Three Puzzles on the Foundations of Law

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Abstract

In this essay, I analyse some of Dyzenhaus's views on Hart's theory of law, which he formulated in his book *The Long Arc of Legality*. In particular, I examine the question of the formal or substantive nature of the fundamental character of constitutions, the reconstruction of the rule of recognition as the ultimate rule of a legal order and its internal or external character in relation to such an order, and the possibility that Hartian legal positivism emerges from the "gunman writ large" explanation advocated by the imperative theory of law. A concluding coda is devoted to analysing the debate between inclusive and exclusive forms of positivism as Dyzenhaus sees it. In addressing these issues, I draw largely on Dyzenhaus's insights, but often come to different and sometimes even opposite conclusions.

Keywords: David Dyzenhaus. HLA Hart. Rule of Recognition. Legal Positivism.

Foreword

One of the main theses of David Dyzenhaus's rich and densely argued book, *The Long Arc of Legality* (LAL for short), is that legal positivism, despite all appearances, contains or is a theory of legitimate political authority, not only in the sense that it reconstructs the law as something different and more complex than a simple set of institutional directives backed by coercion, but also in the sense that it deploys a series of tools which rest on the idea of constitutionalizing the law, in turning its absolute power and potentially arbitrary content into a legally limited one, against

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the tradition inaugurated by Bentham and Austin. Law is not only "might", but also "right", as Dyzenhaus recurrently affirms.

To support this thesis, Dyzenhaus analyses in detail the works of Thomas Hobbes, Hans Kelsen and HLA Hart. In his view, if we read them correctly, we can see that they all made contributions that more or less explicitly took positivism out of the gunman situation writ large and turned it into a kind of constitutionalism (i.e. the idea that legal power has limits). His book can thus be seen as a kind of approximation to a positivist mindset, though not in the sense that Dyzenhaus has become a full-fledged "methodological positivist"[1] (i.e. someone committed to a value-neutral, objective, conceptual reconstruction of law), but in the other sense that foundational thinkers in the positivist tradition – such as Hobbes, Kelsen and Hart – are closer to constitutionalism than it might first appear, and that positivism is better suited than other theories to address the relations between law and morality (something that is lost in the one-system theory developed by Dworkin in recent years, where law disappears and everything becomes morality)[2].

Dyzenhaus's book is a monumental work, rich in sophisticated arguments and profound insights. I cannot do it justice in an essay of a few pages. I will limit myself here to Dyzenhaus's interpretation of some of Hart's tenets which can be found in chapter 3. In particular, I will deal with some issues related to the final layers of legal orders, issues that I have always found congenial because they have a logical component related to the possibility of slipping into a problem of infinite regress, as well as the question of whether Hart has really succeeded in overcoming the gunman situation writ large.

These questions are: 1) the formal or substantive nature of the fundamental character of constitutions; 2) the reconstruction of the rule of recognition as the ultimate rule of a legal order; and 3) the possibility for Hart's legal positivism to get out of the "gunman writ large" explanation.

I will argue that Hart was not so successful on the last issue, whereas he was a (partial) innovator on the second issue (the rule of recognition), even though not for the reasons for which he is normally credited with having changed legal theory. Regarding the first issue, I will argue that Hart's theory, read through the lenses of the primary/secondary rules dichotomy as applied to different types or layers of norms, can easily accommodate a substantive constitutionality, but that Dyzenhaus is right in affirming that, as it was formulated, Hart's theory is full of ambivalence regarding the status of the ultimate norms of the system.

In a coda, I will also say something about the interesting remarks Dyzenhaus

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[1] The *locus classicus* is Bobbio 1961. For an interpretation of Bobbio as a mainly ideological positivist, see Dyzenhaus 2025.

[2] This idea is reminiscent of Scarpelli's (1965) view that legal positivism is better understood as an ideological stance in favour of the positive law of liberal and democratic states.

makes in the first appendix about the post-Hartian debate between inclusive and exclusive legal positivism, about which I happen to have not dissimilar ideas to Dyzenhaus as far as legal theory is concerned, so that our main (and most important) difference is to be sought at the level of metaethics.

1. The Bases of Constitutionality

Dyzenhaus poses two questions about the foundations of the constitutionality of a legal system. One concerns the question of whether the constitution lies within or outside the legal order. I will not address this question in this section, because I will deal with a similar question concerning the rule of recognition in the next one. However, I am inclined to the view that, for conceptual reasons, the constitution is a set of valid rules of the system that are recognized as independent norms belonging to the legal order by extensive identification, in the sense made clear by Eugenio Bulygin (1991).

The other question is presented as follows:

> there seem to be two rival versions of the basis of constitutionality, of its fundamentality. Is it a set of formal authorization rules authorizing legislators, judges and other legal officials to make, interpret and implement the law or is it a set of substantive principles materially limiting what officials, including legislators, are permitted to do, for example, by entrenching individual rights against the state, as in a bill-of-rights legal order? (LAL, 190)

The natural answer for positivists, as Dyzenhaus envisages, is that *it is both*. But this is problematic according to him:

> The answer 'both authorization rules and substantive principles' is vulnerable to the following challenge. In a parliamentary legal order, there are authorization rules: the formal and procedural rules of 'manner and form' the parliament must follow to make law. But there may seem to be no substantive principles, at least none which limits the parliament's authority to make a law with any content. So, the answer to the question of constitutionality might appear to be the one which Hart would offer: necessarily authorization rules and contingently, in addition, substantive principles. Hartian legal theory, that is, both rejects Austin's claim that a bill-of-rights constitution is not law properly so-called and purports to be agnostic on the question whether a legal order should have such a bill-of-rights constitution. However, Hartian legal theory is committed to the view that the legal order of a modern legal state will contain formal authorization rules in its 'secondary' rules. (LAL, 191)

Within this framework, Dyzenhaus argues that «the rule of recognition is an at-

tempt to express a political commitment to confining the constitution to such [formal] rules in an apparently neutral fashion» (LAL, 194) – an attempt that, according to Dyzenhaus, is doomed to failure due to the ambiguity of the concept of the rule of recognition as used in legal positivism[3].

My view on this point, following the insights of Guastini (2014: 57-8), is that constitutions and statutes (or more generally: non-constitutional precepts) have different conceptual requirements. This is due to the fact that constitutions consist primarily of norms on legal production, conferring law-creating powers, and are therefore directed at state bodies, while statutes consist primarily of rules of conduct that are directed at citizens. While a constitution without power-conferring rules (i.e. secondary rules), which grant the state organs the power to enact, amend and repeal norms, would be meaningless, it is possible to design a constitution without substantive rights or principles (i.e. without primary rules or rules of conduct). In contrast, statutes are usually aimed at the general public and are therefore mainly (but of course not exclusively) formed by primary rules. It would be pointless to have norms that are directed at the general public without primary rules among them. A system consisting only of norms of competence would be pointless for controlling human behaviour at this level.

Within the constitution, primary rules – under the guise of substantive principles – are usually used to limit the discretion of the delegated lawgiver, as Dyzenhaus notes, so that primary rules are also part of the strategy of how legal power is to be organized. The existence of primary rules in the constitution may thus be seen as an indirect way of removing some of the legislator's power. However, these substantive norms can also be seen, especially in relation to social rights, as norms that impose an obligation on state bodies to actively carry out certain actions that are necessary for the fulfilment of certain rights. These norms – which both prohibit the creation of certain norms with a certain content or oblige the state power to enact rules that realize social rights – are thus an indispensable technique when it comes to setting negative and positive limits to legislative competence. From the point of view of positivism, there is no reason why there should or should not be primary rules in constitutions. The fact that secondary rules play a major role does not mean that primary rules cannot act here as second-order instruments to limit the legislature's competence.

Contrary to this possible solution of the conundrum, Dyzenhaus affirms that «legal positivists seem committed to the claim that the legal constitution should ultimately be one which consists only of formal authorization rules» (LAL, 194). And, very interestingly, he adds: «Perhaps, then, the legal positivist answer to the question of constitutionality is that the constitution of every legal order is fundamentally its rules of change, that is, its formal authorization rules» (LAL, 199). And this for political rather than technical reasons: Hart and his followers are seen by Dyzen-

[3] I shall address such an ambiguity mainly in the next section.

haus as formal legal constitutionalists who demand on substantive grounds that the legislature has the last word when it comes to settling disagreements over rights, and this cannot be the case if the legislature is obliged to follow the substantive rights set out in a constitution when such disagreements arise. If the Constitution consists only of formal rules (i.e., Hart's rules of change) and it is sufficient to determine which rules belong to the legal order, what is the fate of the rule of recognition? It seems that it loses its identificatory aspect and simply turns into the acceptance of the legal order by a certain number of subjects who are supposed addressees of the norms of such an order. This leads to the conclusion that in Hart's view, as reconstructed by Dyzenhaus, the constitution is legal, that it should be limited to formal rules of authorization, such as one finds in a parliamentary legal order, and that, once so limited, the law made by parliament enjoys legitimate authority (LAL, 203). But, Dyzenhaus argues, «Once the concession is made that the constitution is legal and that it is the locus of legitimate authority, it is difficult […] to confine the constitution to formal authorization rules» (ibid.). This is so because Hartian legal positivism abound in ambivalences:

> legal positivism holds that the constitution is legal, but is ambivalent about whether its authority is located in or outside of legal order. That ambivalence leads to another, about whether whatever gives the constitution authority (an ultimate rule or a basic norm) is itself in or outside the legal order. Moreover, in this register legal positivism still tends to cling to the claim that the constitution either should be or is in fact limited to formal authorization rules, though in its attempts to rise above the constitutional theory fray, it is usually compelled to concede that the constitution can contingently (though perhaps unwisely) contain substantive principles (LAL, 203).

Dyzenhaus is surely right when he says that Hart's positivism is ambiguous on all these points. In my view, many of its problems are due to the introduction of non-neutral notions, such as those of the internal point of view (which is a normative standpoint having to do with the application of rules by virtue of their acceptance by their addressees), the minimum content of natural law, authority, or judicial virtues. To address some of these notions, I will turn in the next section to what Dyzenhaus calls the mystery of the rule of recognition. Once we have solved this puzzle, a clearer theory of law seems to emerge.

2. A Mystery Riddle

Is the rule of recognition inside or outside the legal order? This is the riddle Dyzenhaus poses to legal positivism (LAL, 195), with the unconcealed intention of

showing that Hart does not arrive at a stable solution to this question[4]. This paves the way for a reconsideration of Hart's main idea by Dyzenhaus as a formal restatement of «the normative commitments of this political constitutionalist tradition» (LAL, 193).

As we have seen previously, Dyzenhaus attributes a political dimension to Hart's conception of the rule of recognition, but the problem of its position regarding the legal order can fruitfully be seen also from a purely conceptual perspective. On this reading, this question can be reformulated as follows: if the rule of recognition is the ultimate rule and at the same time a *legal* rule, there is no possible source for it other than itself. In other words, is the rule of recognition self-referential? This seems to be the tombstone of positivism, for if the rule of recognition provides the recognition criteria for the rules of the system and is itself a rule of the system, it will end up establishing the criteria of its own identification, so that there is either an infinite loop with the rule of recognition requiring a perpetual identificatory ascent, or a dogmatic decision that discards other possible sets of criteria of identification which are compatible with the facts they are inferred from. The first consequence is due to the fact that, if we have, say, a set of criteria C1 "All valid rules of the system are this rule and all the rules identified by criteria x, y, z", we shall now ask on what basis the self-identification of the criteria as valid law is made, and this requires of course searching for other criteria C2 saying that "All valid rules of the system are this rule and all the rules identified by criteria C1", and so on. The second consequence is caused by the fact that, if we want to avoid such an infinite regress, we shall pick an identificatory rule justifying a certain practice, but there are many rules capable of justifying a certain practice, so that "identifying the rule of recognition" would mean choosing one possible inducted rule to the detriment of all the other possibly inducible rules of recognition.

However, I will show that there is no such tombstone for legal positivism. The puzzle is easy to solve from a formal point of view if we resort to some good old-fashioned set-theoretic methods and notions.

What is recognized by the rule of recognition is not a set of rules, it is rather a *sequence* of sets of rules[5]. Any sequence is identified by a set of criteria that lay down the conditions for a set to be part of the sequence, but such criteria are not a part of the sequence themselves. To use a mathematical example: the Fibonacci sequence is determined by a set of criteria that make it possible to determine the numbers contained in the sequence, but these criteria are not themselves part of the sequence.

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4 LAL, 194: «it seems that both political constitutionalists and legal positivists must suppose that there are constitutional rules which determine what counts as valid legislation. Hence, the idea of a thin legal constitution is implicit in their position. The rule of recognition is an attempt to express a political commitment to confining the constitution to such rules in an apparently neutral fashion, an attempt which I argue fails».

5 Bulygin 2015: 127.

The same happens with the rule of recognition of a legal system: it determines the criteria, but it is not part of the sequence of sets which is identified by the criteria. If this is true, the rule of recognition can only stand outside the legal order, since it is itself the means by which the legal order is identified. And it can only be identified retrospectively, since norms, unlike numbers, are not mere conceptual entities, but provisions that are enacted by normative authorities in a specific spatial and temporal context. Incidentally, it should be noted that once we reconstruct retrospectively a particular set of criteria that determine the conditions for a set to belong to the sequence, nothing conceptually hinders the possibility of this sequence branching into different alternative sequences with respect to possible new criteria introduced over time into the original set of criteria.

Rules of change play also an important role here, because they provide the set of criteria by means of which momentary legal systems are identified. So, the rule of recognition is the set of criteria according to which the sequence of momentary sets – each one determined by means of the applicable rules of change – is determined. This is not the way Hart explicitly conceives of the relations within a legal order, but I hold that Hart kicked off a way of thinking that leads exactly to these conclusions. The rule of recognition, so understood, is a set theory notion, that correctly developed can lead to a fruitful explanation of how a legal system is structured.

In addition to this notion, though, there is the idea of a rule of recognition being a customary rule or practice imposing on judges the obligation to obey the law or at least to use the criteria to identify legal norms that are used by other judges. On this reading, the rule of recognition is *internal* to the legal system, for two reasons. First, it depends on judges, that are active inside the legal system (in this sense, the rule of recognition supervenes on judicial practice). Second, and consequently, it is a customary *norm* practiced within the legal system, used to guide one's behaviour and to criticize others' deviant behaviour. Notice that between the two rules of recognition there is a unilateral conceptual relation. One need an identificatory rule of recognition in order to spot a customary, obligation-creating, rule of recognition, but not vice versa. In my opinion, one should retain the first notion of the rule of recognition and abolish the second as a useless duplication of the supreme rules of the legal system (generally the Constitution).

However, I think that Dyzenhaus would probably reply that this duality of the rule of recognition, far from being a solution of the puzzle, is a confirmation of his views and exposes once more Hart's moral ingredients. Hart, according to Dyzenhaus, pursued a research project seeking the bases for legitimate authority and found his route to a rapprochement with natural law through his sketch of a minimum content of natural law which he thought leads to a qualification of the positivist claim that the law can have any content. This means that the criteria included in the identifying rule of recognition are partially pre-established (as in any other natural law theory, of course) and cannot be simply induced from practice

(LAL, 159). Furthermore, he affirms that Hart has set out the "judicial virtues" such as impartiality and neutrality in considering the alternatives, consideration for the interests of all concerned and the endeavour to apply an acceptable principle as a reasoned basis for the decision (Ibid.). This leads to the claim that, unlike Hart's followers that suppose the introduction of the rule of recognition was a revolutionary moment in the history of legal theory which allows philosophy of law to discard much if not all of its prior theoretical attempts to articulate the "key to the science of jurisprudence", Hart's rule of recognition was novel «only in that the way in which he elaborated the rule reintroduced the constitutionalist idea to his own tradition» (LAL, 153). So, my arguments would miss the target if Dyzenhaus is right. The real important ingredient for Dyzenhaus is that of acceptance by the legal subjects (viz. the internal point of view). According to Dyzenhaus, authority cannot be limited to the officials of the legal order, since it presupposes the acceptance of the law by those to whom the law is applied. The perspective of the individual legal subject is therefore one of the essential building blocks of the legal order, and

> [this] inclusion is part of an attempt to understand legal order from the position of legal subjects who wish to make sense of the norms of their order as binding as well as valid, as norms they obey because they accept the norm's authority, not because they fear the sanctions following non-compliance. Their perspective is an essential component of what we saw Hart called the 'complex congruent practice' of acceptance constitutive of the authority of a legal order (LAL, 170).

Here I think that my way of understanding Hart and David's part. In his view, Hart's theoretical errors or ambiguities show that he was aiming at a political theory of law under the guise of a general theory of law. In my view, Hart's errors should be corrected by some sort of return to empiricism and logical analysis. These latest observations lead me to emphasize a further point concerning the presence in Hart of an element of imperative theory that he tries so hard to overcome and which Dyzenhaus insightfully considers and critically examines.

3. Held Up without a Gun?

One of the impressions I have always had from reading Hart is that his model is just a "gunman writ large" model with apparently no gun. The "gun element" – the threat – is replaced by the internal point of view, which gives a kind of feeling of being under the gun because the people close to you think they are actually under the gun. It's like being trapped in a cage of shadow bars.

What is very interesting for my sketchy impression is that Dyzenhaus provides an argument to back it up. The internal point of view «provides a reason for acting in a

certain way» (LAL, 196) and especially for judges «from the internal point of view of a legal official charged with interpreting the law, the answer to a question about what the law requires must be the judge's good faith and best shot at showing both that the legal order speaks with one voice on the question and that the answer is based on principles which justify it to those whom it affects» (LAL, 212). Moreover, as we have seen, Dyzenhaus holds that the position of an official is hardly separable from a relationship with the subjects of the law, because the officials bear the burden of justification when the subjects ask an official: "But, how can this be law for me?" (LAL, 405).

As Dyzenhaus observes, following an idea of Raz (1993), «Hart also cannot escape the charge […] that his own theory of authority is ultimately a sanction-based one because it relies on the informal sanction of criticism officials face when they deviate from the accepted practice of applying secondary rules, albeit not the sanctions which apply to subjects for non-compliance with primary rules» (LAL, 163).

If also subjects cannot but take the internal point of view, it is clear that sanctions are spread all over the legal system and it's justifiable to understand this situation as one in which we have "the threat of a gunman situation writ large".

Moreover, we can note that the minimum content of natural law, which Dyzenhaus (LAL, 169) emphasizes in terms of its importance for the existence of law, requires that law contain rules that protect some basic human goods. Even if this protection does not necessarily have to be through sanctions, it is clear that this is the main way to ensure it. By combining the two theses, the situation is therefore very similar to that of the gunman writ large situation.

So Dyzenhaus and I agree on the diagnosis, but probably disagree on the cure. While I would suggest that Hart drop the internal point of view and the notion of the rule of recognition as a customary practice, because they lead him to contradictory results on the one hand (i.e. to the denial and maintenance of the imperative theory of norms) and to a kind of paradox on the other, as we have seen, Dyzenhaus would certainly suggest the opposite and emphasize the importance of refining this notion in order to better grasp the question, fundamental for him, of how a law can be binding on a legal subject.

Dyzenhaus affirms about this point:

> when one drops Hart's commitment to a static model of law, the Separation Thesis is no longer tenable, as he came close to recognizing. If juridical norm production, including the element of official interpretation, is a complex and dynamic mix of attention to enacted law, minimum natural law content and intrinsic principles of legality, there is a necessary connection between law and morality. The conception of morality here is that proposed by pragmatists and it is the conception we need to make sense of law's claim to authority, which can't be anything but a claim to legitimate authority (LAL, 391).

Here we come to our main point of contention, which – I argue – is a methodological one. While Dyzenhaus thinks that if Hart is wrong, it is because he has not paid enough attention to the political consequences of his theoretical theses, so that one can construct a "good" Hart by eradicating the errors and making him a kind of natural lawyer, I would take a different path and try to save Hart from himself, in the sense of eliminating, or at least clarifying, all those notions that, unclear and confused, negatively affect his theory. And in particular I would clarify the notion of acceptance, which plays a very central role in Hart's theory and his stress on the internal point of view.

As Bobbio astutely observed in 1965 in reference to Hart's essay on legal obligation[6], that he presented at a conference in Bellagio, one can assume that, for a single rule, the acceptance of the authority responsible for its observance is sufficient if, among the recipients of the rule, those who observe the rule do so exclusively in a state of passive obedience. However, it is implausible that acceptance by the officials alone is sufficient to make the order as a whole binding and not simply coercive. Lest we fall into a fallacy of division, Bobbio rightly adds that acceptance of the system as a whole does not mean that all rules of the system are accepted by all recipients of the rules. Many rules may only be followed by all out of habit or fear of coercion, and perhaps even systematically violated by some. By accepting Bobbio's remedies, Hart's theory would be better equipped to counter Dyzenhaus's critique, since it would now be possible to sketch a spectrum of legal orders that differ according to whether they are accepted or not. The ideal types of this spectrum are the democratic system, in which both officials and laypersons generally accept and abide by the rules, and the tyrannical system, in which officials accept the rules but the other addressees merely conform to them. Where on this spectrum the gunman situation writ large is located is not clear, but it certainly resembles a tyranny more than a democracy, although we should not lose sight of the fact that even in democracies many basic laws (such as tax laws or labour law) are normally observed for fear of sanctions[7]. But in any case, contrary to what David suggests, we would not have abandoned the value-neutral, analytical theory of law in order to engage in a political conception of legitimate authority.

4. A Coda to Dyzenhaus on the Exclusivism/Inclusivism Schism

In the book's first appendix, Dyzenhaus addresses the famous schism between exclusive and inclusive legal positivism caused by the need to respond to Dworkin's

[6] Bobbio 1966; Hart 1966.

[7] This is why, for example, Art. 75.2 of the Italian Constitution prohibits referendums aimed to repeal tax laws.

famous challenge to the separation thesis[8]. As Dyzenhaus (LAL, 423) aptly puts it, inclusive legal positivism claims that «if the rule of recognition of a legal order contingently includes moral criteria for the identification of law, and if in any hard case on the application of the criteria there is one answer to the legal question posed in the case, that answer should be deemed fully determined by law», whereas defenders of the exclusivist view claim that «law properly so-called is law determined by facts. If moral considerations are involved, judges by definition have discretion and their decisions are not determined by law. This is so even if it is the case both that the constitution obliges judges to take the considerations into account and there is an obvious 'right answer'».

Dyzenhaus rightly notes that the success of Dworkin's challenge to Hart's positivism is in fact demonstrated by the schism itself. He also claims that the success is also demonstrated by the combination of the fact that the exclusive camp's insistence that judges exercise quasi-legislative discretion in hard cases is inconsistent with judges' legal practice, and secondly by the inclusive camp's concession that Dworkin's interpretive theory of law is practically correct (at least in the legal systems in which we work).

I agree that inclusive legal positivism is almost the same as Dworkin's theory and as such is hardly positivist. Moreover, Dworkin's theory ends up being much more empiricist (since it is based on the analysis of actual judicial decisions) than inclusive positivism, when the separation thesis becomes the astonishingly weak (counter-empirical and with the flavour of a thought experiment) thesis that it is sufficient to imagine a legal system in which the fact of being a moral principle is not a condition for the legal validity of a norm.

As for exclusive legal positivism, at least in its Razian version, I agree with Dyzenhaus that it is generally just a roundabout way of stating the command theory of law.

Even if I agree on many points, I am not convinced about the conclusion which Dyzenhaus reaches, according to which «Austin was thus the true founder of exclusive legal positivism, with Raz his main heir» (TAL, 429). I do not agree for a simple, but very significant reason. I think Dyzenhaus here, following the general debate on the positivist schism, is mixing what Bobbio (1961) called methodological positivism with theoretical positivism. As a way of approaching the study of law, says Bobbio, legal positivism is characterized, methodologically, by the clear distinction between real law and ideal law, or, what is the same, between law as fact and law as value, between law as it is and law as it ought to be, and by the conviction that the law with which the jurist must concern himself is the former and not the latter. Legal positivism, when understood as a theory rather than a methodology, tends to explain law in terms of coercion and command and to regard it as a closed legal system (even if other explanations are possible).

[8] Dworkin 1978: 14-45.

Dyzenhaus seems to squeeze these two aspects – like virtually all the participants in the debate on positivism and antipositivism do – into one issue when he equates Austin's methodological thesis (describing law is a different activity from evaluating it) with Hart's separation thesis, which is widely read as an assertion about the sources of legal systems (i.e. as an ontological question). Dyzenhaus affirms that «Austin's claim [is] that the 'existence of law is one thing; its merit or demerit another'. As we have seen, Hart made this claim central to his tradition, though he expressed it rather differently in his Separation Thesis that there is no necessary connection between law and morality» (LAL, 428). In my opinion, these are two quite different claims: the first says that law should be studied as a set of facts (and it may well be that among these facts one finds evaluations or values), the second says that it cannot be that the content of law depends on morality, since it can can only depend on the facts. While Austin upholds the first claim, he is not, as far as I can see, committed to defending the second claim. It's not clear to me whether Raz upholds the first claim (my impression is that he does not), but he certainly upholds the second claim. So in a sense, if they can be called "exclusivist", they are so in two very different ways. While Austin rules out that moral judgments can appear in the value-neutral study of law, Raz rules out that moral norms can be among the sources of law.

One last point must be mentioned. Dyzenhaus's thesis that "judges exercise quasi-legislative discretion in hard cases is inconsistent with judges' legal practice" sounds very dubious to me, not because the exclusivist thesis is too strong, but because it is too weak. I think judges exercise discretion not only in hard cases (whatever this expression can mean), but in every case. The fact that judges tend to conceal this feature of their work and talk as if there is always settled law in every matter cannot be taken as justification for denying that there are strong conceptual reasons for believing that someone who exercises a power that can hardly be limited (especially in the case of a supreme or constitutional court) cannot avoid exercising a quasi-legislative function. In my opinion, legal theorists should try to demystify these ways of speaking instead of taking them at face value. We are interested in what judges do, not what they say they do. The Dworkinian idea that there is always settled law in any matter thanks to an objective morality lurking under the surface of explicitly enacted law is, in my view, an argument that begs the question, since it presupposes what it is supposed to prove: that there is such an objective morality whose norms can be readily identified, and that those norms have a bearing on what judges should decide as a matter of law[9]. But that is a topic for another occasion.

[9] For my defence of ethical scepticism, see Ratti 2021 and Ratti, Redondo 2024.

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