Legal Positivism and Personality

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In Chapter 3 of *Are Persons Property*? Margaret Davies and Ngaire Naffine state that:

> we not only regard the legal person as a formal legal fiction, but we think also that there is a tacit view of the person that underwrites the official fiction, and that it too is a legal invention, one which is of course strongly influenced by social and cultural assumptions about the nature of being human. Although we will emphasise the constructed nature of the person behind the legal person, *we are at odds with the positivists* who are also constructivists, but *who would treat legal personality as a creation of law that has no necessary connection with social or moral facts* ... For we will argue that the concept of legal personality fairly systematically helps to support a quite particular interpretation of the person ...[1]

At the heart of this passage lies the authors claim that they are at odds with the positivists 'who would treat legal personality as a creation of law that has no necessary connection with social facts'.[2] In this short commentary, I want to explore this claim in order to cast some light on the coherence and plausibility of the authors' position on both the concept of legal personality and the positivist account of that concept.

It is important to note at the outset that the phrase 'social or moral facts' renders the meaning of the claim ambiguous. One available reading of the claim is that the authors are in disagreement with those positivists who would assert that legal personality has no necessary connection with *any set* of social - that is, extra-legal - facts. That is, that the concept is empty of social content. The authors, on this reading, would appear committed to the contrary view that the concept does have a necessary

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1 Margaret Davies and Ngaire Naffine (2001) 56 (my emphasis).

2 I'm not sure what the authors mean by the term 'moral facts'. On a philosophically naturalistic account, these may be analysed as being no more than a species of social facts. I suspect the authors would agree with such an account, as would most – if not all – contemporary legal positivists. Hence, I shall refer solely to social facts from this point on. Even if the authors wish to dispute my conflation of the two, their disjunctive claim entails their disagreement with the proposition that legal personality has no necessary connection with social facts.

connection with *some or other set* of social facts, though with no particular set. The concept necessarily contains some or other social content but is compatible with a range of such content.

An alternative reading of the claim is that the authors are in disagreement with those positivists who would assert that legal personality has no necessary connection with *a particular set* of social facts. On such a reading, we might suppose the authors to be committed to the view that legal personality does have a necessary connection with *a particular set* of social facts - for example, with that set comprising the paradigm of the possessive individual which they assert provides a substantial part of the extra-legal content of legal personality in the modern age.[3]

I want to trace the logic of each of these competing interpretations of the authors' claim in order to determine who or what they are at odds with and what their actual position on the necessary content of legal personality, therefore, is. My conclusion will be, firstly, that the authors are *not* at odds with positivists who would assert that there is no necessary connection between legal personality and any set of social facts because there are no such positivists to be at odds with. The positivists the authors discuss - and, indeed, positivists generally - hold the very view the authors may be taken to hold - namely that there *is* a necessary connection between legal personality and some or other set of social facts. Secondly, the authors are *not* at odds with positivists who would assert that there is no necessary connection between legal personality and some particular set of social facts. This is because, though there *are* positivists who hold this view, the authors themselves also hold this view. Both legal positivists and the authors maintain that though legal personality is necessarily connected with some or other set of social facts, it is not *necessarily* connected with any given set of such facts - though it may be *contingently* connected with a given set over time or at any given time.

To get the argument off and running, let us consider the various positivists whom Davies and Naffine claim to be at odds with. Chapter 3 of the book indicates that they include Hans Kelsen, Albert Kocourek, R W S Dias, the editor of *Salmond On Jurisprudence* (12th ed)[4] and Richard Tur. Kelsen is described by the authors as providing 'the classic positivist account of the legal person'[5] and serves as the major focus of their discussion. The other theorists mentioned are selectively drawn upon to flesh out what is, purportedly, the Kelsenian view.

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3 Davies and Naffine, above n 1, 5-15.

4 P J Fitzgerald. To avoid anachronisms, I will henceforth refer to Fitzgerald rather than J W Salmond as the author of that text.

5 Davies and Naffine, above n 1, 52.

It is important to note here that the view attributed by the authors to Kelsen and the others mentioned is represented by them as constituting the view of legal positivism *tout court*. Even if the authors' representation of the Kelsenian view were correct (and I want to argue that it is not), it is clear that positivists such as Hart would not hold to such a semantically purified account of legal personality - or, indeed, any other concept. For Hart, all legal concepts are constructions of (and therefore, necessarily connected to) some or other set of social facts.[6] Consequently, the authors do not provide a general account of contemporary positivist views of legal personality and thus, offer little basis for their claim of being at odds with 'positivism', generally, on this issue. If they are not at odds with contemporary positivism, then it is not clear what the present-day theoretical relevance of their discussion is.[7]

According to Davies and Naffine, the Kelsenian positivists hold to the view that the concept of the legal person has no content apart from that provided by other legal concepts (such as the general concept of a legal right or duty or that of some specific right or duty). Kelsen is quoted as defining a legal person as 'the unity of a complex of legal obligations and rights'.[8] Legal personality is no more than 'an auxiliary concept in the presentation of legally relevant facts'.[9] Kocourek is quoted as stating that the concept is 'a mere ideal or conceptual point of reference...an irreducible juristic subsistent'[10] which 'has only one quality - the capacity for attracting legal relations'.[11]

The content of the concept of the legal person is provided solely by the content of the concepts included in the above definitions - that is, the content of other legal concepts. There is no more to it than this. On this basis, the positivists are alleged to hold that legal personality is 'a purely formal legal concept'[12] with no extra-legal content. Kelsen is said to 'maintain a general insistence that the legal person does not reside outside the law, is never antecedent to and independent of law, but is always a

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6 See, eg, his discussion of legal concepts in *Definition and Theory in Jurisprudence* (1954) 70 *Law Quarterly Review* 37 and, of course, his discussion of the concept of law in *The Concept of Law* (1961).

7 I note that the authors claim that the purist view they describe serves as the orthodoxy of judicial practice. This might have provided their discussion some contemporary relevance were their attribution of such a view to judges not so problematic.

8 Davies and Naffine, above n 1, 53 quoting Hans Kelsen *Pure Theory of Law* (1967)173-4.

9 Ibid.

10 Davies and Naffine, above n 1, 53 quoting Albert Kocourek *Jural Relations* (1928) 292.

11 Ibid.

12 Davies and Naffine, above n 1, 53.

creature of law'[13] designed to simplify legal thinking and practice in relation to legal rights and duties.

But a commitment to the view that the content of legal personality is provided by the concepts of legal rights and duties is quite consistent with the view that legal personality necessarily has extra-legal content *where it is also held* that the concepts of legal rights and duties themselves necessarily have extra-legal content. And this is precisely Kelsen's position. Indeed, he is quoted by the authors as maintaining that '*human behaviour* is the content of legal obligations and rights'.[14] Elsewhere in *Pure Theory of Law,* Kelsen asserts that "only by human behaviour can a right be exercised or an obligation be fulfilled or violated". Human behaviour is an extra-legal fact and one which serves as the necessary basis for all social facts - at least, on the naturalistic account of such facts favoured by positivists. Assuming semantic transitivity,[15] the content of legal personality is, therefore, also provided by human behaviour, by some set of extra-legal - and, potentially, social - facts. The theoretical work providing a necessary connection between the concept of legal personality and extra-legal facts is performed in Kelsenian theory *not directly* by the concept of legal personality itself but *indirectly* by the concepts of legal rights and duties. Kelsen's concept of legal personality cannot be and is not metaphysically isolated from those facts making up the content of the concepts of legal rights and duties. His pure theory serves as a methodological aspiration for jurisprudence, not a comprehensive metaphysical account of the content of concepts.

For Kelsen, at least, the content of legal personality in general may be quite thin, but it is not pure of extra-legal content.[16] It is necessarily connected to some or other array of human behaviour, to some or other

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13 Ibid.

14 Ibid 52 quoting Kelsen *Pure Theory of Law* (1967) 173 (my emphasis).

15 If the content of concept A includes concept B and the content of concept B includes concept C, then the content of concept A includes concept C.

16 Kelsen acknowledges in *Pure Theory of Law* (1967) that this is so, notwithstanding his methodological project of isolating legal from non-legal phenomena as much as possible. Kelsen's methodological aims should not lead one to suppose that he did not recognise the metaphysical rootedness of conceptual content and meaning in the wider world within which law exists. On the very first page of *Pure Theory of Law*, for example, Kelsen clearly states in relation to the phenomena of law generally, that the subject matters of psychology, sociology, ethics and political theory are '*closely connected with law*. The Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, *not because it ignores or denies the connection*, but because it wishes to avoid the uncritical mixture of methodologically different disciplines which obscures the essence of the science of law ...' (my emphasis).

mode of being human - whether individually or collectively.[17] To the extent that human behaviour is meaningful and may be conceived of in terms of social facts, legal personality is *necessarily connected* to some or other array of social facts. The other positivists mentioned by the authors also subscribe to such a view of the content of legal personality. Kocourek and Tur adopt Kelsen's view; Dias and Fitzgerald adopt a view influenced by Hart. All of them conceive of legal personality in terms of legal relations or rights or duties and conceive of these in terms of some set or other of extra-legal social facts.[18] Indeed, the authors themselves confirm that on the positivist view, 'legal personality is better regarded as groupings of rights and duties whose content depends on such factors as age, sex and mental ability (all regarded as natural categories), as well as legal purpose and jurisdiction'.[19] Legal personality is grounded on extra-legal factors.

So it would appear that the positivists Davies and Naffine discuss do not subscribe to the proposition that the concept of legal personality bears no necessary connection with *some or other* set of social facts. It clearly does for them. Hence, the authors cannot be at odds with those positivists on this ground because those positivists don't hold to this ground. Further, I am unaware of any legal positivists who would subscribe to the view that legal personality bears no necessary connection to some or other set of social facts. Certainly, Hart and others who purport to practice a sociological or naturalistic mode of legal positivism would not accept such a view. For Hart, legal concepts and concepts in general were the product of some or other set of social facts and their content was constituted by some or other such set.[20] Consequently, the authors are not and cannot be at odds

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17 Kelsen and the other positivists, of course, acknowledge the potential legal personality of non-individual or non-human phenomena such as corporations (see, eg, *Pure Theory of Law* 174-6). I will follow Davies and Naffine's lead (Davies and Naffine, above n 1, 69) and focus my discussion on human beings rather than corporations etc. For the purposes of this discussion, nothing important is lost by such a focus.

18 Tur conceives of legal personality as 'an empty slot' that 'can be filled by anything that can have rights or duties' (quoted in Davies and Naffine, above n 1, 54). Fitzgerald states that 'a [legal] person is any being whom the law regards as capable of rights or duties' ibid. For both theorists, rights and duties are necessarily held by and amongst humans or with the agency of humans. See Richard Tur 'The "Person" in Law' in *Persons and Personality: A Contemporary Inquiry* (1987) 121-2 and P J Fitzgerald (ed), *Salmond on Jurisprudence* (12th ed, 1966), 216-24.

19 Davies and Naffine, above n 1, 54-5.

20 See above n 6. At this juncture, we might also note the cogent and highly influential critiques offered by W V O. Quine ('Two Dogmas of Empiricism' in *From a Logical Point of View* (1953) 20) and Donald Davidson ('On the Very Idea of a Conceptual Scheme' in *Inquiries into Truth and Interpretation* (1984) 183) of the very idea of a purely formal

with positivists who would treat legal personality as having no necessary connection with some or other set of social facts because there are no such positivists.

What then of the other interpretation of the authors' claim - namely, that they are at odds with those positivists who would assert that legal personality has no necessary connection with *a particular set* of social facts? Is there any basis for this claim? As with the previous interpretation of the claim, it would appear that there is not.

What differs in relation to this claim, of course, is that there *are* positivists who subscribe to the view in question. Indeed, they include the positivists mentioned by the authors. For it is quite consistent with the Kelsenian view that legal personality is necessarily connected with *some or other* set of social facts, that it is not necessarily connected with *a particular* set of such facts. On the Kelsenian view, legal personality may attach to any set of human behaviour.[21] It is not limited to some particular set. For Tur and Fitzgerald also, legal personality can attach to anything that can have rights and duties, to any being capable of rights or duties.[22] And if, per Kelsen, any set of human behaviour can bear rights and duties then any set of behavioural or social facts may bear legal personality. Legal personality may be informed by such facts.

Again, the authors expressly confirm this to be the positivist position when they state that:

> There is, therefore, in this [the positivist] view no *necessary* relation between *any given set* of human characteristics (say the ability to reason and reflect) and legal personality.[23]

Are the authors, then, at odds with positivists who hold to such a view? No, for it is the very position of the authors themselves. For example, the authors state that 'a particular conception of human nature is *generally presupposed* by the prevailing legal concept of the person'. No necessary link is asserted here. Similarly, in the quote which opened this discussion, the authors state that 'the concept of legal personality *fairly systematically*

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concept whose content might be quarantined from the general web of concepts making up a person's or conceptual community's worldview. Even if the positivists mentioned by Davies and Naffine (or any other legal theorist) were to hold to the purist account of legal personality, such an account would have little credibility within the contemporary philosophy of concepts and would provide little more than a 'straw person' for the purposes of their thesis.

21 Or, at least, any set of rights- and duties-capable behaviour. We may assume this to constitute some broad range of - if not all - human behaviour.

22 See Tur and Fitzgerald, above n 18.

23 Davies and Naffine, above n 1, 54.

helps to support a quite particular interpretation of the person ...'Thus, the relationship between the concept of legal personality and that particular mode of human behaviour comprising the modern possessive individualist paradigm, for example, is, ultimately, a *contingent* one though it may be systemic and longstanding.

More importantly, the very thesis of the book confirms the consistency of the authors' and the positivist view. The authors' historical account of the various sets of social facts to which the concept of legal personality has been applied within Western law illustrates the semantic independence of that concept from any one particular set of those facts. The authors maintain that in practice and over given periods of history the concept has taken up specific social content. However, this is a contingent incorporation of such content and not a necessary linking of the concept and that content. Davies' and Naffine's account of the historical development of the concept of legal personality would not be coherent if the content of the concept was necessarily determined by any of the sets of social facts the concept contingently linked up with in social practice from time to time. If it was, they would not and could not be talking about the same concept over time but would rather be talking about different concepts at different times. Thus, I would argue that they are performatively committed to a distinction between the content of the concept and its historically variable uses by virtue of their historical project.

The authors claim to be in agreement with legal positivism in relation to the social and legal constructedness of concepts such as legal personality. To this extent they stand with the positivists in opposition to those natural law theorists who would import a specific and necessary extra-legal set of social or moral facts into the concept.[24] They also claim to be in disagreement with the positivists over the relationship of the concept to extra-legal facts. What I have endeavoured to show here is that they do not disagree with the positivists on this relationship at all. Positivists don't maintain the problematic conceptual account which the authors impute to them. Rather, they hold a view substantially the same as that held by the authors themselves. Thus, the authors are *wholly* in agreement with the positivists on both issues.[25] As a result, their critique of positivism, which takes up much of Chapter 3 and which provides a basis for much later discussion, is, in my view, of limited value within the context of an otherwise fascinating and important book.

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24 See Davies and Naffine, above n 1, 55-6.

25 Of course, it is open to any positivist to challenge the authors' account of the specific social facts which have contingently informed the concept of legal personality historically or which inform it currently. No such positivists are mentioned by the authors.