

What counts as *law*? What rights do I have?

Trying to agree with T. Endicott.

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The analysis of theoretical or conceptual controversies can be very fruitful. Endicott shows this by way of his exhaustive analysis of a group of arguments. I agree with his main conclusions, at least regarding the general framework of the discussion and his emphasis on the need of the legal theoretician to pay attention with the practice he/she wants to understand. But I would like to raise an issue at the root of the controversy.

This issue relates to the notions of “existence of the law” and “content of the law”, commonly used when writing about the thesis of the social sources of the law. In this sense, I think that we can distinguish between the Thesis of the Social Sources¹ as formulated by Hart in *The Concept of Law*, and what I would call, the Social CONTENT Thesis as presented later by Hart and defined by Raz².

I believe that in the first case the goal is only to make clear that in order to verify the existence of law we need to observe a shared social practice. In this sense, what often matters is the question of what is the foundation of a legal expectation or claim (what specific legal basis give it that nature, legal nature, and that is often done with reference to its pedigree). This thesis can answer questions such as: Why do you suggest this is a legal response? or, put it metaphorically, “which is the legal source from which your expectation comes from?” It does so by answering the first question: “because it satisfies criterion X” or the second (for example, “the Spanish Constitution”). The legal community shares the recognition of X as a valid criterion or, in this example, the Spanish

¹ In Endicott's Draft the expression used is “Sources Thesis”, following Dworkin's terminology in *Hart's Postscript and the Character of Political Philosophy*, en O.J.L.S., Vol 24, No. 1 (2004), pp. 1-37. It must be recalled that he ascribes that thesis to Hart.

² In fact what I am saying is that we must not confuse the tradition of the “Sources Thesis” with the tradition of the “Social Thesis”. It is possible to associate Alf Ross with the initial purpose of legal positivism in denying the existence of Natural Law, even if he talks about “establecer la existencia y describir el contenido” (Ross, 1961: 12). By the way, the same can be said about José Juan Moreso when he takes the Social Source thesis as an ontological claim (Moreso 1997: 238).

Constitution as a (the) legal source of Spanish law. What matters then are the reasons to justify the consideration of something as a legal expectation³. The legal positivist is mainly concerned with showing that the reason of legality is not, at least not primarily, the satisfaction of some moral standard. There is no problem in assuming that such reason of legality may be purely political, as long as it is recognised by a shared social practice. What are the ultimate criteria of legal validity? What are the legal foundations that justify an expectation or a legal claim? Why do you think you have a right? These are the type of questions that the thesis of the social sources is concerned about.

In the second case there is a sort of unification between the ideas of the legal criterion (foundations of law, legal source, and basis of validity) and the idea of the determination of the legal answer. Somehow the notion of the legal source of a judicial decision gets confused with the notion of the valid legal interpretation that allows the judge to reach such decision⁴. This makes sense if we recognise the peculiarity of the object that we want to identify, that is after all simply a right or an obligation that can be called upon if the law allows for it.

When Hart accepted that it was not necessary to talk exclusively about legal rules and that it was possible to call up principles as part of the content of law, recognising as well that the reason of legality could also be the agreement

³ Hart tells us in *The concept of Law*: “The criteria so provided may, as we have seen, take any one or more of a variety of forms: these include reference to any authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases. (p. 98.). More important, in the notes clarifying this question Hart distinguishes between formal (legal) source and material (historical) source. Although there is nothing wrong in attributing a relevant role to the historical notion as reason (for?) validity, he is talking about sources of legality: “Enactment as a statute by a competent legislature is the *reason* why a given rule is valid law and no merely the cause of its existence. (p. 246)

⁴ In Hart: “According to my theory, the existence and content of the law can be identified by reference to the social sources of the law (e.g. legislation, judicial decisions, social customs) without reference to morality except where the law thus identified has itself incorporated moral criteria for the identification of the Law” (CL: 269). We must pay attention to the parallel vision of Raz “In the most general terms the positivistic social thesis is that what is law and what is not is a matter of social fact (that is, the variety of social theses supported by positivists are various refinements and elaborations of this crude formulation” (Raz 1979: 37). In my view this second case can not be understood as a general expression of the hartian idea. Needless to say that for the same reason I think Coleman’s expression is even more misleading and unclear: “The organizing idea of legal positivism is that law’s possibility must be explained in terms of social facts. I call this the Social Fact Thesis, and nothing is more important to legal positivism” (Coleman, 1998: 396)”. Mitrophanous has *said* something that can be seen as expressing the original hartian background: “Perhaps the only common positivist position is that the law is posited, that its existence is due to human action and not in some sense “natural” (Mitrophanous, 1997: 622), but doing that what he clearly shows is that a proper use of the Social Sources Thesis is to oppose Positive Law and Natural Law.

with a certain content – of course, only if the source of legality so established – was building the background for confusion between existence and content of the law. That is why Dworkin can exploit the following idea: “Only if the expectation of Mrs. Sorenson is recognised by the Law can she win” , “if someone tells Mrs. Sorenson that her expectation is not recognised by the law, then this person is telling her that she has no chance”. The fusion to which I refer, that between the criterion of the existence (legality) of the law, and the content of a right, is present in numerous theoretical positions. I shall not attempt their analysis here, but let it suffice to say that they conform a chain: the law is seen as a set of norms, the norms as expressions of meaning and the meaning as the product of a practice regulated by more or less shared criteria. In this sense, since the rule of recognition can be formulated linguistically, the discussion as to what criteria it incorporates can be as demanding from an interpretative point of view as the discussions about the precise meaning and boundaries of any legal norm. This kind of discussion becomes as relevant as the proper interpretation of rules to determine the precise legal response in each case. That is why it seems rather difficult to accept that we have, on the one hand, the sources of legal validity (basis upon which there is no controversy and raise no interpretative dilemmas) and, on the other hand, a different thing, the specific judicial interpretations, that are always going to raise controversy⁵. But the distinction has a clear meaning: what is at stake in these controversies is the prevalence of some legal basis or of some criteria over others. The litigants and all the participants in the process have to recognise the kind of discussion they are engaging in, they have to use legal arguments rather than arguments of a different nature. To claim the superiority of the arguments of one of the parts involved is not to question the fact that they are, or ought to be, arguments of a legal nature and that the criteria involved to determine the superiority are criteria of legal validity. This is shown by the fact that whoever is refusing a criterion in one case, calls up this same criterion in another case.

To be sure, this is a thought that has not a very philosophical insight. Why? Because every question can peacefully remain in legal practice, and also

⁵ The law understood as an institution that solves controversies uses controversial structures. The routine cases of Aarnio, and the peaceful use of the law never seem interesting enough.

everything can be discussed in legal practice, even the criteria of validity. In other words, what counts as a reason for validity can be discussed. But we have no possibility to discuss all things at the same time and every time. May be in order to understand this we can get some help from the consideration that a change in the rule of recognition is a change of the sources of law, a change of legal Order, as some authors would put it.

But to modify an interpretation, to substitute it, does not call for a modification of the sources or criteria of validity. The granting of specific rights and the requirement of specific duties depends upon particular interpretations. In fact, the content of the law changes (is modified) legislatively following always the same methods of production (for example, by the enactment of a statute by the Parliament), but they also change by the evolving interpretations the judges make. We know about our everlasting theoretical problem at this point trying to combine the principles of legitimacy and legal security. If we have some sources of law and not others, is precisely because he/she who has legitimacy to decide (or competence to legislate) can not be anyone. We don't want to welcome by the door of interpretation an antidemocratic new content created by someone without legitimacy or competence.⁶ No lawyer would deny the relevance of the distinction between legislating (to create law) and interpreting, although all of them know that in practical terms this is a distinction that never becomes clear enough, above all because every time that judicial activism turns out to be "convenient" for someone, in spite of his/her own words, he/she shows by his/her actions that he/she accepts (willingly or reluctantly) "what the judge decides" as a criterion of validity. In that sense, he is turning "what the judge decides" onto a source of law.

If what Hart wanted was (and I am complete unaware of this) to follow Austin's path distinguishing between the science of legislation and

⁶ The Spanish civil code give us in its article about interpretation such a vast listing of reasons that can be alleged by the judge when interpreting a rule that we know there is no way to fix once and for all its content, and that, of course, being scrupulous with legality. (Art. 3. 1 Cc: Las normas se interpretarán según el sentido propio de sus palabras, en relación con el contexto, los antecedentes históricos y legislativos, y la realidad social del tiempo en que han de ser aplicadas, atendiendo fundamentalmente al espíritu y finalidad de aquellas). Jurists know this all too well, and that is why, even if they complain about judicial activism, they don't do it by saying to the judge "Sir, your words are not a judicial decision but a mockery, so I don't care about it". If they were to do it, I don't manage to understand how they would conceive appealing against the decision.

jurisprudence, he needed to start by telling us that the criteria of legal validity or sources of law (or what counts as grounds for a legal claim) was something more complex than the will of the sovereign, although something of the same nature: factual. What this “something” is, is *shown* by the very practice of identification of law, that is, shown by the rule of recognition. For that reason, the normative science par excellence is that which offers content proposals. Their specific application will be the result of a latter interpretation. In order to participate into the science of legislation, a political philosophy is of course needed, because only from there can a justification of rights and duties be done. Hart does not want to justify one concrete decision over others. The positivistic science of law, and even the dogmatic theories of law, have been trying to achieve a position among the other sciences, keeping away from normative activities. Of course, it has been so difficult to keep the purity and the neutrality inside the dogmatic constructions that legal theoreticians have no other way that to rest in abstractions, generalities, and models, hoping not to favour some ethical claim when elaborating his theories.

On the other hand, Dworkin has been looking for a technique of interpretation and adjudication, and thus asking theories for a way to determine the contents of law. He has no possibility to begin his task by using the same approach. As far I am concerned, the very idea of inclusive positivism comes from the impossibility to identify specific rights and duties without using evaluative reasoning. But Hart long time ago said this. He explained that valuations and balances have been done in deciding a case or answering a legal dispute without changing his own idea of legal Source. Who dares to say that the Social Thesis committed us to identify contents (rights an duties) without making evaluations must do something more than simply align himself with –if you allow me the expression- “the first Hart”: hence the complex and sophisticated theory of Raz.

On Monday the 14th of March, Constitutional Spanish Court raised a legal controversy by deciding a case appealing for legal protection. In that decisions the Court offered a new interpretation modifying the concept of suspension of prescription by operation of the law. On its view –delivered in answering a legal question about a concealment of assets-, it must be considered that in order to suspend the prescription by operation of the law it is

not enough to bring an action before the courts. It has been for ages clear that that was a sufficient legal condition to accept the suspension in criminal processes. But in the particular case the Court took two years to declare the admission of the case. The financial institution that brought the action was considered negligent because she did not act during the two years the document was lost in the Court dependences. The punitive power of the State was extended in time for two years. The new authoritative doctrine establishes that a formal activity presuming the interest of the claimant can not be accepted as a proper way to suspend prescription, when by mistake or negligence the admission of the action remains unresolved. The legal reason granting the constitutional doctrine is that it violates the due process of law. The Supreme Court (in Spain, a court different to the Constitutional Court) is fuming. So are politicians, due to the implications this interpretation may have in decisions to be made in the near future. But regardless of the commotion raised by this constitutional decision, I can assure you that in Spain the rule of recognition has not changed while the interpretations of the C.C. are observed or followed by the others Courts as established in our Judicial Power Statute. This is so, because according to the rule of recognition of my legal community, it still has some weight determining the citizen's rights and duties, not what Rex I says, but what our Constitutional Court says.