WITTGENSTEIN OR FRANKENSTEIN: THE CONCEPT OF RULE FOLLOWING IN LEGAL INDETERMINACY

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ABSTRACT

This paper examines Wittgenstein's concept of rule following in the context of legal indeterminacy. It argues that many legal scholars have misinterpreted the concept and, subsequently, applied it wrongly to law. This is due to the fact that, first of all, they have relied on a wrong interpretation of Wittgenstein's work, which affects the internal logical consistency of their claims. Moreover, their applications of rule following in the domain of jurisprudence are not sophisticated in general. Thus, this paper concludes that many extended claims derived from the concept of rule following are incoherent – products that are not entirely Wittgenstein's. It is best leave the concept of rule following where it is, and approach legal indeterminacy in some other way.

Keywords: Ludwig Wittgenstein, Rule Following, Legal Indeterminacy, Jurisprudence.

INTRODCUTION

In recent years, legal scholars have tried to explore the possibility of borrowing ideas from various disciplines in order to provide new solution to existing legal problems. When a complex idea is being borrowed, such as Ludwig Wittgenstein's concept of rule following, the original work must not be distorted or misinterpreted. This paper argues that such misfortune has happened within legal scholarship. This mishandling has inflated volumes of unnecessary literature. Hence, it is time to admit that the existing applications of the concept of rule following are neither helpful nor useful for the understanding of law.

Wittgenstein and Rule-Following Considerations

This part of the paper will examine briefly Wittgenstein's concept of rule following. It will set out the basic understanding of the concept that sceptics and non-sceptics both agreed on. It will then move on to examine the two theories in detail, and will conclude by stating that the non-sceptics' reading ought to prevail. To begin with, the definition of a rule in Wittgenstein's sense has a wider meaning than the one lawyer contemplates with. Under the concept of rule following, rules are defined as basic arithmetic, logical inferences and other types of basic grammar (Arrington, 2001: 119). In section 185 of *Philosophical Investigations* (1958) (hereafter, *PI*), Wittgenstein uses the example of 'adding 2' to demonstrate the issues related to the grammar of understanding (Wittgenstein, 1974: 75). For Wittgenstein, sociological and legal rules only play a peripheral role, for his investigation only concerns with the normativity of 'natural' rules (Hershovitz, 2002: 631). Therefore, the concept of rule following should not be applied directly to the domain of positive law.

Wittgenstein also believes that the proper task for philosophy is to clarify words (Stern, 2004: 13). He claims that philosophical confusions are created by the misuse of language. In section 116 of *PI*, Wittgenstein argues that the task of a philosopher is to clarify these issues which are related to language so that we could eliminate abstract metaphysical entities

(Wittgenstein, 1974: 48). To do so, Wittgenstein introduces us to the idea of *language-game*. In section 23 of *PI*, he compares the use of language with different types of game that contain specific rules which guide participants to communicate with each other in a particular context (Wittgenstein, 1974: 11).

Instead of viewing language as a distinctive complex of rules, Wittgenstein's language-game emphasises on the link between language and activity (Stern, 2004: 90). This eliminates the need to search for mysterious intermediaries between language and reality by labelling objects as the means of representation in our language-game (Wittgenstein, 1974: 25). Yet, to fully advance his theory, Wittgenstein realises that his claim must also encapsulate how agents understand and act according to those rules (Arrington, 2001: 120). In Baker and Hacker's (1985) point of view, Wittgenstein is concerned with the logic behind the agent's reasoning when they express or articulate (1985: 154-155).He is not particularly concerned with the causal relations of artificial rule following, such as, citizens obeying the law. This is because, in Wittgenstein's point of view, this is not the task of philosophy, nor is it philosophically '*sensical*' (*Ibid*).Therefore, applying the idea of rule following to social sciences, in hoping to explain causal phenomena, seems to be distorting Wittgenstein's intention of *PI* (Bix, 1993: 36). The concept of rule following can be analysed in terms of *understanding*, *knowing* and *interpreting* meaning (Arrington, 2001: 120). Section 143 of *PI* looks at the possibility of understanding. The Section dispels the claim that understanding is guided by some existing 'mysterious medium' (Wittgenstein, 1974: 56-57). In section 146 of *PI*, Wittgenstein argues that since the mental act of understanding is *un*observable, what can only be seen is the extended application. Therefore, in order to dispel the 'mystical' claim, the question turns to whether it is valid in claiming that the act of understanding is its application or, in other words, its usage (Wittgenstein, 1974: 58).

Since each application of the word only exposes to a finite portion of the alleged answer, the agent cannot be said to have shown of having a full understanding of the question (Arrington, 2001: 122). Thus, making the claim of application as a synonym for understanding does not *prima facie* provide a coherent argument. But there, Wittgenstein makes a qualification; understanding is an ability that could only be observed throughout a period of time via testing in different circumstances and by mastering it (Wittgenstein, 1974: 59).

In other words, since a single act would not be able to capture 'meaning' holistically, Wittgenstein claims that understanding is a mastery of technique and can only be achieved via *practice* (Baker and Hacker, 1985: 161); we are able to understand meaning because we have the ability to grasp the technique and refine it (Wittgenstein, 1974: 81). The claim resolves the issue of how we could categorise instantaneous moments of enlightenment. In Wittgenstein's view, these moments could not be interpreted as understanding because they are not formalised in the way described above (Stern, 2004: 143). Having affirmed the possibility of understanding, the issue now becomes what are the criteria for establishing it. This raises the need to discuss how agents come to interpret and learn about the meaning of rules. In section 185 of *PI*, Wittgenstein illustrates the problems of interpretation by examining a thought experiment; a pupil is asked to follow a mathematical equation of 'adding 2'. She continues to do so, but something odd happens when she reaches 1,000 – for each subsequent addition, she starts adding '4', instead of '2'. In what sense, Wittgenstein asks, can we say the pupil has made a mistake (Wittgenstein, 1974: 75)?

If the pupil says she is doing exactly what she has been told to do, could we possibly say that her computation is wrong? If the teacher points to her the incorrectness by illustrating the

correct computation, could that rectify the wrongness? The answer to both questions seems to be negative in Wittgenstein's view, for any illustration of the answer would only constitute a finite portion of the whole and thus, cannot be evidence of understanding (Wittgenstein, 1974: 75).

Moreover, since the meaning of a rule could be interpreted in various ways, even competing ones, any interpretation could not determine its meaning (Wittgenstein, 1974: 80). It follows then none of the acts of rule following could be said to be in accordance with the rule, *ergo* rendering the exercise of rule following meaningless (Wittgenstein, 1974: 81). This is the so-called *rule following paradox* illustrated in section 201 of *PI.*If so, it would be impossible to understand any application related to language in actual circumstances since any applicatory uses in life, such as citizens obeying and interpreting the definition of a piece of legislation, would be subject to the paradox. Yet, this is where sceptics and non-sceptics disagree. From the sceptics' point of view, Wittgenstein is posing a sceptical paradox (Baker and Hacker, 1984: 2). They claim that Wittgenstein rejects the possibility of understanding true objects of the world, and that no one could justify the past or present usage of language (Baker and Hacker, 1984: 4). Thus, learning language is logically *impossible*. According to the sceptics, Wittgenstein offers a solution that is, to claim that language makes sense because existing community sets standards of correctness that in turn helps ascertaining the correct meaning of how we should use it (Stern, 2004: 153).

From the non-sceptics' point of view, Wittgenstein is not conceding to the sceptics' position. In fact, they claim that Wittgenstein himself has provided an answer to the paradox. In section 201, Wittgenstein argues that it is a misconception of viewing meanings as solely constituted by interpretation. Instead, he argues that the actual *practice of language* itself is what constitutes meanings (Wittgenstein, 1974: 81). Non-sceptics argue that in Wittgenstein's sense, each interpretation carries the same functional constituents as the former and thus, they are viewed as alternative and non-sequential in nature (McDowell, 2010: 165). Hence, interpretation is a type of substitution that is simply 'nonsensical' to associate with the meaning of a word (McDowell, 2010: 163). Baker and Hacker (1984) argue that the sceptics have mistaken Wittgenstein's discussion in associating it with actual circumstances, when it is simply concerned with the philosophical *possibility* of it (1984: 10). This is evident in the sceptics' claim that the agent's inability to justify '*present and past*' application in existing circumstances substantiates the indeterminacy of language (1984: 27).

However, even if the above is not so, the non-sceptics argue that their opponent's claims are still logically inconsistent. For example, the dispositionists argue that no matter what constitutes the past, whenever I am being asked with a question at the present moment, I am intended to answer *x*; to speak of me answering *y* is simply 'non-sensical' (Finkelstein, 2011: 723). However, as Boghossian (1989) argues, this counter-sceptical move is problematic (1989: 540). Since agents are contingent on the context in which they are situated, their beliefs are inevitably subjective (Boghossian, 1989: 539).Because words in usage are confined to the semantic and intentional context, it is inevitable that whenever we utter words they will inevitably subject to the sceptics' doubts, namely, no one could justify it (*ibid*). Therefore, the dispositionalist's account could well be invalid.

Although the dispositionalist's account may be problematic, Stroud (2006) argues that the sceptic's solution of communal practice would not make a difference for the 'past and present' challenge after all, because the right answer of the present use lies with something

more than the 'sum' of the past uses, *ergo* the sceptics' claim is a meaningless exercise (2006: 307-309).

The sceptics tried to revitalise their claim by relabeling their approach as *meaning determinism*, taking Wittgenstein to be a 'constitutive' sceptic and not an 'epistemological' one. In other words, Wittgenstein is taken to be sceptical about meaning and determinative facts but not a sceptic on understanding (*Ibid*: 240, 243). However, since it is the non-sceptics who have raised such constitutive possibility in order to illustrate its wrongs, this objection is not warranted (Baker and Hacker, 1984: 4). To take stock, this part of the paper has demonstrated the complexity of rule following, and has argued that the sceptics' reading is inaccurate, for Wittgenstein did provide us with a 'straightforward answer'; whereas the sceptics' approach consists of possible logical inconsistency. Therefore, any extended claims derived from the sceptics' view may well be problematic.

CRITICAL LEGAL SCHOLARS AND LEGAL INDETERMINACY

This part of the paper will examine the concept of legal indeterminacy and how it is used in critical legal theories. It will argue that critical legal scholars' claim that law being indeterminate fails on three grounds. First of all, they fail to form a unified theory of legal indeterminacy and thus, it affects the integrity of their arguments. Secondly, the claim of radical indeterminacy is unsound, and at best, it could only be viewed as a moderate one. Thirdly, even if the moderate claim can be justified, critical legal scholars have overstated their claims. Legal indeterminacy plays an important role for critical legal scholars and liberal theorists because it is practically and theoretically significant for our understanding of law. If law is to be seen as indeterminate, individuals would be unable to ascertain their rights prior to their commitments, thus, making law unascertainable (Coleman and Leiter, 1994: 580). Furthermore, the principle of democratic consensus and the legitimacy of enforcement will be at stake if law is indeterminate. This is because there will be no single unitary conception of what law is actually about (Kress, 1989: 285). Therefore, legal indeterminacy has significant effects on how practitioners and theorists conceptualise legal ideas.

Despite its significance, the concept of legal indeterminacy is problematic. Different theorists have come up with different theories and definitions with regarding the concept. To illustrate how different the concept could be within critical legal scholarship, take Singer's nihilist approach and Derrida's deconstructionalist approach. Although both are labelled as critical legal scholars, the nihilist argues that law is determinate only if the power of exercising choices is constrained (Singer, 1984: 14), while deconstructionalist takes a more radical definition. They claim that law poses responsibility that we have to follow and yet, at the same time justice requires 'absolute' freedom to be obtained (Endicott, 1996: 676).In order for freedom to flourish, the deconstructionalist argues that we must interpret the law by resisting past references and continuing to interpret it in new ways. According to this view, law would never be determinate since we will never be able to take a point of time and claim that the law to be just, for the examined law at a point of time is always subject to future criticisms (*ibid*). Another example is that of the German scholar, Oskar Bulow, who is said to be the first legal scholar to coin the term legal indeterminacy (Herget, 1995: 67). Bulow's idea of legal indeterminacy derives from the incompleteness of legislation and the judges' discretion in filling the gaps between the letter and the spirit of the law in question (Herget, 1995: 69). It would be interesting to see if Bulow would recognise the claims propounded by the critical legal scholars – this paper thinks not; for Bulow's claim strengthens the legitimacy of adjudication, which the critics try to undermine.

What the above examples attempt to show is that legal indeterminacy is not a distinct concept. The best way to justify the concept of legal indeterminacy is to view it as incidental to some other claims. There has been a lot of ink spilt with regarding the question of classification; for example, Endicott (1996) argues that legal indeterminacy should be divided into *practical* and *theoretical* dimensions (Endicott, 1996: 669). The former is concerned with indeterminacy derived from practical usage, e.g. process of adjudication (Endicott, 1996: 669), and the latter deals with the source of meaning in question (Lipkin, 1992: 611); in other words, to be theoretically indeterminate, the meaning has to be contingent (Lipkin, 1992: 612). This distinction, however, does not capture the causal elements of the two. Theoretical implications would inevitably affect how the law works in practice and thus, such dichotomy does not seem to reflect the full descriptive account of indeterminacy.

Other commentators such as Coleman and Leiter (1994) classify indeterminacy as 'determinacy of reasons' and 'determinacy of causes' (1994: 559). The former is concerned with justificatory power of legal reasoning alone, and the latter with judges' explanatory power (*ibid*). The classification captures specific features of indeterminacy but nonetheless fails to generalise common characteristics across the concept (Coleman and Leiter, 1994: 562). Solumn (1987) has tried to address the classificatory issue by advancing a relativistic approach where determinacy is depended on the 'case' involved (1987: 472). In order to do so, Solumn (1987) introduces a third category of determinacy, viz., '*under* determinacy' in order to capture cases that are decided under *ultra*-legal norms (1987: 473). Conceptual and classificatory confusions have made it difficult for critical legal scholars to advance their radical indeterminacy claim, as we shall see later on. Before we move on to examine the radical indeterminacy thesis, it is worth looking into what the critical legal scholars are trying to establish. The critical legal scholars (hereafter, CLS) have one objective in mind that is to demonstrate the status quo as illegitimate in various ways.

As Solumn (1987) observes, if law is indeterminate, judges will have to seek extrinsic sources when adjudicating cases. CLS argue that judges in exercising their discretions provide opportunities for the special class, i.e. judges, to dominate the socio-structure by introducing their own moral or political ideas into the impartial judicial system. They claim that in doing so, judges violate the legitimate mandate that the society has assigned to them (1987: 463). Therefore, proving radical indeterminacy as a valid claim would *ipso facto* trigger the so-called 'illegitimacy' claim (*ibid*). Radical indeterminacy is presented in many forms, e.g. sources, legal reasoning and conceptual impoverishments. However, the objective of their claim is the same, namely, to show that law under any circumstances and at any rate is fundamentally indeterminate and thus, the legal system including the use of adjudication is nothing but 'politics' (Langille, 1988: 465). This is where the sceptics' reading of Wittgenstein would become useful for the CLS (Finkelstein, 2010: 654). Yet, as Endicott (1996) rightly observes in applying the sceptics' reading to the claim of radical indeterminacy, the CLS made the mistake of taking Wittgenstein's philosophical analysis to be a question of concerning 'social facts' (1996: 691).

Endicott reminds us that Wittgenstein is not interested in how rules are actually followed and that he is only interested in the normativity within rules and how it is logically understood (Endicott, 1996: 691). When the CLS use the sceptics' Humean solution of communal standard, they have wrongly assumed that Wittgenstein's rule following operates on the empirical level (*ibid*). Even if such move is justified, this paper argues that the radical indeterminacy thesis is still intrinsically problematic. This is because, first of all, the radical indeterminacy thesis is based on the wrongful assumption that political consensus gives rise

to legal legitimacy (Kress, 1989: 289). CLS argue that citizens are morally obliged to follow the law only if there is political consent (Coleman and Leiter, 1994: 594). Yet, such an assumption has been debated for a long time with no clear answer as to whether citizens do actually provide an explicit or tacit consent to the political institution. Therefore, to claim that there is a need for political consent in giving rise to legal obligation is controversial in itself (Kress, 1989: 290).

CLS argue that law is radically indeterminate because judges should only exercise deductive reasoning to act in accordance with the democratic mandate (Kress, 1989: 329). However, as Kress (1989) rightly argues, in sticking with the approach of deductive reasoning, CLS have forgotten the richness of legal sources that are actually deem to be desirable in the course of adjudication (1989: 325). For example, an analogous approach could help softening the hard edges of legal mechanics and revitalise the law with contemporariness, which are all important in achieving justice (1989: 330). In acting otherwise, CLS ignore the complexity of the system and the purpose behind it. The epiphenomenalist's CLS have also made an attack on the legitimacy of adjudication. Yet, they do not claim that 'easy' cases are radically indeterminate but that they are concerned with the explanatory power with regarding it (Solumn, 1987: 484). The epiphenomenalist argues that legal doctrines do not have a 'causal element' towards their outcomes and thus, law is radically indeterminate because there is no 'bridge' between the facts of the case and the law (*ibid*). This is problematic too because when adjudication is in operation, the causal element is embraced within the legal practice itself and thus, it should not treat legislation and the practice as separate entities (Solumn, 1987: 485). In other words, they should be viewed as a reflective activity.

Regardless of how conceptually or theoretically indeterminate law is, the fact that law exists as part of our society means that the point of reference for the debate of determinacy ought to be viewed thereon(Solumn, 1987: 480). Otherwise it will ignore the fact that law is presented within our society and the fact that it has gained the sense of legitimacy that our present society thinks fit. Hence, arguing that liberal concepts are fundamentally incoherent, or that law must take into account of our experiential factors, so to become determinate, do not address our concern (Kress, 1989: 303). There is another problem related to radical indeterminacy theorists that is they often confuse themselves with conceptual nihilism (Endicott, 1996: 668). For example, deconstructionalists claim that law is unjust because of the paradox mentioned earlier on; that justice could be done only if 'absolute' freedom is obtained (Fiss, 1982: 746). Yet, as Endicott argues, this would not solve the indeterminate issue because they are essentially arguing for a continuing movement of deconstruction in which justice would never be achieved (Endicott, 1996: 678). Therefore, Endicott claims that they are not advancing an argument on determinacy at all but rather that there is no such thing as justice (*ibid*).

The above arguments show that the radical indeterminacy thesis is unsound and is moderate, at best. In Lawson's (1996) view, the concept of moderate indeterminacy is often confused with the concept of uncertainty (1996: 411). He claims that indeterminacy should be viewed as a product of a standard of proof and the uncertainty involved in the alleged case (*ibid*). Lawson observes that since the standard of proof is adjustable, there is a possibility where indeterminacy could be diminished (1996: 421). This could be done by bringing the concept of 'burden of proof' into the picture, where the person who carries the burden of proof in the indeterminate case is to reach a standard of proof (Lawson, 1996: 423). It is unclear whether we could use it in a theoretical sense since Lawson's theory is mainly focussed on constitutional interpretation. Secondly, theorists of indeterminacy may take Lawson's

definition of 'uncertainty' as having the same meaning of 'indeterminacy', and thus, deflate Lawson's approach as meaningless.

To take stock, this part of the paper has argued that the CLS fail to advance a coherent claim of radical indeterminacy. This is because the CLS has relied on the sceptics' reading on Wittgenstein in which this paper believes to have little force. That being said, the conception of indeterminacy is also problematic, different CLS have different interpretations as to what indeterminacy mean, which adds to the complexity of the problem in question.

WITTGENSTEINIAN LEGAL SCHOLARS AND LEGLA INDETERMINACY

This part of the paper will examine whether or not it is appropriate to use Wittgenstein's rule following in the context of legal indeterminacy and in jurisprudence in general. It will argue that such applications are unsophisticated because, first of all, they have mistaken Wittgenstein's rule following and so, they have distortedthe original meaning of it. Moreover, they have mistaken some of the conceptual aspects of law and therefore, their arguments are incoherent. This section will mainly focus on academics that apply rule following in law, *viz.*, the *pro-extensionalists*.

Many pro-extensionalists use the concept of rule following in order to argue against the CLS movement. They are often right in pointing out that the CLS have relied on a wrong reading of Wittgenstein's works and that the radical indeterminacy claim is unsound. But they nonetheless have misapplied to law. First of all, many of these mistaken claims are often due to a lack of understanding of Wittgenstein's rule following. For example, Arulanantham (1998) agrees with the anti-realists that the legal realists have taken a wrong reading of Wittgenstein, although not in ruling out the possibility of applying rule following in law (1998: 185-58). It seems justified at the beginning of his approach where he treats law and 'language and mathematics' differently because Arulanantham recognises that law is a reflective activity, which the other two are not (1998: 1880).

Yet, he makes a mistake in claiming that the criteria of a theory of legal correctness must provide a way to avoid the regress of section 201 (1998: 1881). Such direct application ignores the fact that Wittgenstein's rule following operates in a separate language-game, *viz.*, a philosophical one (Endicott, 1996: 691). Applying rule following directly to law is to do exactly what Wittgenstein told us not to; namely, to take the use of language outside its appropriate context and utilising it in some unconventional way (Bix, 1993: 47).

In another example, Arulanantham is right in claiming that the 'strong internal sceptics' are wrong in borrowing the sceptics' reading of Wittgenstein in the debate of radical indeterminacy (Langille, 1988: 453). However, he took a step further in claiming that the non-sceptics' reading could be used in rejecting the external sceptics' claim of law being explanatory without the need for legal normativity (*ibid*). In arguing so, he made the mistake of applying the concept of 'grammar' in Wittgenstein's sense to the so-called 'grammar of law' in order to outline normativity (1989: 561). Bix (1993) argues that applying such definition of 'grammar' in law would imply that law is an unreflective activity that is clearly not true (Bix, 1993: 48).

Not only do the pro-extensionalists suffer from a lack of understanding of the concept of rule following, but they have also mistaken the many legal concepts that are involved in their discussions. For example, Hershovitz (2002) criticises Marmor for failing to make a clear

distinction between 'easy' and 'hard' cases in the debate against radical indeterminacy; Marmor claims that 'legal standard' is needed for 'hard' cases and not for others, but this does not seem to capture the distinction of the two (2002: 633).

Mamor in claiming interpretation is not needed for all cases of law according to rule following is also problematic. First of all, his definition of 'interpretation' does not mirror Wittgenstein's (Hershovitz, 2002: 634). Secondly, law is a social construct and Wittgenstein's rule following only concerns with natural grammars that are of *un*debatable nature, as mentioned in Part I. As Hershovitz (2002) correctly observes, law is a network of rules that requires each interpretation to be dealt with and act holistically (2002: 639). Therefore, Marmor's account of interpretation fails to demonstrate his claims in a coherent sense of the relationship between law and the concept of rule following.

Patterson's application of Wittgenstein in the context of commercial law could be seen as another example where the concept of rule following has been misunderstood (Markell, 2005: 817). Patterson is particularly interested in how Wittgenstein's 'straightforward solution' to section 201 paradox, *viz.*, 'form of life', could be used to explain the idea of good faith with regarding the American's UCC. He claims that good faith could be derived from the Code via a purposive interpretation that embraces the communal standard according to the 'form of life' (Markell, 2005: 818-819). However, as Markell (2005) argues, Patterson's theory does not have enough descriptive power of how the legal aspect works. He criticizes Patterson for equalising the concept of understanding to explain good faith as practice in which it directly contradicts Wittgenstein's avoidance of intentional approach (2005: 821-822). Therefore, Patterson's theory does not seem to be coherent either.

In the first part of this paper, we saw that Wittgenstein is not concerned with a complex and 'highly-structured' language-game (Markell, 2005: 824). Wittgenstein's intention in *PI* is to dissolve the 'mystical medium' of understanding and to provide a descriptive account of it as we have examined earlier in Part I(Wittgenstein, 1974: 48). In other words, Wittgenstein's intention is not to change the way we approach practical activities, but to enable us to disregard a branch of philosophy he thinks that does not add to our understanding. Patterson's application distorts Wittgenstein's objective by introducing a prescriptive way of dealing with socio-legal concepts and thus, violates the integrity of Wittgenstein's claim.

Apart from his application of rule following in commercial law, Patterson (1990) has also advanced a general theory of law by using the concept of rule following itself (1990: 940). He claims that law is a practice that follows a particular communal standard, and that legal arguments direct a construction of a particular trend (1990: 941). But as Bix (1993) rightly points out, the theory seems to have deviated from Wittgenstein's original work (1993: 51). This is because the only reason why Wittgenstein developed the concept of rule following is to understand more about the nature of understanding, as we have examined earlier on in this paper. It will be interesting to see whether Wittgenstein would be able to recognise any of Patterson's work as his own.

To take stock, it is time to admit that Wittgenstein's concept of rule following poses a different set of questions from those we, as lawyers, are asking(Bix, 2005: 220). As Bix (2005) points out, for law the question is often with 'how' to deal with disagreements (2005: 221). For Wittgenstein, the task is to dissolve philosophical confusions in descriptive account (2005: 223). Therefore, much of the pro-extensionalists' claims seem to have missed the point in confusing themselves with the two 'language-games'.

CONCLUSION

It is important to clarify the paper's position. This paper does not go so far as to claim that academics should not 'cross-fertilise' ideas. Yet, what it tries to say is that it ought to be done in the right circumstances without distorting the author's original intention. There are many commentators who have applied Wittgenstein's work in the context of legal indeterminacy correctly, which this paper believes to have force in their claims. But as Markell (2005) rightly points out, a legal theory that employs Wittgenstein's rule following would have to be descriptive all along; it cannot be a normative account as to how law *should* work (2005: 843). It is too often the case that legal literature has used Wittgenstein's works rather too quickly without carefully reflecting on them (Bix, 2005: 224), and there are too many cases where academics use 'quantum mechanics to brew a pot of coffee' (Markell, 2005: 845), which something less would easily do the job. Therefore, it is best to put the excitement of Wittgenstein aside and to address legal indeterminacy from another angle.

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