-only communities. By thinking historically, then, MacCormick opens up the question of how law is related to its expression – observing that the relationship between law and language can be contingent. Law may also be expressed in the performance of certain gestures or in communal bodily rituals. To his credit, Hart did in fact mention that his own approach to the transition from the pre-legal to the legal world could mean that a necessary distinguishable stage in that process was 'the mere reduction to writing of hitherto unwritten rule.'[20] Note, however, the difference between the two approaches: MacCormick's is more historical, for he treats law as something capable of existing across times and places, such that the expression of law becomes one of law's internal variables; Hart's, on the other, is a-historical, for he treats law as existing (in some mythical time, or out-of-time) as a union of primary and secondary rules, which leads him to make certain problematic historical assumptions, in this case that law would need to be written down first for secondary rules to emerge (after primary rules). On the MacCormick approach, we can study the variability of law's forms of expression across times and places, also identifying external variables that may affect how law is expressed, e.g. the size and heterogeneity of the population, the degree of professionalization and bureaucratisation, perhaps the degree of the centralisation of power, and so on.

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[18] John Gardner, *Law as a Leap of Faith* (2012), 273-4.
[19] MacCormick (n. 13), 128.
[20] Hart (n. 11), 95.

I return briefly to the variable of law's expression below, as it is generative also for theorising legal thought. For now, let me mention something else that is taken for granted historically by Hart's a-historicism in theorising law. Consider the following from Brian Simpson:

> To a historian, a critical stage in the evolution of a form of society governed by law as we now understand it seems to involve the development not so much of rules but of institutions, which have come to be called courts, which enjoy the power of adjudication. It is out of such institutions that legislation, originally not clearly differentiated from adjudication, emerges.[21]

Simpson's observation here reminds us that, in theorising law, we cannot take for granted the separation of powers. Further, in thinking about the history of power, we cannot assume that the institutions of power, divided or not, were deliberately and strategically established by rules first. On the contrary, the more likely sequence is for exercises of power, some more or less institutionalised, to have come first, with rules at some point entering into the story for various particular purposes, introduced by particular persons or groups at particular times. In other words, rather than beginning with an account that already assumes certain well-established distinctions – for instance, between legislation and adjudication (as Hart's secondary rules arguably do) – we must inquire into the messy, contingent history of conflicts and struggles over power (including precisely the fragile emergence of such distinctions as between law-making, law-administering and law-applying), and think about law's relation to those conflicts and struggles.

Let me add just a little more historical detail here. We know, for instance, that the very word 'statute' does not appear in England until later in the 13th century.[22] Even when it does come into usage, and we can speak of officials applying them, it would be misleading to say that these are judges interpreting statutes, for, as Neil Duxbury points out, 'no real distinctions were made' at that time 'between enactment and adjudication. The king's justices were not mere officers of law but important members of his council with responsibility for drafting, or at least assisting with the drafting of, statutes'.[23] Thus, not only was there no distinction between the legislative and the adjudicative, but also the officials involved in both kinds of power were very much in the service and control of the king. Peter Cane, in his recent book on *Controlling Administrative Power: A Comparative History* (2016), puts the point very clearly:

> In the period from the late 11th century to the turn of the 17th, the English system of government is aptly described as monarchical. In theory, at least, all public power resided ultimately in the Monarch, who was chief legislator, chief administrator and chief judge. The main institutions of Central government – The Council…Parliament and the courts – developed out of and were, in a significant sense, extensions of the group of hand-picked advisers and supporters – the Curia Regis (King's Court, the ancestor of the Privy Council) – that early Monarchs summed as the need was felt. Membership of the various manifestations of the Curia was quite fluid. For instance, judges were active in Parliament. No sharp distinctions were drawn between legislating,

[21] Brian Simpson, *Reflections on 'The Concept of Law'* (2011), 176.
[22] Neil Duxbury, *Elements of Legislation* (2012), 23.
[23] Duxbury (n. 22), 23.

> administering and adjudicating. Parliament was the highest 'court' in the land; and in modern terms, much of its business was judicial rather than legislative.[24]

As Cane goes on to describe, during the 17th century, we see a series of conflicts and struggles over the scope of the King's power, including the well-known cases of *Prohibitions* (1607), *Proclamations* (1611) and *Bonham's case* (1610). The first two challenge 'the power of the Monarch to participate personally in the administration of justice', and establish 'the nature, scope and limits of prerogative powers.'[25] *Bonham's Case* (1610) again seeks to limit power, this time holding 'that an Act of Parliament contrary to common law would be void.'[26] Important here – in terms of challenging the power of the Monarch – are not only statements made by judges, but also the Parliament, e.g. the *Petition of Right* (1628), 'which challenged royal assertions of prerogative power to raise loans, and impose taxes and imprisonment.'[27]

Let me now return to Hart. Recall that Hart wants to say that law emerges when we have the union of primary and secondary rules, with the majority of the population obeying the primary rules and the officials accepting (in Hart's sense) the secondary rules. Hart's secondary rules are, as we all know, power-conferring rules. According to Hart, it is the introduction of these rules that is supposed to distinguish the pre-legal society from the legal. This looks plausible until it is looked at historically. When we think historically, we see that taken for granted in this picture is an already-existing class of officials and their practices (here, precisely, are the institutions before the rules) as well as divisions between powers. Taking this for granted obscures matters of theoretical significance to law, both descriptively and normatively. Descriptively, we see how law changes, and is thus affected by, changes in the structure of power relations (for instance, precisely their fact and degree of separation). We see, too, the importance of the process of professionalization, in which a certain class of persons is involved in a struggle to establish their own (relative) autonomy. Power is in many ways already being exercised, and the rules that are introduced are less about conferring power, and more about limiting it. Normatively, what is at stake is whether and how, and of course whose, power is limited. Both descriptively and normatively, then, we might inquire into the importance of power-limiting rules (or, perhaps more broadly, power-limiting practices). Further, rather than presenting this as an inevitable, progressive narrative (of law limiting power ever more successfully, or worse, finally taming power), we see the contingency and fragility of law's capacity to limit power, with law adapting (though sometimes also misadapting) to new forms of power (including of course being used by power as an instrument).

I have now given a sense of the dangers of theorising law a-historically, as well as indicating some of the benefits of the model of historical inquiry for theorising law. Something similar could be done for theorising legal thought. Given constraints of space, let me simply make a few suggestions for how this might be done.

Recall that on the model I have proposed, an object of inquiry can be created by treating it as existing in time. This can be done by seeing it as temporally extended, though this temporality can be modelled in various ways. Theorising legal thought can benefit greatly from treating its operations as temporally extended in different ways, for example, by looking over long spans of time, we can ask about the lifecycles of certain kinds of operations and expressions in legal thought, such as metaphors. If we

[24] Peter Cane, *Controlling Administrative Power: A Comparative History* (2016), 25.
[25] Cane (n. 24), 29.
[26] Cane (n. 24), 32.
[27] Cane (n. 24), 30.

focus only on the use of a metaphor in an instant case, we can miss both its function and its value, which often only come into view over a long period. For instance, with metaphor, part of its value is its memorability (obtained, for example, through its surprising clash of images), and another is the way it can both suggest a direction of legal change while also making room for a good deal of disagreement (for the semantic tension inherent in metaphor can be resolved in different ways by different persons on different occasions). Metaphor is a feature of legal thought that must be studied as it exists in time, not only because a metaphor will generate different kinds of cognitive resources at different times in its lifecycle or career (both of these metaphors have been popular in the literature on metaphor), but also because the use of particular metaphors is related to changes in other aspects of social life, including cultural, literary and technological innovations.

Treating legal thought as temporally extended already suggests a broader object of inquiry than the traditional focus on the use of justifying reasons in particular cases. It might result, for instance, in modelling legal thought as a diachronic process of communicative inquiry into normative relevance, accompanied by reason-giving in resolving disputes or advising on particular occasions. This broader object will then enable both the identification, as well as investigation into the value, of a group of cognitive operations that one might not otherwise notice, e.g. precisely metaphorical communication over time, or a range of devices that enable decision-making while withholding generalisation (such as, arguably, personified tests).

Historical inquiry creates object of inquiry by also sometimes treating them as persisting through time, going on to explore the internal and external variables that characterise how it changes across times and places. Such internal variables – i.e. features that one may, but need not necessarily, find in the practice of legal thought – may include the resolution of disputes, the giving of advice, the provision of reasons, communication with future courts, drawing on materials from past courts, proving and disproving of claims, interpreting social actions, events and utterances, and so on. To these internal variables we add the external variables that may affect their character, e.g. reason-giving or interpreting may be affected by the presence and development of archival depositories and information technology,[28] by whether reasons are given orally or in writing, by the visual design of the materials,[29] by the architecture of the places where reasons are given, and by the emotional culture of that time and place. Each of the above internal and external variables would be approached as contingent, and thus capable of being otherwise – legal thought may not have developed reason-giving, and so it is interesting to ask when and why it does, and what other possible futures there were in times past. Similarly, each of these variables can be modelled with different temporalities, e.g. we could speak of recurring cycles of intense pressure to justify by precedent, followed by just as intense pressure to justify by policy.

I mentioned above the theoretically generative feature of variable legal expression, and particularly the importance of the changes wrought by writing. There have, of course, been studies of the history of legal language,[30] but more could be done to theorise the impact on legal thought of continuities and discontinuities in the

[28] See e.g. Paul Halliday, 'Authority in the Archives' (2014) 1(1) *Critical Analysis of Law* 1.

[29] See e.g. Manuel Hespanha, 'Form and Content in Early Modern Legal Books' (2008) 12 *Rechtsgeschichte* 12. See also Ian MacLean, *Interpretation and Meaning in the Renaissance: The Case of Law* (1992), and Nils Jansen, *The Making of Legal Authority* (2010).

[30] See e.g. Peter Goodrich, *Languages of Law* (1990), and Peter Tiersma, *Legal Language* (1999).

transition from an oral to a literate culture.[31] What survives and what does not survive in that transition – for example, how much of the language of law continues, even after the turn to writing, to be influenced by the arts of memory, e.g. some laws continue to take the form of sayings (one thinks of the maxims of equity), and legal knowledge is in many respects comprised of archetypal characters and certain genre-specific kinds of narrative.[32] What is lost and what is gained in (arguably) less emphasis on gesture or visuality as a carrier of legal meaning? The point here is simply to raise these questions, at once pointing to their theoretical generativity.

Conclusion

Louis Mink, who contributed greatly to the question of the epistemic benefits of historical inquiry, said once that 'the historian must in act of judgement hold together in thoughts events which, by the destructiveness of time, no one could experience together'.[33] On the model of historical inquiry I have proposed, to think historically is to experiment with modelling pasts in ways that do not necessarily overlap with what is experienced. It is, further, to recover much that almost was or could have been, but was not, experienced, i.e. to return and give back to the past its possible futures. In this respect, it is quite different to other modes of inquiry, e.g. those for which the anchor to experience matters, such as phenomenology, some traditions of sociology and anthropology. Historical inquiry, then, is a distinct mode of inquiry, with distinct virtues and vices. But its distinctiveness need not be incompatible with other modes of inquiry, nor neither superior or inferior to them. Theory need not be thought of as a practice that has winner-takes-all stakes. What we have, instead, are modes of inquiry, which themselves shift and change over time, and which carry their own benefits and dangers. To theorise, then, would be to create objects of inquiry via different modes, exploring their complexity – and to enter into dialogues between modes and their relative strengths and weaknesses. And, surely, that is the kind of engagement that complex phenomena such as normativity, law and legal thought call for and deserve.

Further Reading

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[31] See Jack Goody, *The Logic of Writing and the Organisation of Society* (1986), chapter 4 on 'The Letter of the Law'.
[32] Indeed, the very idea of the 'case' may be thought to be a literary form – see e.g. Andres Jolles, *Simple Forms* (2017), chapter 6.
[33] Mink (n. 4), 187.

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