

Joseph Raz 'Authority, Law and Morality' [1985] 68 *Morist* 295-324, summary of 295-315

[The following is a summary of the first three sections of Raz's paper. We will be mainly concerned with his response to the coherence thesis and mainly with the line of argument flowing through the passages marked with an asterisk.]

Three theses bearing on the relation between law and morality have been defended recently:

The Sources Thesis: All Law is source based, where law is source-based if its existence and content can be identified by social facts alone without resort to any evaluative argument.

The Incorporation Thesis: All law is either source based or entailed by source based law.

The Coherence Thesis: The law consists of source-based law together with the morally soundest justification of source based law.

Raz is concerned to defend the sources thesis. He argues that only it is consistent with a proper account of authority.

I. Authority and Justification.

All sorts of directives can give those subject to them reasons for action - i.e. reasons to do or refrain from doing things.

Authoritative directives are distinguished from others by the fact that they provide those subject to them reasons for action of a special kind.

Illustration: Suppose we agree to send a dispute between us to an arbitrator and to be bound by the arbitrator's decision. There are two salient characteristics of the arbitrator's decision:

1. The decision is reason for action for us, but not one that stands alongside all the pre-existing reasons for action. It is supposed to be based on those other reasons, to reflect their outcome, to be derived from them, and to sum them up.
2. The decision is also meant to replace the pre-existing reasons for action. It is not that we have both the reasons we had all along for doing one thing or another *and* the arbitrator's decision. Once the decision comes out *that* is the determinative reason for action.*

Raz derives three theses from this illustration which he claims are general in the sense that they hold of all authoritative directives.

The Dependence Thesis: All authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives.

The Pre-emption Thesis: The fact that an authority requires performance of an action is a reason for its performance which is not added to all other relevant reasons when assessing what to do, but should replace some of them.*

The Normal Justification Thesis: The normal and primary way to establish that a person should be acknowledged to have authority over another involves showing that the subject is more likely to comply with reasons which apply to her if she accepts the directives of that authority than if she tries to act on the reasons which apply to her directly.

The first two theses flow directly from the salient features of the arbitrator's case. The third feature is supposed to do the work in the general case done by the parties' agreement to be bound by the arbitrator's decision in the narrower case.

[Elsewhere Raz has given an account of 'pre-emptive reasons' in terms of a distinction between 1st and 2nd order reasons. 1st order reasons are direct reasons for acting. 2nd order reasons have as their subject not actions directly, but first order reasons for action: they prohibit or require us to act on certain classes of 1st order reasons. A promise is a 2nd order reason for action - before I promise to meet you for lunch I have all sorts of reasons for doing so and for not doing so - (I've always enjoyed my lunches with you before, I'm a vegetarian and you want to lunch at The Steakhouse etc etc etc). The effect of a promise to lunch, however, is supposed to be that these direct reasons for action are excluded from my deliberations. The promise is an exclusionary or pre-emptive reason for action, and so is the law.

Competitions between 1st order reasons for action - my desire to have lunch with you and my desire to avoid The Steakhouse - seem likely to be settled by something like weight. We do that thing for which we have the most or the strongest reasons for action. Competitions between 1st and 2nd order reasons, however, turn not on weight but on the conceptual nature of the two classes of reasons - 2nd order reasons *exclude* rather than outweigh 1st order reasons.

Thinking of law as giving us second order reasons for action may seem to distinguish Raz from positivists like Austin (or at least like Austin according to the standard story of Austin). Austin's account of law relies heavily upon sanctions - they provide Austin with a non-moral, non-evaluative account of the way law works and is to be identified. One way to understand the role of sanctions is to see them as adding more 1st order reasons for action to the balance - we are supposed to comply with the law because once we take the sanctions into account we will see that the reasons we have to rob the bank are outweighed by the reasons given to us by our desire not to go to jail. Raz's account of law differs from this (probably somewhat unfair) account of Austin because it doesn't think the law works by weight at all.]

II. Authority and the Law

[This section is difficult and obscure - unlike the rest of the article! Don't worry about all of its details - the following summary will suffice.]

There are two sorts of reasons that a claim to authority might fail:

- a. The moral pre-requisites to having authority might be absent (ie. The normal justification thesis might not be satisfied).
- b. Some non-moral pre-requisite to having authority might be absent - the thing purported to have authority might be incapable of communicating or the like.

considerations. Raz rejects Dworkin's account because of the 'natural law' elements of Dworkin's theory and would reject any natural law account for similar reasons.

Note as well an apparent parallel between this ground for rejecting appeal to moral considerations and the following passage from Chapter V of Hobbes' *Leviathan* (1651):

[I]n any ... subject of reasoning, the ablest, most attentive, and most practised men may deceive themselves, and infer false conclusions....: [N]o one man's reason, nor the reason of any one number of men, makes certainty; no more than an account is therefore well cast up, because a great many men have unanimously approved it. And therefore, as when there is a controversy in an account, the parties must by their own accord, set up, for right reason, the reason of some arbitrator, or judge, to whose sentence they will both stand, or their controversy must either come to blows, or be undecided, for want of a right reason constituted by nature; so is it also in all debates of what kind soever. And when men that think themselves wiser than all others, clamour and demand right reason for judge, yet seek no more, but that things should be determined, by no other reason but their own, it is intolerable in the society of men, as it is in play after trump is turned, to use for trump on every occasion, that suite whereof they have most in their hand. For they do nothing else, that will have every one of their passions, as it comes to bear sway in them, to be taken for right reason, and that in their own controversies: betraying their want of right reason, by the claim they lay to it.

4. The Incorporation Thesis

Fails the first non-moral test. Authorities are portrayed as endorsing all that is entailed by the directives they do endorse, but people, including authorities, do not in fact endorse everything that is entailed by the things they do endorse. The first test requires that authoritative directives be someone's view on how norm-subjects should act. Since the incorporation thesis would count as law things which authorities had not thought of or endorsed, it fails this test.

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Raz wants to develop the non-moral features into an argument for the sources-thesis. Among the non-moral pre-requisites for a directive to be potentially authoritative are these:

1. It must be, or at least be presented as being, someone's view of how those subject to the directive should behave.
2. It must be possible to identify the directive as being issued by the alleged authority without relying on the reasons the directive purports to adjudicate.*

3. The Coherence Thesis.

Ronald Dworkin's account of law has changed somewhat over the years, but the following passage will give us an adequate summary for current purposes.

To establish the content of the law of a certain country, one first finds out what are the legal sources valid in that country and then one considers one master question: Assuming that all the laws ever made by these sources which are still in force, were made by one person on one occasion, in conformity with a complete and consistent political authority (i.e. that part of moral theory which deals with the actions of political institutions) what is that morality?

The answer to that master question, and all that it entails, is the law.

[Note the two dimensions of Dworkin's account of law: the law must conform with political morality and fit into an explanation of the legal history of a jurisdiction.]

Dworkin's account does not satisfy the two non-moral pre-requisites for authoritative directives.

1. For Dworkin the law includes the best justification of all source-based law. This is an immense task beyond the powers of any actual judge.- hence Dworkin speaks of Hercules J. The best justification, then, may in fact never have been thought of, let alone endorsed, by anyone. So significant parts of the law neither are, nor are presented as being, anyone's judgement as to how the law's subjects ought to act.
2. The identification of much of the law depends upon considerations which are the very same considerations the law was meant to settle.*

[I]n order to decide [e.g.] what the tax liability is in law the court has to go into the issue of what a fair tax would be ... My disagreement with Dworkin here is that in saying [judges] follow pre-existing law he makes the identification of a tax law, e.g., depend upon settling what a morally just tax law would be, i.e., on the very consideration which a tax law is supposed to have authoritatively settled.

So Dworkin's theory of law is inadequate since it does not give an account of law consistent with the non-moral pre-requisites for a things being law.

[Note that this second ground will lead Raz to reject all theories of law which grant a role in determining what the law is or what would count as a legitimate move within law to moral