

AGREEMENTS AND DISAGREEMENTS. SOME INTRODUCTORY REMARKS *

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That two theories of law are different does not imply that they differ in all aspects. Far more likely is the opposite state of affairs, namely, that there are some common points along with some points of disagreement. I will start with three points in which there seems to be at least some connection between Joseph Raz's opinions and my own. In a second step, I will consider what is, perhaps, the most fundamental difference.

Owing to the character of this statement, namely, as an introduction to a discussion, everything will have to be extremely brief and sketchy.

The most general and abstract point of agreement seems to be the conception of legal philosophy as an universalistic enterprise. Legal philosophy is reasoning about the nature of law. Asking for the nature of something is more than asking for interesting or important properties. Questions about the nature of law are questions about its *necessary* properties. Thus, for the question 'What is the nature of law?' one can substitute the question 'What are the necessary properties of law?'

Necessity implies universality. If law is necessarily connected with coercion or force, then all legal systems reflect this necessary connection. 'Necessity and strict universality ... belong together', as Kant puts it, 'inseparably'¹. Necessity is not only intrinsically connected with universality but also with essence. Necessary properties of law are, when specific to the law, essential properties of law². Legal philosophy *qua* inquiring into the nature of law is, therefore, not only an universalistic enterprise but also an essentialistic one.

There is, however, an important difference. Raz connects the theses that 'legal philosophy is universal'³, that a 'claim to necessity is in the nature of the enterprise'⁴, and that there 'are... essential features of the law'⁵ with the thesis that the concept of law is parochial. His reason for the parochial, non-universal character of the concept of law is 'that the concept of law is itself a product of a specific

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1. I. Kant, *Critique of Pure Reason*, trans. and ed. Paul Guyer and Allen W. Wood, Cambridge 1997, 137-8 (B4).

2. R. Alexy, 'The Nature of Legal Philosophy', *Ratio Juris* 17 (2004), 162-3.

3. J. Raz, 'On the Nature of Law', *Archives for Philosophy of Law and Social Philosophy* 82 (1996), 1.

4. *Ibid.*, 2.

5. *Ibid.*, 6.

culture'⁶. An example of Raz's are 'theocratic Jewish communities', which had 'a legal system even though they lacked the concept of law'⁷.

Raz's thesis that 'all concepts are parochial'⁸ seems, at one and the same time, to be true and not true. Whether people have or possess a concept is a matter of fact. In so far as concepts depend on conventions, one could call their possession a 'social fact'. Concepts as social facts are indeed 'the product of a specific culture'⁹. But concepts are conventions or rules of a special kind. They claim to be adequate to their objects. In this way, they are intrinsically related to correctness. This claim to adequacy connects the concept of a thing with its nature. This is the non-conventional dimension of concepts. To the degree to which a concept corresponds to the nature of its object, it has universal validity. To this extent, concepts are universal and not parochial. The parochialism of their genesis is compatible with the universality of their validity.

Raz's theory is essentially positivistic. I have attempted to reply to positivism by defending a non-positivistic view. On first glance, positivism and non-positivism seem to be no more than a single proposition, asserted in the one case, denied in the other. A closer look, however, reveals that things are far more complex. Raz's positivism says a good deal about the close relations between law and morality, and non-positivism includes the classical elements of legal positivism, namely, authoritative issuance and social efficacy. The difference consists not in some substitution of these two elements by correctness of content and, with it, morality. Rather, the difference consists in adding correctness of content to them as a third element, necessarily included in the nature and concept of law. Positivism and non-positivism share what Raz calls the 'social thesis', but they do this in different ways. Raz's version is necessarily exclusive, that of non-positivism necessarily inclusive. Raz calls the necessarily exclusive social thesis the 'strong social thesis' or 'sources-thesis'¹⁰. It says 'that the existence and content of every law is fully determined by social sources'¹¹. Non-positivism contests precisely this and maintains a necessarily inclusive social thesis, which claims that the existence and content of law necessarily depends not only on social facts but also on moral ideas. In this way, law and morality are necessarily connected. The social thesis is toned down to a version of what Raz calls the 'weak social thesis'¹². Raz terms his strong social thesis the 'backbone' of the version of positivism he 'would like to defend'¹³. The

6. *Ibid.*, 4.

7. *Ibid.*

8. *Ibid.*, 5.

9. *Ibid.*

10. J. Raz, *The Authority of Law*, Oxford 1979, 47.

11. *Ibid.*, 46.

12. *Ibid.*, 45.

13. *Ibid.*, 39.

connection thesis¹⁴ is the backbone of the version of non-positivism I would like to defend. This seems to me to be the main source of disagreement.

The third point in which there might well be some resemblance between our respective views concerns the claims that are connected with law. Non-positivism essentially rests its case on the thesis that law necessarily raises a claim to correctness, which includes a claim to moral correctness¹⁵. According to Raz, it belongs to the 'essential properties of law' that 'it claims to have legitimate, moral, authority'¹⁶. As an essential property of law, this claim is 'necessarily'¹⁷ raised. Both claims obviously include moral elements. This provokes the question of whether non-positivism is right in maintaining that this claim is incompatible with positivism or whether positivism is correct in assuming the compatibility of positivism and claims that are, first, necessarily raised by law and, second, necessarily related to morality. To answer this question, we must now focus on the differences.

Again, as the point of departure I shall take up a general issue. It concerns the role that necessary relations between law and morality play in the debate between positivism and non-positivism. Raz maintains that the question of whether there exist necessary connections between law and morality is the wrong question where the relationship between positivism and non-positivism is at issue. According to Raz, the thesis 'that the existence of necessary connections between law and morality cannot really be doubted' is a 'relatively trivial thesis', which 'has little bearing on important issues' as discussed in the perennial debate between legal positivism and natural law¹⁸. This, again, seems to be partly true and partly not true. Three examples of necessary connections adduced by Raz show this.

The first refers to Hart's concept of 'natural necessity'¹⁹. It is indeed true that 'given human nature and the conditions of human life..., necessarily no legal system can be stable unless it provides some protection for life and property to some of the people to whom it applies'²⁰. But a natural necessity, thus understood is not enough for a necessary connection between law and morality. The means/end-relation expressed in such natural necessities as this creates a necessary connection between law and morality only if two further premises are added, first, that there is a moral obligation to achieve the end, and, second, that this moral obligation is

14. R. Alexy, *The Argument from Injustice*, trans. B. L. Litschewski Paulson and S. L. Paulson, Oxford 2002, 4.

15. *Ibid.*, 35-39.

16. Raz, n. 3 above, 6.

17. *Ibid.*, 16.

18. J. Raz, 'About Morality and the Nature of Law', *The American Journal of Jurisprudence* 48 (2003), 3. Raz's division between 'legal positivists' and 'natural lawyers' (*ibid.*, 2.) is not taken up here, for not everybody who rejects legal positivism on the ground that it is unable adequately to grasp the relationship between law and morality must adhere to everything a full-fledged natural lawyer may assume.

19. H. L. A. Hart, *The Concept of Law*, 2nd ed., Oxford 1994, 199.

20. Raz, n. 18 above, 3.

necessarily connected with law. These two premises transform natural into moral (first premise) and legal (second premise) necessities. Natural necessities as such contain neither the first nor the second. For this reason, they are necessarily neutral with respect to morality—and, thus, neutral with respect to the problem of positivism, too. Raz's first example, therefore, is not an example of a necessary relation between law and morality.

The second example runs as follows: 'Given that only living animals can have sex, necessarily rape cannot be committed by the law or by legal institutions'²¹. This example illustrates one of many necessary conceptual relations that are relevant in a legal system, but not a necessary property that belongs to the general nature of law. Only the latter and not the multifariousness of special conceptual relations inside the legal system is the issue in the debate between positivism and non-positivism²².

Raz's third example is far more interesting. It is expressed as follows: 'Given value pluralism, necessarily not state or legal system can manifest to their highest degree all the virtues or all the vices there are'²³. This seems to be a proposition about the relations between different normative systems—no fewer than three, a legal system and two competing moral systems—and it is, indeed, necessarily true that no legal system can realize or help to realize to the highest degree possible all moral values of all competing moral systems. This necessity, however, is a logical necessity concerning the relation between different normative systems. It has no direct bearing on the problem of positivism, for it says, as such, nothing about the existence or the content of law. In order to contribute to the content of law, a premise like 'All value systems have to be treated equally by law' would have to be added. As soon as this premise is added, Raz's sentence about law and value pluralism implies that none of the competing value or moral systems can expect either full manifestation or realization through law. The question of whether premises like that about equality are necessarily connected with law is, however, a question of relevance for the debate between positivism and non-positivism.

Raz's examples show that the question of whether there exist necessary connections between law and morality has as such, indeed, no direct bearing on the debate about legal positivism—it does not, at any rate, if it is understood as a question concerning natural, or empirical, or logical necessities. Things change

21. *Ibid.*

22. It is, naturally, possible, that some necessary conceptual relations inside the legal system depend on assumptions which are not only legal but also moral assumptions. An example is: 'Given that only rational beings can commit murder, necessarily my cat cannot commit murder'. My cat's inability to commit murder is a corollary of the thesis, expressed in the antecedent clause, that only rational being are subject to criminal responsibility. This thesis is a moral thesis, and the question of whether it is necessarily included in law is a question of relevance for the positivism debate. But this necessity would not be the necessity expressed by the sentence about my cat.

23. Raz, n. 18 above, 3.

fundamentally, however, if the question about necessary connections is directly related to the content and the existence of law, that is, to legal correctness and legal validity. I will confine myself to some short remarks about the claim to correctness.

The content of the claim to correctness differs when it is raised, on the one hand, by the law-maker and, on the other, by the judge. Here, only the application of law should be considered. The claim to correctness as raised by the judge has two dimensions. The first refers to the institutional or authoritative nature of law, the second to its ideal and critical character. In cases in which a morally acceptable statute can be applied without any doubts, the claim to correctness can confine itself to saying that a legally valid and just, or at least not unjust, law has been correctly applied. Things become more complicated if the law is unjust, or the facts of the case are contested, or a statute allows for different interpretations. Here only the problem of interpretation should be considered. With an eye to simplification, I will assume that the wording of the statute allows for two interpretations and that only one further argument is available, which is a moral argument supporting the first and rejecting the second interpretation. A further assumption shall be that the positive law says nothing about what to do in this case except that the judge has the power to decide and that he is obligated to exercise this power. I am quite confident that Raz will agree that in this case the first interpretation should be chosen, but we no doubt have different opinions about what this means and implies. These different opinions become rather clear in different understandings of what happens when the judge chooses the second, morally wrong interpretation.

Nothing exhibits the nature of these differences more clearly than Raz's strong social or sources thesis. According to this thesis the content of the law and its existence 'depend *exclusively* on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument'²⁴. The strong social thesis thereby excludes morality from the concept of law. This means that Raz's claim to legitimate moral authority creates a necessary connection between law and morality without any change of the content of law. The claim refers to morality only as 'standards by which the law is to be judged'²⁵. The 'arguments of principles'²⁶, for instance, which are the reasons for the norm adopted, remain outside the law. This is a clear result-oriented concept of law.

All of this applies, more or less, to interpretation, too, that is to say, to our case. That the judge should choose the morally correct interpretation does not mean that the moral reasons supporting it belong to the law. The choice of the morally correct interpretation is an act of 'authoritative interpretation[s]', which

24. Raz, n. 10 above, 39-49, emphasis by. R. A.

25. Raz, n. 3 above, 16.

26. *Ibid.*, 14.

has ‘a law-making effect’²⁷. It is a law-making act that transforms morality into law in, on principle, the same way as the law-making acts of the legislature do.

The impact of this in the event that our judge chooses the second, morally wrong interpretation is not difficult to determine. The judge does not fulfil law’s claim to moral correctness. But he has not violated any legal standard. Therefore, his decision is legally perfect in spite of being morally wrong. A court of appeal could overturn his decision only for moral reasons, not for legal reasons.

Another way of understanding our case is, I believe, preferable. It begins with a weak social thesis. Here two interpretations of this thesis are of interest. According to the first interpretation, whether or not law includes moral elements is a question of positive law. Jules Coleman’s inclusive legal positivism goes in this direction²⁸. One can call this ‘contingent incorporation’. The claim to correctness, however, leads to far more than a merely contingent incorporation. It results in a necessary incorporation. One can interpret Raz’s strong social thesis as a thesis of impossible incorporation. Necessary and impossible incorporation are contraries. Both contradict contingent, or possible, incorporation. There are, therefore, three modalities of incorporation, mirroring three positions in legal philosophy. If it is really necessary that law raises a claim to correctness, that will include a claim to moral correctness, which, in turn, is mainly a claim to justice. Then, legal decisions that do not fulfil this claim cannot be legally perfect decisions. Their moral faultiness extends to legal faultiness. Legal faultiness does not, by itself, imply legal invalidity. This happens only in cases of extreme injustice. But it allows courts of appeal to remain legal courts when they overturn the decision of our judge in case he chooses the morally incorrect interpretation. They are not thereby transformed into moral courts.

This, however, is only a side effect of the incorporation of moral elements into the law by way of the claim to correctness. The main effect is a fundamental change in the nature of law. Law remains authoritative, but it is no longer only authoritative. Its authoritative dimension is intrinsically connected with an ideal one. In this way, the tensions between these dimensions are no longer tensions between the law and morality *qua* something outside the law, but tensions inside the law. This has far-reaching consequences. Perhaps most spectacular in this connection is the Radbruch formula, which says, in its most concise expression, that extreme injustice is not law²⁹. But this is a story that would go well beyond the scope of this introduction.

27. *Ibid.*, 23.

28. J. Coleman, ‘Authority and Reason’, in: R. P. George (ed.), *The Autonomy of Law*, Oxford 1996, 287, 316.

29. Alexy, n. 14 above, 28-31, 40-62.