

Introduction^[1]

In their book, *Law and Justice in Community*, Barden and Murphy discuss in some detail the topic of legal authority.^[2] According to them, we can speak of legal authority in two senses:

First, a ruler is said to be in 'authority' over his subject in that the ruler is entitled to command his subject who, reciprocally, is obliged to obey. [...] Secondly, a person is said to be an 'authority' in as much as he is expert in a domain and worthy of belief, although not infallible. The source of authority of this type is expertise, truthfulness or, in moral affairs, wisdom.^[3]

Authority in the second sense, i.e. expertise, plays an important role in contemporary positivist legal theories, especially the one presented by Joseph Raz. At the conference in Reykjavik, held in March 2011 and dedicated to the publication of Barden's and Murphy's book, discussions took place on the soundness of Raz's authority concept. In my talk at the conference and in this short paper I argue against it.

The obstacle

As Hart famously showed, the earlier positivist theories of Austin and Bentham, describing laws as orders backed by threats, were unable to explain the difference between *the law* and the orders of a gunman and therefore failed to give a sufficient account of our concept of law. The key to understanding this difference was to adopt what Hart called the *internal aspect of rules*. The legal theorist has to acknowledge that people do not understand rules simply as a basis for a prediction of hostile reactions, but as a *reason* for hostility. Legal rules appeal to respect for *authority*, and create an obligation, while the gunman's threat appeals to fear, creating no obligation (even though you may be *obliged* to follow his orders).^[4]

HLA Hart, a self-claimed positivist, thus agreed that authority is an element involved in our concept of law. However, the naturalist explanation of authority was denied to him as he claimed that there is a conceptual distinction between law and morality and that the foundation of the legal system, the rule of recognition, did not need to be based on morality. [5] This created a problem for him:

...the element of authority involved in law has always been one of the obstacles in the path of any easy explanation of what law is.[6]

However, Hart had not said his final word on the element of authority. As will be discussed below, he later gave a more detailed (and better) account of authority. Later on, his former apprentice, Joseph Raz, added to the positivist explanation of authority.

I argue that in spite of later attempts by Hart and Raz to give a satisfying account of law's authority, for a positivist the element still presents an 'obstacle in the path of any easy explanation of what law is'.

As discussed earlier, serious flaw in the positivist theories of Bentham and Austin, describing the law as commands backed by threats, was their inability to explain the difference between obeying legal rules, on the one hand, and the orders of a gunman, on the other. When realizing how people understand rules as not just a basis for a prediction of hostile reactions, but a *reason* for hostility, one can see that legal rules appeal to respect for *authority*, and create an obligation, while the gunman's threat appeals to fear, creating no obligation. However, the question remains: why do people understand rules in this way? Why do they view legal rules differently than orders from a gunman? Hart did acknowledge that the 'coercive power of law presupposes its accepted authority'. [7] But to him, that did not mean that law needed to be accepted as morally binding. [8]

This may be the case for the ordinary citizen, who may never give a serious thought to why he sees laws as reasons to act. But this can hardly apply to the officials, enforcing the law. It is hard to imagine a legal system, let alone a stable one, where the officials adopt the internal point of view, seeing the rules as reasons for action and hostility, without grounding this perspective on any moral reason whatsoever. Not to mention the situation where the officials have strong moral reasons *not* to adopt such a view. If the only reason for adopting the view is *social pressure* (or fear) we are simply back in the gunman situation.

Hart therefore used the conception of *authority* to articulate an important difference between a legal system and the power of the gunman. But at the same time, it made his theory vulnerable to the argument that by correcting some of the mistakes made by earlier theorists he had in fact abandoned the positivists' distinction between law and morality. He was therefore quite right to acknowledge the concept of authority as an obstacle to an easy *positivist* explanation of what law is.

Unsuccessful Attempts to Remove the Obstacle

Since the publication of *The Concept of Law*, theorists have given the concept of legal authority a closer attention and attempted to clarify its role in legal theory. Here, two of these attempts will be briefly discussed; Hart's own modification of the concept and, more importantly, the one made by Joseph Raz.

Hart introduced a developed account of legal authority in his 'Commands and Authoritative Legal Reasons', which was written under influences from Joseph Raz.^[9] There, Hart defines *authoritative legal reason* as such:

[T]hat is a consideration [...] which is recognized by at least the Courts of an effective legal system as constituting a reason for action of a special kind. This kind of reason I call 'content independent and peremptory'.^[10]

A reason, according to Hart, is *peremptory* when it cuts off the hearer's deliberations for acting and thus replaces all other reasons. A reason is content independent if it presents a reason for action 'independently of the nature or character of the actions to be done'.^[11]

Hart uses the third chapter of the article to resist the argument that the 'Courts of an effective legal system' could only have moral reasons for their actions, which, as mentioned earlier, would have meant that he had abandoned the positivist view on the relationship between morality and law.^[12] He believed that the requirement that the courts see legal rules as authoritative could be satisfied by motives 'which have nothing to do with the belief in the moral legitimacy of the authority whose enactments they identify and apply as law'.^[13] For an example of this, he mentions compliance on the basis that the judges had sworn on taking office to continue the established practice.

This later account of legal authority adds much to what had been said in *The Concept of Law* and gives a fuller picture of the foundations of the legal system in Hart's theory. However, some difficulties remain.

First, the notion of legal rules functioning as *peremptory reasons* clearly does not describe their actual function in modern legal systems. People do not surrender their judgments by letting legal rules cut off their deliberations on whether or not they should perform the acts required by the rules. A rational person, with a 'standing recognition' of legal authority, may well reflect on whether or not she should follow a given legal provision or not. If she ultimately decides not to break the law she has obviously shown the utmost respect for legal authority, even though the deliberation did take place.^[14]

Secondly, Hart not only insists that the officials of the legal system do not need to view the rule of recognition as morally binding but goes further (than Raz) and maintains that they do not even have to pretend to view the law as binding in this way. As Hart himself acknowledged, this is somewhat troubling given his own account of the function of authoritative legal rules:

I am vividly aware that to many it will seem paradoxical, or even a sign of confusion, that at the end of a chapter, a central theme of which is the great importance for the understanding of law of the idea of authoritative reasons for action, I should argue that judicial statements of the subject's legal duties need have nothing directly to do with the subject's reasons for action.[15]

Hart undeniably strengthened his theory with his new account of legal authority. But this later effort was not enough to remove the obstacle. We therefore turn to the theorist who has probably given more thought to the concept of legal authority than anyone else.[16]

According to Joseph Raz, all legal systems claim legitimate authority and a system that cannot possess such authority cannot be a legal system.[17] His conception of authority is grounded on three theses: *the dependence thesis*, *the normal justification thesis* and *the pre-emption thesis*.

According to *the dependence thesis* 'all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive'.[18] According to *the normal justification thesis*:

[The] normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[19]

Scott J. Shapiro summarizes Raz's *pre-emption* thesis as follows: 'When authorities require performance of an action, their directives are not merely added to the balance of reasons, but they also exclude these reasons and take their place.'[20]

These different aspects of Raz's authority concept will not be pursued further, but some of them will be discussed (and criticized) in more detail later in this paper. It is necessary though to emphasise the importance of the dependence thesis and the normal justification thesis as constituting the *service conception* of authority. This means that authorities provide service to their subjects by mediating 'between people and the right reasons which apply to them'.^[21]

Raz maintains that authorities can fulfil their roles as mediators between people and reasons, only if their decision can be identified by means 'other than the considerations the weight and outcome of which it was meant to settle'.^[22] It is this feature of Raz's authority concept that leads to his rejection of the *incorporation thesis* adopted by so called inclusive positivists. In other words, Raz rejects the idea that a legal rule can by referring to a moral norm incorporate it into the legal system. According to this, a legal rule which refers to a moral standard, e.g. 'due process' or 'degrading treatment', merely gives power to the courts to legislate on the subject. His conclusion is that the 'sources thesis' (claiming that legal validity can only be established by reference to the conventionally identified sources of law) should be preferred over the incorporation thesis.

Raz's strong focus on the concept of authority can therefore be explained by the twofold role it plays in his theory. Not only is it the basis of his theory as a positivist arguing against competing theories, but it is also meant to defend his exclusive positivism against the line of positivist theories which allow for non-source-based laws to be entailed by the source-based law. However, as thoughtful and sophisticated his conception of authority is, many aspects of it raise serious questions and doubts.

As noted earlier, Raz maintains that all legal systems claim legitimate authority and a system that cannot possess such authority cannot be a legal system. Dworkin points out that this might suggest that no system can be regarded as a legal system unless it fulfils all the requirements of having legitimate authority, among them the moral requirements that Raz himself recognizes.^[23] This, however, would make his exclusive positivist theory untenable.

Raz understands this difficulty, because he is careful to declare that being “capable” of legitimate authority requires meeting all the non-moral conditions of that status but not require meeting any of the moral ones. He says that this distinction is “natural,” though he does not explain why.[24]

Dworkin has a point here. Raz seems to be adjusting his concept of authority to his own theory of exclusive positivism. This is troubling, because the concept of authority forms the basis of Raz’s theory of law, not vice versa.

Secondly, Raz’s authority concept seems somewhat ‘eccentric’.[25] Take for example the *normal justification thesis*, the core of the service conception. According to the thesis, legal authority is agent specific. It depends on the service the directives provide each individual with, which of course varies between people of different skills and expertise. This may well hold as an academic account of the concept of authority but it hardly provides us with the ‘normal’ way to establish legal authority in real life. We normally talk about governments or legal acts having authority in much more general terms.[26] It sounds strange for example to say that no general answer can be given whether or not the legislator had authority to ban smoking in public places and that the answer simply depends on whether we are asking the question on behalf of Peter or Paul.

It is not only the aspect of agent-specificity that disturbs our normal notion of legal authority. Most citizens of modern democracies probably accept the state’s authority in many cases even though they are not being *served* in the Razian sense. Indeed, Raz himself acknowledges that his concept leads to the conclusion that even the states that are ‘reasonably just’, often exceed the sphere of legitimate authority.[27] Again, this does not constitute a logical problem for Raz, but it shows that his concept is somewhat distant to our general notions of legal authority.

Thirdly, Himma, although being partly mistaken in his criticism, has marked a different kind of problem with Raz’s authority concept. Himma claims that the normal justification thesis

implies that legitimate authority is unlimited.[28] Read in isolation the thesis certainly gives the impression that as long as the legal authorities know better than you and can provide you with their service, their authority is legitimate. This would leave no aspects of one's life out of their reach. However, this criticism is misdirected because Raz specifically presents an 'exception' to the normal justification: 'this general rule has an important exception. It consists of all those matters regarding which it is more important to act independently than to succeed in doing the best'.[29]

The exception may save Raz from the otherwise devastating effect of Himma's criticism. But at the same time it waters down the normal justification thesis. Read together with the exception the thesis could be accepted by almost all theorists concerned about legitimacy of state authority. The libertarians and the anarchists would simply say that in almost all aspects of life it is 'more important to act independently than to succeed in doing the best' while the communists and fascists would argue that the exception creates a very limited sphere of protection from legitimate state authority.[30] In other words: the exception strips the concept of most of its practical usefulness.

Finally, Raz's authority concept seems to ignore procedural aspects of authority. Most would agree that a democratic legal regime, allowing its subjects to influence governmental policies and accepting the voters' decision every four years, enjoys greater legitimate authority than a dictatorship even though the latter might on balance take wiser decisions for its subjects.[31] But *the normal justification* thesis does not explain this difference. On the contrary, it seems to award the dictatorship in the example greater authority as it provides its subjects with *better service* than its democratic counterpart.

To summarize: Joseph Raz set out to describe 'the core notion of authority', a concept 'deeply embedded in the philosophical and political traditions of our culture'.[32] Raz fails to do exactly that by presenting a conception of authority which is strictly agentdependent, ignores the importance of procedure (democracy), and seems to be specially designed to serve the ends of external positivism.

Conclusion

One of the main advantages of Hart's theory, presented in *The Concept of Law*, is that it not only describes in general terms important features of legal systems but does so in a relatively simple way. Hart was right however to note that for a positivist like him, trying to describe 'what the law is', the element of authority presented an obstacle. An obstacle certainly not sufficiently dealt with in the book itself. Later attempts to remove the obstacle by clarifying the concept have not come without a cost. First, the more sophisticated the explanation of authority has become, the more distant it has become to our general usage and notion of the concept. Second, although many theorists may accept Raz's account of the element of authority, few would describe his explanation as *simple*.^[33] And the more complicated it gets, the farther we move from the path of an 'easy explanation of what law is'.

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[1] This paper is based on my talk at a conference held in Reykjavik 4 March 2011 on the occasion of the publication of Garrett Barden's and Timothy Murphy's book *Law and Justice in Community*. It is based on an earlier article of mine, 'Are Law and Justice Intrinsically Related? - A Sketch of an Answer', which was published in *Rannsóknir í Félagsvísindum X*,

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[2] Garrett Barden and Timothy Murphy, *Law and Justice in Community* (OUP, Oxford 2010), esp. chapter 11.

[3] *Ibid*, pp. 232-233.

[4] HLA Hart, *The Concept of Law* (2nd edn OUP, Oxford 1994), pp. 6, 20 and 90.

[5] HLA Hart, 'Commands and Authoritative Legal Reasons' in *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, Oxford 1982), pp. 243 and 265. For a naturalist's account of legal authority, see John M. Finnis: 'Natural Law: The Classical Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP, Oxford 2002). For my own thoughts on the natural law explanation of authority: Hafsteinn Þór Hauksson, 'Are Law and Justice Intrinsically Related? - A Sketch of an Answer'.

[6] HLA Hart, *The Concept of Law*, p. 20.

[7] *Ibid*, p. 203.

[8] *Ibid*, p. 203.

[9] HLA Hart, 'Commands and Authoritative Legal Reasons' in *Essays on Bentham: Studies in Jurisprudence and Political Theory*, p. 244.

[10] *Ibid*, p. 243.

[11] *Ibid*, p. 254.

[12] *Ibid*, p. 262.

[13] Ibid, p. 265.

[14] Joseph Raz, *The Morality of Freedom* (Clarendon Press, Oxford 1986) 39. The phrase 'standing recognition' is from Hart himself. HLA Hart, 'Commands and Authoritative Legal Reasons' in *Essays on Bentham: Studies in Jurisprudence and Political Theory*, p. 256.

[15] HLA Hart, 'Commands and Authoritative Legal Reasons' in *Essays on Bentham: Studies in Jurisprudence and Political Theory*, p. 267.

[16] Ibid, p. 265.

[17] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP, Oxford 1995), p. 215.

[18] Joseph Raz, *Morality of Law* (OUP, Oxford 1986), p. 47.

[19] Joseph Raz, *Morality of Law* (OUP, Oxford 1986), p. 53.

[20] Scott J. Shapiro, 'Authority' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP, Oxford 2002), p. 404.

[21] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, p. 214.

[22] Ibid, p. 219.

[23] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, p. 199.

[24] Ronald Dworkin, *Justice in Robes* (Harvard University Press, Cambridge, Massachusetts 2006) p. 202.

[25] Ibid, p. 201.

Adam Tucker, 'Beyond the Normal Justification Thesis: Jurisdiction in the Service Conception of Authority', <<http://www.trinitinture.com/documents/tucker.pdf>>, p. 5. Tucker's article is a draft prepared for Oxford's Jurisprudence Discussion Group which met with the author in November 2007. I had the privilege of participating in the discussions and was given permission by the author to cite the article.

[27] Joseph Raz, *Morality of Law*, p. 70.

[28] Kenneth Einar Himma, 'Just 'Cause You're Smarter than Me Doesn't Give You a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis' (2007) 27 OJLS 121, p. 144.

[29] Joseph Raz, 'Introduction' in Joseph Raz (ed), *Authority* (New York University Press, New York 1990), p. 13; Tucker, 'Beyond the Normal Justification Thesis', pp.15-16.

[30] Tucker downplays the importance of this point in his article. See, Adam Tucker, 'Beyond the Normal Justification Thesis', p. 17. I, however, believe it is of great importance. The value and extent of personal autonomy lies at the heart of the differences between competing political theories.

[31] See Himma's imaginary example of the two states, *Coercia* and *Consentia*. Kenneth Einar Himma, 'Just 'Cause You're Smarter than Me Doesn't Give You a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis', pp. 142-144.

[32] Joseph Raz, *The Morality of Freedom*, pp. 63-64.

[33] Ronald Dworkin, *Law's Empire* (Harvard University Press, Cambridge, Massachusetts 1986), p. 199; Scott Hershovitz, 'Legitimacy, Democracy and Razian Authority', (2003) 9 *Legal Theory* pp. 201, 206.

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