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Conventions, Norms and Law*

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Abstract

In this paper, I defend a conventionalist theory. Conventions, in this theory, are patterns of interdependent expectations of behavior. Such patterns generate reasons for action for those who are involved in such patterns. I argue that conventions, therefore, have authority. Social norms are subsequently analyzed as conventions backed up by a whole raft of emotional dispositions such as fairness, trustworthiness as well as resentment and indignation. These serve to explain why social norms have a normative force that extends well beyond that of mere conventions and as a result have an authority that differs subtly from conventions. Turning my attention to (sanctioned and unsanctioned) positive law, I investigate whether positive law could be analyzed along such conventionalist lines as well. My answer will be that although some laws can be regarded as codified social norms, many laws are not social norms. However, positive law presupposes the existence of social norms, for without these we could not explain some of the key features of positive law.

Introduction

The ubiquity of norms is overwhelming. There are (detailed) norms regulating our behavior in the community at large, norms that regulate our actions in the schools we attend, in the organizations we join, in the workplace we frequent. There are norms that tell us what to wear, how to eat and how much real fruit there should be in orange juice. There are norms regulating spoken language, as well as our communications in electronic

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mail and on paper. The important occasions in our lives ranging from birth to burial are structured by norms. Our lives are pervaded by norms of all kinds.

Some norms are rules we have set only for ourselves. They determine our individual actions and habits. For example, I have made it a rule never to leave home without my keys. Such personal norms will not be my concern here. Instead, I will be concerned with norms that regulate the interactions between people. These norms are such that we expect each other to observe them. We believe that others expect the same of us. For these reasons we could label such norms as *social norms*.

However, that is still too crude. There are further distinctions possible and, indeed, necessary. When arriving in London I fully expect that people will speak English and so I address a person I ask for directions in English. If, instead, it turns out that this person does not speak English, I will be surprised, but not outraged, indignant or resentful. Instances like these concern social norms that are best characterized as *mere conventions*. These norms do seem to have a grip on our lives, but they don't have the same normative 'pull' as other norms.

Compare this preliminary characterization of conventions with the reactions that most people have towards an adulterous partner. We feel seriously let down, hurt and feel our soon-to-be ex-partner is a terrible cheat who has transgressed some basic norms of sexual fidelity. The authority of the norms of sexual fidelity has a different 'flavor' from those of mere conventions. Not only do such norms regulate the interactions among certain groups, perhaps society as a whole, they also come with a battery of social responses that seem somehow connected to its normative force. For want of a better label, I will refer to norms such as those of sexual fidelity, as *social norms proper*.¹

¹ I tend to believe that a lot of morality falls within this category, but I will not pursue this point here. In what follows, I will ignore questions about the proper characterization of the authority of morality. In

The set of social norms is not exhausted by distinguishing conventions from social norm proper. Law, especially formal law, also contains norms that regulate the interaction between agents. In which of the two categories that I loosely distinguished above should it fit? Should we regard law as a convention, or is it better understood as a social norm proper, given that lots of law (but not all!) comes with sanctions when violated.

The ubiquity of social norms raises a question about their role in social life. Social norms of any kind seem to make a difference in how we behave ourselves in our interactions with others. Social norms *require* certain actions from us; social norms *obligate* us, and social norms *give us reasons* to act in certain ways. What is it about social norms that they have that power? What is the authority of social norms? In this paper, I sketch a framework that allows me to characterize the authority of social norms. This framework is the conventionalist theory of norms.² In the next section, I will explain how I understand the question whether a norm has authority. Next, I will show how one can understand that mere conventions have authority. I then argue that this cannot fully explain the authority of social norms proper and suggest that special attention to the role of resentment, indignation as well as dispositions like trustworthiness and fairness is helpful here. Then, in the final section, I briefly turn to law and argue that if it has any authority of its own this presupposes the existence of certain social norms in the society in which it is valid.

(Verbeek 2007) I say a little about how we should understand morality in the type of account of authority that I develop here.

² This is my favorite label for theories of norms as they have been developed by authors such as (Schotter 1981; Sugden 1986; Binmore 1994; Skyrms 1996; Binmore 1998; Den Hartogh 1998; Den Hartogh 2002; Skyrms 2004). For my own version of the theory, see (Verbeek 2002; Verbeek 2007; Verbeek 2008).

Authority

People often act in accordance with existing social, legal and moral norms. Often they do so out of habit. Sometimes they are tempted to break these norms but fear the response of others. They wish to avoid the formal and informal sanctions that disobedience to norms provokes. Alternatively, sometimes people seek the positive sanctions that are attached to acting in accordance with the norm, such as the esteem and respect of others. In all these cases, the agent's motivation to act in accordance with the norm is independent of the norm itself, but is derived from other considerations. However, sometimes it is not habit or the fear of sanctions that motivates such behavior but the very fact that it is the norm. That is, agents recognize that a norm has *authority*. The fact that the norm requires certain behavior is sufficient reason to act in accordance with it. In those cases, the motivation to act in accordance with the norm depends on the norm. If agents recognize the authority of the norm, they *comply* with the norm rather than *conform* to it.

Many authors, most notably Joseph Raz, believe that authority has two distinct features.³ A norm is authoritative if, first, it gives (sufficient) reason to the agent to act in accordance with it. Authority makes a difference in the deliberation of the agent independent of the formal and informal sanctions that accompany it.⁴ Secondly, a norm is considered authoritative if it is – to use Raz's terminology – *pre-emptive*. The reason for action that a norm gives excludes other reasons for action from consideration. There is much discussion about the question how any reason for action, including those issued by

³ (Raz 1985; Raz 1986).

⁴ See also (Coleman and Hart 2001, Introduction) for a characterization of the 'difference thesis': the claim that (legal) norms make a practical difference.

an authority, can be pre-emptive at all.⁵ In this essay, I will only consider the first part of this Razian notion of authority. How can it be the case that norms in and of themselves give reasons for action, which are not present in the absence of those norms. That is, I am interested in the difference that norms make.

If this is how I propose to think of authority, the question is comes up whether, if ever, such authority exists. Do social norms, whether conventions, social norms proper or legal norms, have authority? A well-known skeptical answer to this question has been put forward by the philosophical anarchists. William Godwin (1756-1836) argued that governments never could have authority:

To a government therefore, that talked to us of deference to political authority, and honour to be rendered to our superiors, our answer should be: 'It is yours, to shackle the body, and restrain our external actions; that is a restraint we understand. Announce your penalties; and we will make our election of submission or suffering. But do not seek to enslave our minds. Exhibit your force in its plainest form, for that is your province; but do not seek to inveigle or mislead us. Obedience and external submission is all you are entitled to claim; you can have no right to extort our deference, and command us not to see, and disapprove of, your errors.' – (Godwin 1971)

We can apply the same criticism to the idea that social norms, conventional or proper, have authority. The criticism takes the form of a dilemma – the *compliance dilemma*⁶: suppose that a norm N requires from an agent A an action ϕ in circumstances C. When C is the case, there either is a better option than ϕ available or there is not. Suppose there is an better alternative than ϕ . Then it would be *irrational* to comply with N. Suppose on the other hand that there is no better option than ϕ . Then ϕ -ing is supported by the balance of reasons, and A is justified in ϕ -ing but not because ϕ -ing is required by N but because rational agents should always choose options which have better alternatives. N is

⁵ E.g., (Moore 1989; Perry 1989).

⁶ I adapted this formulation of the dilemma from (McClennen and Shapiro 1998).

irrelevant to the deliberations of A. Therefore, compliance to norms is never rational and norms do not have authority.

Note that the notion of rationality that I employ in formulating the dilemma is the standard kind of instrumental rationality, which gets a theoretical expression in contemporary rational choice theory, especially in evolutionary game theory. Many, mostly kantian, authors have argued that this conception of rationality is problematic and that if we abandon it for a more encompassing notion of rationality, the compliance dilemma will look very different and avoidable.⁷ I don't think it necessary to attack the compliance dilemma at such a fundamental level. As I will demonstrate in the next section, the dilemma can be avoided within a conventionalist theory of norms which does not question this conception of rationality.

The authority of conventions

Imagine a cross roads where two vehicles, A and B, approach each other at the same time. Both drivers have the usual preference of going their way as quickly, efficiently and safely possible. However, this is only going to be achieved if one of them gives way to the other, for if they don't a terrible accident is bound to happen. On the other hand, if both give way, they will both come to a stop and inch their way over the cross roads and loose a lot of time in the process. Clearly, it would be best if one of them simply gives way to the other while the other maintains speed. Finally, while both prefer this last

⁷ (Korsgaard 1996; Korsgaard 1997).

outcome to be realized, each prefers to be the one who maintains speed. What are they going to do? How can they resolve this?⁸

Suppose that B gives way. In that case, A has good reason to maintain speed. If A maintains speed, B has reason to give way. Therefore, A's reason to maintain speed depends on B's reason to give way. And B's reason to give way depends on A's reason to maintain speed. A and B's reasons refer to each other; they are *interdependent*. Notice that these are all the reasons that they have. Neither A nor B has independent reasons to give way or maintain speed. Independent, that is, of each other. Both A and B have reason to move quickly and efficiently through traffic, but that reason does not inform them whether to maintain speed or give way at all.

Given this interdependency of reasons, should A then maintain speed and B give way? Of course not, as there is an alternative outcome possible in which A gives way and B maintains speed. This is no surprise, as interdependence of reasons occurs only if there is at least one alternative pair of reasons for action. Note, furthermore, that interdependence of reason only occurs when neither A and B have an independent reason to give way or maintain speed. Suppose that A has no reason to stop, regardless of what he believes B will do (suppose A is driving in an armored vehicle and is unconcerned about what will happen to B whereas B is riding a bicycle). That is, A has an independent reason to maintain speed. Then, of course, B has reason to give way. Since

⁸ In (Verbeek 2002) I give a formal analysis of this situation. In this paper, I will try to avoid all game theory and formalisms, but for those who yearn for some: the situation of A and B is that of an impure coordination game.

		A	
		<i>Give way</i>	<i>Maintain speed</i>
B	<i>Give way</i>	1	3
	<i>Maintain speed</i>	2	0
		3	0

A's reasons do not depend on those of B in that case, their reasons are not interdependent.

Suppose that this is not the only crossroads in this part of the world. Suppose, moreover, that there are many drivers like A and B who regularly meet at crossroads like this one.⁹ Secondly, suppose that A and B can learn from past experiences and adjust their choice of action in the light of what they have come to believe about the expected choices of others in this part of the world. Suppose, furthermore, that drivers such as A and B notice asymmetries between them. For example, A and B could notice who comes from the right. Evolutionary game theory teaches us that under such circumstances individuals could adopt asymmetrical strategies, such as “if I come from the right, I will maintain speed; otherwise, I will give way”. What is more, such asymmetrical strategies are remarkably successful.¹⁰ Individuals will recognize this success and adjust their choice of in the light of this success and adopt the same strategy. In short, after some time, individuals such as A and B will expect that people in this part of the world will maintain speed when coming from the right. This expectation will give them reason to do the same, thus reinforcing the expectation in that population. Once it is there, it is best for each individual agent to follow it. This asymmetrical strategy is stable. Occasional deviations do not cause the whole pattern of expectations to shift. Rather, occasional deviations reinforce the belief of all concerned that they should conform to asymmetrical strategy.¹¹ Note that this is not the only possible stable strategy. The population could

⁹ In the jargon of evolutionary game theory, anonymous agents from a finite population are randomly paired in each round in a repeated game.

¹⁰ Formal proofs of this success can be found in most texts on evolutionary game theory, e.g., (Sugden 1986).

¹¹ “Maintain speed when coming from the right; otherwise, give way” is an evolutionary stable strategy in this population (Smith 1982). Occasional deviations from this course of action will immediately be

have settled on the strategy as “if I come from the left, I will maintain speed; otherwise, I will give way”. A stable strategy in a situation where there are more stable strategies possible points to the existence of a *convention*.

Many social theorists, especially economists, claim that the existence of such stable strategies should be identified with conventions, rather than taken as evidence for its existence.¹² This claim is misleading for a number of reasons. One reason is that the identification of conventions with combinations of strategies that are stable implies that one thinks of norms as convergent patterns of *behavior*. However, such a convergent pattern may be an indication that agents are following a convention, but it is not itself a convention. Therefore, I propose that we think of a convention in terms of the *reasons* of the agents that lead to such a convergence.¹³ To be precise, I propose that we think of a convention as the stable pattern of *interdependent expectations* that support this convergent behavior. Thus, the claim that “if I come from the right, I will maintain speed; otherwise, I will give way” is a convention, is to be understood in the sense that there is a stable pattern of interdependent expectations to this effect.

This gives us the answer to the compliance dilemma according to which norms never have authority. First, notice that a typical individual in such a population will have good reasons to follow the convention that requires her to maintain speed when coming

corrected as individuals find out on each occasion that had they followed the same rule, they would have done better.

¹² E.g., (Sugden 1986; Skyrms 1996; Skyrms 2004).

¹³ Therefore, though the analysis is clearly related to the standard evolutionary game-theoretic analysis of norms, I deviate in two ways from this analysis. First, on my analysis norms are patterns of convergent expectations, rather than patterns of convergent behavior. Secondly, the agents that have these expectations are capable of reasoning in a strategic fashion about these expectations, whereas the agents in contemporary evolutionary game theory often are portrayed as a-rational creatures.

from the right. She will expect others to be prepared to give way when they will come from the left and, therefore, she does best by maintaining speed. Similarly when this individual comes from the left, for in that case she can expect the other to maintain speed and, hence, she does best by giving way. In general, individuals in such a society will conform to the convention to give priority to the right.

Secondly, conformity is not the same thing as compliance. It is not enough to demonstrate that people will conform to a convention. We also need to know *why* they follow the convention. A typical individual will give way when coming from the left because she expects the other driver will maintain speed. What warrants her expectation? The answer is that she expects that the other driver expects her to give way. What supports that expectation? The answer is that the other driver expects that she expects that the other maintain speed – and so on. What emerges here is that the expectation of each of the drivers is supported by the expectations of the other. This is true for all the relevant expectations of all members of this group. The reasons of each individual for following the convention are determined by the reasons of the other members of the group.¹⁴ No single member of this group can work out for herself, independently of

¹⁴ At this point, it may be objected that the expectations that give these reasons are ultimately ungrounded. It is true that once such a pattern of expectations is in place each individual has reason to do as the convention requires, but that does not justify the ‘first’ of these expectations, upon which the others are grounded. Thus, the agents cannot all be rational believers contrary to what rational choice theory presupposes. There are roughly four strategies to meet this challenge. First, one can give up on the assumption that all agents are rational all the time. This is typical for the evolutionary game-theoretic approach to institutions and social norms in general. This approach assumes that the first agents who adopted the strategy to respect property had no particular reason for doing so. Having done so, however, they created an environment where this became the rational course of action. The second strategy assumes full rationality of the agents, but claims that the grounding of those ‘first’ expectations comes from brute psychological facts like salience (Schelling 1960), and, perhaps, (Lewis 1969). The third strategy assumes

others, whether she ought to give way or maintain speed. Her reason for action is not accessible independently of those of others. It is only against the background of existing patterns of expectations that she can determine what to do. An individual in this group has reasons to follow the convention only in so far as she takes others to have similar reasons. These interdependent reasons are self-enforcing. Once the members of this group expect each other to act according to the convention, they have no reason to stop expecting this from each other. These expectations form a stable pattern of interlocking expectations. This pattern is the reason for each individual agent to do as the convention prescribes. Since I defined conventions in terms of such patterns of expectations, we have a solution to the compliance dilemma: the convention itself is the reason for doing as the convention prescribes.

Social norms and resentment

Given that we have shown one kind of social norms – mere conventions – to have authority, it is tempting to see if we can extend this account to other social norms, in particular, social norms proper and law. Perhaps *all* social norms are conventions in the sense described above. This is too quick. The authority of mere conventions is quite limited. Stable patterns of interdependent expectations can only give reason to agents such as A and B if they have an interest in traveling safely and efficiently. Once this

full rationality but instead of seeking grounding in salience or lower-order beliefs, it assumes that the grounding comes from higher-order beliefs (Den Hartogh 1998). This type of strategy reverses the usual direction of justification of beliefs. Finally, one could abandon the traditional individualism of rational choice theory and argue that the grounding of that first belief is due to other ‘social facts’ (Gilbert 1989, especially chapter 4). I think all four strategies are flawed, but the flaw in the first strategy is tolerable, whereas this is not the case in the other three. See (Verbeek 2007; Verbeek 2008).

interest changes, it no longer need to be the case that such patterns of interdependent expectations continue to give reason. Similarly, if one person in such a network has an independent reason, the expectations may shift and new regularities in behavior and expectations which are not conventions may emerge. In Kantian terms, conventions bind only hypothetically.

Furthermore, if a person deviates from the convention (perhaps she made a mistake, or perhaps her particular interests give her independent reasons for action), on the model presented so far, the response of others will be surprise and perhaps the adjustment of expectations. However, social norms proper, like the example of sexual fidelity I mentioned in the introduction, are not like that at all. First of all, the reasons for fidelity that this norm gives often seem stronger. They cannot be ignored as easily as mere conventions can. Secondly, social norms proper remain valid even if on occasion one feels tempted and it is not in one's interest to comply. That is, social norms proper seem to bind categorically, unconditioned by our particular ends and desires. In general, this seems true of many social norms proper. We apply them; judge in terms of them without it being the case that 'I had no interest in complying' is accepted as an apology. Third, social norms in the proper sense differ from mere conventions in that deviation is not met with surprise and adjustment of expectations. Instead, violations of such norms provoke strong emotional responses like resentment and indignation: if your partner has an affair with another then, other things equal, you will experience hurt, anger and a deep resentment towards your partner. Other people will, if they learn about this, feel some form of anger towards your partner.

The key to understanding how social norms proper differ from mere conventions lies in these emotions. Resentment and indignation help explain the stronger authority of social norms proper. In addition they show that an account of social norms proper presupposes networks of interdependent expectations, just like conventions. That is, at

the heart of social norms proper lie conventions. Third, they show that the authority of social norms proper presupposes a kind of virtue among the norm followers. Finally, resentment and indignation as well as the virtue that is presupposed in this theory of social norms help us explain the above mentioned features of social norms proper: their strength and that they bind categorically. So it is to the analysis of resentment and indignation that I now turn.

Resentment and indignation made a comeback to the philosophical scene in 1962 when Peter Strawson published his famous essay “Freedom and Resentment”.¹⁵ In this essay he distinguished between two kinds of attitudes we take towards others, the participatory stance and the objective stance. In the participatory stance we regard others as agents. We respond to their actions with praise or blame, resentment or gratitude, indignation or admiration. Strawson called these responses ‘reactive attitudes’ and their existence shows that, at least sometimes, we take others somehow as fellow agents, as beings like us. The objective attitude on the other hand does not take others as agents. Instead, when we take the objective attitude we regard others as causally determined input-output systems which do not merit any of the reactive attitudes (those would be beside the point). For example, we don’t resent a psychopath who harms someone. Instead, we hospitalize such a person and try to treat her. Perhaps we are annoyed at the trouble she is causing us, but resentment would be out of place. Recently, Stephen Darwall, has argued that the participatory attitude somehow marks the realm of morality.¹⁶ Resentment is the appropriate response of the victim of a norms violation.

¹⁵ (Strawson 1962). Of course, resentment and indignation are a major concern for the British sentimentalist school of thought and figures prominently in the writings of philosophers like David Hume and Adam Smith

¹⁶ (Darwall 2006) refers to the participatory attitude as the ‘second person perspective’ for reasons that need not concern us here.

Hence, to claim that an action wrongs a particular person (is wrong to that person) means that the action is such that it is appropriate for that person to resent the agent. Indignation, on the other hand is the proper response for those who are not victim of the violation, but share the participatory attitude. Hence to claim that an action is wrong – *period*, is to claim that it is appropriate to be indignant towards the agent.¹⁷

We can apply this analysis of the duties that moral norms impose on us to the realm of social norms proper. Then we will not be discussing whether it is in some absolute, ideal sense appropriate to resent someone's actions or be indignant. That is, we are side-stepping any issue of whether the social norm can be justified or is correct. Instead, we will look at those cases where people concerned *believe* it to be proper to resent the agent or to be indignant.

With that last caveat in place, I will argue for the following claims about resentment: (1) Resentment or indignation concerns other agents and their actions; (2) resentment or indignation involves that the interests of the one who resents are harmed and the one who is resented (or object of indignation) knows this to be the case; (3) resentment or indignation implies the existence of interdependent expectations; and (4) presupposes certain virtuous motives, in particular trustworthiness and fairness.¹⁸

Claim (1) is easily verified. One does not feel resentment against the outburst of a volcano, no matter how much damage it has done or the degree in which one's

¹⁷ The main difference between an action that is wrong *to* a person and an action that is wrong *period*, is that in the former case it is up to the victim to resent the agent. The victim has the prerogative to resent or indeed forgive the agent. However, this prerogative is not available to the indignant person.

¹⁸ I am agnostic about the question whether these conditions are necessary, sufficient or neither. I simply assume that they tell us something about the phenomenon of resentment

expectations about the likelihood of the event were reasonable.¹⁹ Claim (2) seems equally platitudinous, for if an action wrongs a person (or is wrong) that person is harmed and harm presupposes that one is made worse off. Why should the resented know this to be the case? This explains the observation that ignorance can function as an apology. If I park on your spot without realizing it, you will resent my action and, when aware of this resentment and its cause, I can excuse myself by saying that I did not realize that this was your spot (assuming, of course, that there are social norms governing the allocation of parking spots). Then my parking on your spot is no longer resented, though my ignorance might be.

The third claim introduces the expectations of the agents concerned. Resentment follows deviance from a social norm proper. Deviance implies that the deviant did not act as was expected. However, not just any failed expectation gives rise to resentment. It is only those expectations that somehow warrant taking the participatory attitude. That is, only if the expectation is taken to be legitimate, resentment will be forthcoming. To analyze when such expectations are legitimate we can appeal to the analysis of conventions in the previous section. There we saw that when a pattern of interdependent expectations exists among all in the collective in question, each agent has a reason to expect that others will comply. What is more, when a convention is in place, my expectation that you will act according to the convention is (part of) your reason to comply. Therefore, once we are in this web of interdependent expectations, our expectations about the actions of others become legitimate for they are based on reasons. What is more, this shows to a large extent that the participatory attitude is not a non-cognitive attitude we happen to take or not. Instead, it cognitive components since it

¹⁹ Except of course when one lives in an animistic culture where one's world view allows for personification of such things as volcanoes.

depends on interdependent beliefs (expectations). Therefore, just as is the case with reactive attitudes like resentment and indignation, we can even determine whether or not the participatory attitude itself is reasonable. We can determine, in other words, who is the relevant ‘us’ to whom the social norms in question apply.

This leads me then to an intermediate conclusion about social norms proper. For resentment and indignation to function they do in the context of social norms, it seems that social norms are conventional patterns of interdependent expectations such that they draw those under its scope into taking the participatory attitude towards each other, making resentment and indignation appropriate responses towards violations of the norm. Roughly and in a nutshell: social norms proper are conventions plus reactive attitudes where the conventions warrant taking the participatory attitude.

Before tackling the final claim I made about resentment and indignation, I wish to signal two implications of this rough and preliminary idea. First, this explains for a large part why there are very few mere conventions. Almost any convention, that is, any pattern of interdependent expectations, draws individuals into taking the participatory attitude and makes them suitable candidates for the reactive attitudes of resentment and indignation. In other words, most conventions quickly become social norms, as their existence draws people into taking the reactive attitudes towards each other. The example of the cross roads above demonstrates this. In all societies I am familiar with accidents that occur as a result of violating a pattern of interdependent expectations is a suitable occasion for criticizing the deviant, including resentment and indignation, and sympathy and solidarity with the victim.²⁰

²⁰ Not that resentment automatically follows traffic accidents. It is up to the victim to determine whether or not he will be upset and how upset he will be.

There is a further aspect of social norms proper that is explained by resentment and indignation. As I stipulated above, social norms proper seem to generate stronger reasons for action than mere conventions. Various authors have argued that we have intrinsic desires to avoid the resentment of others and, instead seek their praise, admiration and gratitude.²¹ Thus, the prospect of resentment gives us additional reason to comply. It might be objected that the avoidance of resentment at best gives us reason to conform, rather than comply. However, since we are to understand social norms proper as interdependent patterns of expectations plus reactive attitudes, it follows that the avoidance of resentment triggered by violations of interdependent expectations just is compliance with the norm. Note that the presence of these interdependent expectations is crucial in this argument. It is not the case the indignation and resentment do all the work.

Social norms and moral motives

However, this cannot be the whole story of social norms proper. For we still have to account for the fact that they bind categorically. So the very least we need to establish is that social norms bind even on those occasions when it is not in one's interest to comply. However, we saw that interdependent patterns of expectations only give reasons when a certain configuration of interests is in place. Moreover, it was only in such circumstances

²¹ Most notably, again, (Hume 2001) and (Smith 1976) and interesting contemporary defender of this view is (Sugden 1986). In (Verbeek 2002), I put a wrinkle on this view arguing that only reasonable expectations matter.

that resentment is reasonable and, thus, legitimate.²² The answer is to be found in other sources that contribute to the legitimacy of the expectations upon which the reactive attitudes are based. These sources can be found in what can loosely be referred to as moral motives. The idea is that if, on occasion, it is not in your interest to comply with a social norm, it can still be the case that others rely on you to comply. Their interests are at stake. They depend on you. This reliance is of a specific kind.²³ That is, the kind of reliance at stake here is not the sort of attitude you have towards an ATM when you rely on it to function well in order to retrieve money from your bank account. Neither is the reliance the sort of attitude one takes as when one relies on independent motives or interests of others. For example, it is not the attitude you take towards a second-hand car dealer on whom you depend to get a good car when you rely on this car dealer's concern for his reputation. What is it then that people rely on that you will comply with a social norm even if it is not in your direct interest on this occasion? It has to be that they rely on your trustworthiness, your fairness. They rely on you not to let them down. These motives, these moral motives, are insufficient on their own to guarantee compliance. They presuppose interdependent expectations about one's action. Here is why. First, without relevant expectations trustworthiness as well as fairness, the disposition not to let others down when they rely on you and are vulnerable, is 'blind'. They would be motivationally ineffectual. Secondly, these relevant expectations cannot be arbitrary. When I trust you, when I rely on you to treat me in a fair manner, this trust, this reliance has to be reasonable. I don't rely on you to give me your life savings. I might believe that you will donate these to me, but it seems odd to suppose that if you refuse you are guilty

²² Remember that I am not talking of ideal, objective or 'real' legitimacy – rather I take these to be conditions under which agents come to believe this legitimacy of their expectations.

²³ See (Baier 1986). Trust is the reliance on the other to comply when you are vulnerable to his performance.

of unfairness and fraudulent dishonesty. Again, the prime resource that makes such expectations reasonable is the existence of interdependent patterns of expectations. Therefore, social norms proper presuppose that at least a substantial part of those following the norm are characterized by such moral motives.

Notice that this also shows how that a social norm that is absolutely not in your interest ever to comply with does not have authority. For if this fact is well known, others will refrain from relying on you and they cannot appeal to considerations of fairness or trustworthiness to entice you to comply. In such a case, you would truly be out of the scope of the social norm.²⁴

All of this, finally, helps to make good on the fourth claim I made about resentment and indignation, namely, that these reactive attitudes presuppose the presence of moral motives, i.e., trustworthiness and fairness, among the followers of the norm in addition to the existence of interdependent expectations. These moral motives explain the reasonability or legitimacy of the expectations that ground the reactive attitudes. They explain why, even if it turns out to be the case that your interests are not served by compliance with the pattern of interdependent expectations, it can be reasonable to nevertheless expect you to comply. And if it is reasonable, resentment is an appropriate response to violations of social norms proper.

This leaves us then with a final refinement over the rough and ready characterization of social norms proper. A social norm proper exists in a society when²⁵:

- (1) There is a stable pattern of interdependent expectations,
- (2) which generates reasons for compliance and not just conformity.

²⁴ (Den Hartogh 1988; Den Hartogh 1998; Den Hartogh 2002) develops this thought into a theory of political obligation.

²⁵ This list of conditions for the social norms closely resembles that of (Den Hartogh 2002), (Winch 1990) and (Hart 1961)

- (3) This pattern draws people into taking the participatory attitude towards others.
- (4) This pattern of interdependent expectations is supported by moral motives, such as trustworthiness and fairness
- (5) Reactive attitudes of resentment and indignation are perceived to be proper responses to deviations from these expectations by those concerned
- (6) These responses provide reasons for those concerned to comply with the norm.

The authority of law

With this rather elaborate analysis of social norms proper, we can finally make a few brief suggestions about law. Just as it was tempting to assume that social norms proper are mere conventions; similarly it is tempting to assume that law is completely reducible to social norms. Formal law is nothing but the codification of mere conventions and social norms proper. Common law, informal law, consists of mere conventions and social norms proper that have not been codified.

This idea has certain advantages. If (formal) law is nothing but codified social norms, we can explain why legal rules oblige. For example, traffic laws, just as the rules of the road, give drivers reasons to give way, stop at certain signs, just as social norms proper and mere conventions would. Law, on this picture, is nothing but a sign that in this society certain patterns of interdependent expectations exist.

Secondly, we can explain the authority of laws that do not seem to oblige. For example, a legal requirement that a will be signed does not impose a duty. It does not require you to make a will, nor does it require you to sign this document. All it stipulates

is what makes a certain document a will. It is, in the words of Rawls, a constitutive rule.²⁶

Such a legal rule can be interpreted as a convention: it generates a pattern of interdependent expectations as to which documents are recognized as a will.

Third, it throws an informative light on the function of legislation. Legislation need not just be the codification of what is already there. It could also be the starting point of new patterns of interdependent expectation. For example, when, back in 1969, the Swedish government changed the traffic law such that, instead of driving on the left, people had to drive on the right from then on, the entire country switched. The fact that parliament enacted such a law, was enough to shift the whole pattern of interdependent expectations from left-driving expectations, to right-driving expectations. Legislation on this view is the process whereby patterns of interdependent expectations come into being or shift.

Finally, we can explain why some law (but not all law) comes with sanctions. Just like social norms proper come with reactive attitudes, criminal law has its own responses to violations.

In spite of its many virtues this picture is too simple. Law does not just contain norms that oblige its subjects. In addition to the obligations *in* the law, there is an obligation *to* the law. More precise, many authors believe that there is an obligation to obey the law because it is the law. That is, law requires compliance to itself and not to other norms. So if law is nothing but codified social norms, whether conventions or social norms proper, the law itself has no independent authority. We have to conform to the law, because doing so is in accordance with the relevant social norms. Law would

²⁶ (Rawls 1955). For a conventionalist theory of social norms, this distinction is not fundamental. Both regulative rules, i.e., rules that impose duties, and constitutive rules, rules that don't oblige, but instead constitute certain practices (e.g., the rules of the game) or artefacts (e.g., money, or, indeed, a will), are patterns of interdependent expectations.

have no authority of its own. It would merely be an archive of the social norms that operate in a society.

So how can we account for this obligation to the law – if it exists at all – within our conventionalist framework?²⁷ Again, I turn to the idea of interdependent expectations. Suppose that you live in a well-ordered society with a decent and relatively well-functioning legal system. In such a society there exists a well-entrenched social norm that one conforms to the law. I believe that some western democracies are societies where such a norm exists (most notably, the USA with its obsession for legal correctness).²⁸ Such a social norm *confers* authority to the law. It tells subjects that they need to look to the law for practical guidance. With such a social norm in place, law becomes a source of reasons of its own. In other words, because and only because in such a society we expect from each other that we conform to the law, the dictates of law provide reasons which are independent of mere conventions and social norms proper. Law then is not just the institution that passes on reasons stemming from existing social norms. It will be a source of reasons of its own. Only if such a pattern of interdependent expectation exists can we accept the claim that law has authority.²⁹

If all of this is correct, we have the beginnings of a general theory of all social norms. Stable patterns of interdependent expectations lie at the heart of any social norm.

²⁷ And there is a large number of authors who are skeptical that law has any authority of its own. Partly, because they have a more stringent concept of authority than I have here. Partly, because they take the obligation to the law to be a moral obligation.

²⁸ I am not claiming that only in western democracies (minus Italy?) such a social norm could exist. I do think that if it exists anywhere, chances are it would be a well functioning democracy.

²⁹ It is a matter of empirical debate whether such a social norm exists. It is also a matter of debate how wide-spread such a norm would need to be. (Hart 1961) famously believed that only judges would have to be part of such a social norm.

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