

The Inevitable Social Contract

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The mark of ‘the political’, according to Bernard Williams, lies in a society finding an answer to the ‘first political question’--the ‘Hobbesian’ question of how to secure ‘order, protection, safety, trust, and the conditions of cooperation’. It is first because ‘solving it is the condition of solving, indeed posing, any others.’ Williams also argues that a political order differs from an ‘unmediated coercive’ order in that it seeks to satisfy the ‘Basic Legitimation Demand’ (BLD) that every legitimate state must satisfy if it is to show that it wields authority over those subject to its rule. To meet that demand the state ‘has to be able to offer a justification of its power *to each subject* whom by its own lights it can rightfully coerce under its laws and institutions.’ (Williams 2005, pp. 3-4, his emphasis)

In Williams’s view, legitimacy is a matter of the actual acceptance of a political order’s authority by those subject to it. He thus criticizes liberal political theories that make morality prior to politics, either by taking politics to be the instrument of the moral or as structurally constrained by moral principles. In contrast to these versions of ‘political moralism’, he advocates ‘political realism’ which gives a ‘greater autonomy to distinctively political thought’ (Williams 2005, p. 1).

Williams does not explain why we should want to escape an unmediated coercive order. Nor does he set out the institutional structure of a political order. I shall argue that law is one of the principal means of mediating might so that it is transformed into right. For a political order to be autonomous it must manifest itself as a legal order. In so doing, it puts in place the core of constitutionalism. This I take to be the political project of ensuring that the rulers of a polity are accountable to their subjects in terms of a scheme of constitutional principles that protect their

subject status: the status an individual enjoys when the law responds to her 'dignity as a responsible agent'. (Fuller 1969, p. 162)

I explore resources in positivist legal theory which show, first, that the authority of a legal order is constituted by the acceptance by legal subjects as well as of its officials of the legitimacy of the legal order, second, that such acceptance brings back into legal philosophy the social contract of Hobbesian political theory, despite the fact that HLA Hart and Joseph Raz, two major positivist figures, deny any link between legality and legitimacy and reject social contract theory. But, relying on Hans Kelsen, the third major figure, I argue that a contractarian account of legitimacy becomes inevitable as soon as one attempts to understand the authority of legal order as constituted by acceptance.

Part 1 focuses on problems Hart encountered in explaining law's authority. Part 2 draws on Kelsen to argue that legal theory can respond both to these problems and to the concerns that animate Williams's critique of liberalism. Part 3 set out why legitimate authority is constituted by an attitude of contract-like acceptance made possible in large part by the legal institutions which require that exercises of power be justifiable to each subject. Part 4 sketches the program of 'political legal theory'--the theory needed to understand modern constitutionalism, whether or not the constitution is written or unwritten, and whether or not, if written, the constitution entrenches rights and makes judges their guardian. To understand legal order as authoritative, we need first and foremost to understand it as a constitutional project underpinned by a social contract that makes acceptance of authority conditional on legal officials being able to answer the question of the legal subject: 'But, how can that be law for me?'

Hart's Paradox of Authority

In 1958, Hart opened a manifesto for legal positivism by saying that the positivist tradition of , Jeremy Bentham and John Austin should be understood as the 'history of an idea': the 'Separation Thesis' that there is no necessary connection between law and morality. (Hart 1983a, p. 50) The thesis enables legal positivism to avoid the dangers encouraged by natural law positions that hold that law has some intrinsic moral quality. Such positions lead either to the anarchic stance that law fails to be law when it does not reflect morality or, worse, to 'obsequious quietism'--an inappropriate reverence for law on the basis that it must be moral. (Hart 1983a, 54)

Hart rejected part of his inheritance from his predecessors--their command theory of law which understood law as the commands backed by force of a legally unlimited sovereign, who can be identified because he is the person in fact habitually obeyed by the bulk of the society. Hart's first reason is that 'law surely is more than the gunman situation writ large'; that is, law is a matter of authority as well as coercion. Second, as a matter of fact 'nothing which legislators do makes law unless they comply with fundamental rules specifying the essential law-making procedures.' 'They lie', Hart said, 'at the root of a legal system' and 'what was most missing in ... [Bentham and Austin's] scheme is an analysis of what it is for a social group and its officials to accept such rules.' (Hart 1983a, 59)

Hart elaborated his account of fundamental rules by describing a 'primitive' society in which there are only 'primary' rules, rules that impose duties on the individuals in the society, and in which problems arise in regard to: the 'uncertainty' about what social norms count as such rules; the 'static' nature of these rules since there is no clear way of changing them; and 'inefficiency' because of the lack of recognized means of determining rule violations and for rule enforcement. (Hart, 1994, pp. 92-93).

Uncertainty is remedied by the introduction of ‘secondary’ rules’ of which the most fundamental is the ‘rule of recognition’, which specifies ‘some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the local pressure it exerts.’ The static quality of primary rules is remedied by the introduction of ‘rules of change’ and the problem of inefficiency by ‘rules of adjudication’. (Hart 1994, pp. 95-97) But while acceptance of these rules is constitutive of authority, it need not, Hart insisted, amount to moral endorsement. The obligations of the legal realm can be accepted on the basis of ‘many different considerations.’ (Hart 1994, p. 203)

Hart’s explanation of authority in terms of actual acceptance resonates with Williams’s analysis of political order. He also shares with Williams the sense that something goes wrong when one’s study of authoritative order is restricted to orders which one happens morally to endorse. (Hart 1994, pp. 209-212.) However, he fears that talk of legitimacy imports a moral component to the analysis that one should avoid if one is to preserve the wide scope of one’s inquiry. For him there is a clear distinction between the authority a legal order has as a matter of fact, *de facto* authority, and legitimate or *de jure* authority. Armed with that distinction, the good liberal citizen can decide whether to obey the law with his judgment unclouded by natural law confusions. In contrast, it seems that Williams must suppose that an individual in a society which successfully answers the BLD should regard the law as legitimate, even when its content is morally wanting.

However, it is not often noticed that Hart in setting out the Separation Thesis approved Bentham’s ‘general recipe of life under the government of laws ...: ... “*to obey punctually; to censure freely*”’. Hart described Bentham’s recipe as ‘simple’. (Hart 1983a, p. 53) But it is far from simple since it requires that the legal subject obey the law while maintaining his freedom to criticize it. It is precisely the complexity of this kind of stance that is obscured by the moral question legal positivism takes to be central, ‘Should I obey the law?’, though illuminated by a different question,

‘But, how can that be law for me?’

The latter question replaces the positivistic, two-stage inquiry—first, find out what the law is, second, ask whether it should be obeyed in the light of some external moral standard—with a one-stage inquiry. It assumes that legal officials can vindicate the claim that they rightfully wield the authority they have and so inquires into what resources in the legal order make it possible to answer that question. Moreover, when one puts the legal subject and the question about the justification of any exercise of legal authority at the centre of philosophy of law, it becomes apparent that the distinction between *de facto* and *de jure* legal authority has to be greatly softened, if not eliminated.

Hart tried his best to avoid going down this path in his discussion of acceptance. Here he was preoccupied with the question of how many individuals in a jural community must have the ‘internal point of view’—the attitude of acceptance—for the legal order to be sustained. ‘It is true’, he said, ‘that if a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily. Without their voluntary co-operation, thus creating *authority*, the coercive power of law and government cannot be established.’ (Hart 1994, p. 201, his emphasis)

According to Hart, there are ‘two minimum conditions necessary and sufficient for the existence of a legal system’: the officials must take the internal point of view and the subjects must generally obey, though he also acknowledges that if the internal point of view were confined to officials, this would present ‘an extreme case’: ‘The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.’ (Hart 1994, p. 117) An even more extreme case arises when in addition to acceptance being confined to the officials, the second condition of obedience is not fulfilled, because that represents ‘a breakdown in the *complex congruent practice* which is referred to when we make the external statement of fact that a legal system exists.

There is here a partial failure of what is presupposed whenever, from within the particular system, we make internal statements of law.’ (Hart 1994, pp. 117-118, my emphasis)

Hart indicated that he could avoid elaborating his position because the existence of the practice is a matter of fact (Hart 1994, p. 110). But he was forced to say more in response to Raz’s argument that legal officials, in telling subjects what their obligations are, must give the appearance of allying themselves with the law’s claim to authority which, Raz suggests, is perforce a claim to legitimate authority. The officials--those who ‘use’ the law--must at least pretend to believe that the laws they enforce are just, even if they do not in fact so believe. (Raz 1983, pp. 141, 154-155). They act as if they adopt the point of view of the figure Raz names the ‘legal man’, whom he claims to find in Kelsen’s legal theory: the legal man adopts ‘the law as his personal morality, and as exhausting all the norms he accepts as just.’ (Raz 1983, pp. 142-143)

In other words, an understanding of legal orders as authoritative involves understanding their claim to have legitimate authority, which requires the figure of the man who accepts the legitimacy of the legal order because he equates justice with the content the laws happen to have. In turn, the legal theorist or jurist must explain legal order from this figure’s point of view. But Raz thinks that presupposing this figure is perfectly consistent with a claim that legal orders are rarely just, so that in general their claim to legitimate authority fails. (Raz 1994)

In response, Hart repeated his claim that judges need form no views about the moral merits of the law in accepting that they are under a standing duty to apply it, which he took Raz to recognize in the thought that the judges could be insincere. In addition, while Raz’s account presupposed a ‘cognitive account of moral judgement in terms of objective reasons for action’, ‘[f]ar better adapted to the legal case’, Hart asserted, is a non-cognitive theory, according to which ‘to say that an individual has a legal obligation to act in a certain way is to say that such action may be

properly demanded from him according to legal rules or principles regulating such demands for action'. (Hart 1982, pp. 155-157, 159-160)

The problem arises for Hart because 'official acceptance' is the relationship between the officials and the fundamental rules of the legal order. Acceptance refers to the voluntary cooperation of each official with every other that maintains the secondary rules. But these officials do not have to have any regard for the individuals who are subject to their decisions. Once they have determined what the law is, they simply declare it, apply it or enforce it. But, as he acknowledged, his account then seems committed to the 'paradoxical' even confused conclusion that 'judicial statements of a subject's legal duties need have nothing directly to do with the subject's reasons for action.' (Hart 1982, pp. 266-8)

Even more telling is that Hart at times set out an inconsistent view. He made a concession to natural law positions in saying that 'a minimum of justice is realized whenever human behaviour is controlled by general rules publicly announced and judicially applied.' If law is to function as a system of social control, its rules 'must be intelligible and within the capacity of most to obey, and in general they must not be retrospective ...' (Hart 1994, pp. 206-207) His explicitly Hobbesian argument is that both law and morals have to have a minimum content if they are to 'forward the minimum purpose of survival which men have in associating with each other' and that 'in the absence of this content' men would have 'no reason for obeying voluntarily any rules.' (Hart 1994, p. 193) The point about reason is important because we have to understand law as operating with reasons, not causes. These reasons must be addressed at least to the facts of 'human vulnerability', 'approximate equality', 'limited resources', and 'limited understanding and will'. This 'natural necessity', he says, has to qualify the 'positivist thesis that "law may have any content."' (Hart 1994, pp. 194-200)

Hart also said that judges ‘may often display’ what he calls ‘characteristic judicial virtues’: ‘impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable principle as a reasoned basis for decision.’ (Hart 1994, p. 205) He was, I think, deliberately coy about the status of these virtues. But I assume that he saw them as the characteristics of the role of a judge who understands himself as operating in a system of authority rather than a gunman situation writ large, and who understands his legal order as catering to the ‘minimum content’ of natural law. (Hart 1994, p. 193)

Now imagine such a judge confronted by a law that requires that a whole group of people be treated inequitably, for example, one of the segregationist statutes of the apartheid regime. That judge must--a matter of *legal duty*--struggle to find an interpretation that displays both consideration for the interest of all those who will be affected and a concern to deploy some acceptable general principle, derived from the relevant legal materials, as a reasoned basis for decision. It is a struggle because a law that institutionalizes inequality on its face does not display such consideration and is hard to interpret in a way that displays some acceptable general principle. That creates a tension internal to the legal perspective of the judge, since the judicial virtues are prominent among the norms defining the judicial role; and the judge will have a hard time answering the legal subject who asks: ‘But, how can that be law for me?’ (Dyzenhaus 2010)

Put differently, if the commands of the powerful are incapable of sustaining a claim to be exercised with right on those within their power, the commands lack authority, and therefore start to lose their grip on their claim to legal status. For such commands undermine the mutual relationship between protection and obedience Hobbes outlined at the end of *Leviathan* and which Hart depicts as follows: ‘It seems clear that the sacrifice of personal interest which such rules *demand* is the price that must be paid in a world such as ours for living with others, and the protection they *afford* is the minimum which, for beings such as ourselves, makes living with others worth while. These simple

facts constitute ... a core of indisputable truth in the doctrines of Natural Law.' (Hart 1994, p. 181, his emphasis)

Hart's own treatment of this kind of issue relied on a clear distinction between an in-group that gets protection from the law and an out-group that does not. As we saw, he thought that the in-group could be small, confined to the officials of the system, and the system, albeit deplorable, would still be a legal system. Only if there were no one in the in-group at all would the system become one in which there was the appearance of law but what passed for law had sunk to 'the status of a set of meaningless taboos.' (Hart, 1983a, p. 82)

Hart thus did not attend to the issue that arise for legal philosophy when one is in the in-group for some purposes but not for others; when, that is, an individual has the status of second-class citizenship. Yet, it seems fair to say that he must hold the view that the 'healthy' or 'normal' case of a legal order is one in which power is exercised authoritatively. (Hart 1994, pp. 116-118) To be a first-class citizen, or full legal subject, in such an order is to be able to accept that the legal order as a whole and its particular laws offer one the kind of reasons that are understandable as addressing one's interests. Even when such subjects strongly disagree with the content of the law, they must be in a position to recognize that the legal order as a whole serves the interests that are in the character of a legal order to serve and that its particular laws are interpretable in light of those interests. When they ask the question, 'But, how can that be law for me?', a judge mindful of the judicial virtues can give an answer.

I shall now argue, drawing on Kelsen, that it matters that this position is understood in political terms, more accurately, in legal-political terms. Such terms have to do with an idea of legitimacy that cannot be reduced to a moral position of the kind that Hart seemed to have in mind when he articulated the Separation Thesis that there is no necessary connection between law and

morality. Rather, it has to do with the actual acceptance by legal subjects of the *de jure* authority of a legal order in a way that constitutes that authority.

The Legal Man v. the Legal Subject

According to Kelsen, at the base of every legal order is a basic norm that must be hypothesized in order to make sense of the idea that there is a unified normative order. That norm tells the officials and subjects of the order that the constitutional norms of that order--from which all other norms derive their validity--must be obeyed. (Kelsen 1992, pp. 54-55)

On one interpretation of Kelsen's theory of authority, the legal subject is central in the authority relationship. He is to be found in Kelsen's treatments of norm conflicts, and is given expression in the kinds of statements that Raz relies on for the claim that the legal subject for Kelsen is the legal man. Hart, unsurprisingly, criticized Kelsen at just these points, in particular, Kelsen's claim that it is not possible 'to serve two masters' when it comes to law and morality. (Kelsen 1945a, pp. 373-375, 408-410) Hart said that while this point addresses the situation of conflict in which an individual is subject to duties by two norms he accepts as valid, it does not address the situation of an individual who wishes to make a moral criticism of the law for, say, requiring military service, even though he himself is not liable for such service. He found 'alarming' that Kelsen's argument 'excludes the possibility of a moral criticism of law.' (Hart 1983b, pp. 302-303)

But Hart overlooks Kelsen's claim that it 'is by juristic interpretation that the legal material is transformed into a legal system'. (Kelsen 1945a, p. 375) While Kelsen, like Hart, emphasized that there is an irreducible moment of creativity in any official act, unlike Hart, he denied that there are gaps in the legal order. (Kelsen 1967, pp. 245-250) In setting out this position, Kelsen was primarily

concerned with explaining legal order from the internal point of view of one who accepts that the norms of that order are binding, not because of any threat of force, but because they are part of an authoritative order. If one adopts the internal point of view, one assumes that the answer to any legal question will be produced by legal procedures and will make sense of one's subjection to the material and formal norms of the legal order by displaying them as a unity. Kelsen is, then, mostly concerned to answer questions about what makes an order legal: a polity governed in accordance with the rule of law in the sense that law regulates its own production and all legal problems are solved in a dynamic process of norm application by legal procedures.

Moreover, Kelsen at times accepted that the assumption of the unity of legal order introduced a natural law element to his legal theory, thus transcending the limits of a 'strict positivism.' (Kelsen 1945b, p. 437) 'In this sense', he said 'there is absolutely no contradiction between natural law and positive law', although he also suggested that his theory's positivistic character was preserved because the content of the legal order would be filled by legislation. Hence, he thought the thesis that law can have any content could remain intact. (Kelsen 1981, p. 252) But that thesis must be qualified for reasons quite similar to the qualification we saw Hart inject into his own version of legal positivism in the last part; and this qualification supports a claim that an affinity Kelsen once acknowledged between the idea of the social contract in natural law theory and the basic norm goes deeper than he was willing to recognize, as he himself recognized through indicating at several points that the postulate of unity is not merely formal, since it is also a postulate of peace. (Kelsen 1968, p. 1652.)

Kelsen's argument for the postulate of peace is that every legal order must be effective to some degree before it can be said to be valid. If there were total compliance with its norms, it would be superfluous; too little compliance and it would not exist as a legal order. For it to be effective somewhere in between these two points, Kelsen asserted, it must represent a 'compromise' between

‘conflicting interest groups in their struggle ... to determine the content of the social order’. To be that compromise, it must be the case that none of these groups is ‘wholly satisfied or dissatisfied.’ (Kelsen 1945b, pp. 438-439) That is what makes a legal order an order of peace.

Now on one view peace is just the absence of conflict. But Kelsen has in mind that the state’s monopoly on legitimate force is necessary but not sufficient for effective or stable legal order. It is necessary because in every legal order there will be individuals who will conform to law only when they fear being sanctioned if they do not. It is not sufficient because long term stability depends on the majority of those subject to the law being able to understand their subjection as serving their interests even when they disapprove of the content of some or many laws.

Put differently, the compromise between conflicting interest groups is unlikely to be achieved if the content of the law as determined by the relevant officials relegates the individuals on the losing side of the struggle to a condition of permanent and almost total second-class status. Such individuals will not be able to accept the compromise as a sufficient basis to make sense of their legal order as an order of legal right or authority, rather than one of unmediated coercive power. The kind of compromise that sustains a legal order is not a compromise on any terms whatsoever--terms that permits the law to have any content; rather, it maintains the individuals who are affected by the law in their status as legal subjects.

This point can be put as follows, adapting Hart’s terminology: the voluntary relationship that constitutes authority is not constituted exclusively by the officials who make, interpret, and implement the law. It is constituted by the acceptance of those to whom the law is applied--the legal subjects—as well as by the officials who accept the norms that regulate law-making, law interpretation and law-application. This factor introduces into the legal order what we can think of as the perspective of the individual legal subject, one which Hart portrays as entirely external to law and deployed as a resource to criticize the content of the positive law.

But, as we have seen, Hart cannot avoid the insight that, because law made at the higher levels of the legal hierarchy must be progressively concretized as it journeys down to the point of actual application to a particular legal subject, officials faithful to their role will take the subject's perspective into account. This perspective will become altogether explicit when the legal order institutionalizes mechanisms of review of and appeal against the interpretations of the law adopted as the basis for official implementation of the law. But even in the absence of such mechanisms, officials must take into account this perspective because their own internal point of view is incomplete without it. As Raz argues, officials cannot make the distinction between might and right without assuming that it holds for legal subjects. More precisely, their internal point of view is dependent on whether, in applying the law to legal subjects, they apply it by right *from the perspective of those subjects*.

Of course, if no mechanisms of review or appeal are available to subjects, there is no way within the legal order for testing the claim that the law is so applied, other than by observing that subjects have what Austin called the 'habit of obedience'. (Austin 1861, Lecture VI) And just as the internal point of view is incomplete without this perspective, so a legal order is incomplete without such mechanisms, as it is incomplete without mechanisms of enforcement for use against those who wish to treat the legal order not from the internal point of view, but as a system of unmediated coercion.

It is incomplete in the first respect because it does not permit the vindication of the internal point of view. It is incomplete in the second respect because it fails to guarantee to those who take the internal point of view that their practice will not be undermined by those who regard the law as nothing more than commands backed by threats. The inclusion of this perspective in even its most austere form is the beginning of constitutionalism since it attempts to understand legal order from the position of a legal subject, one who wishes to make sense of the norms of her order as

authoritative. Her obedience, together with that of other like-minded subjects, is an essential component of the ‘complex congruent practice’ of acceptance constitutive of the authority of a legal order.

However, if the legal subject is the legal man who adopts ‘the law as his personal morality, and as exhausting all the norms he accepts as just’, the introduction of this perspective into an account of legal order may seem to presuppose exactly Kelsen’s monism about law and morality that Hart found so ‘alarming’, and which led him to express disquiet about Raz’s argument. But there is no cause for alarm since Kelsen’s legal subject is not the legal man. Rather, she is the person who wishes to make sense of legal order when faced with a conflict between her own moral norms and the norms of her legal order. In the perspective of a legal theory that aims to understand law’s authority, this individual is the legal subject who stands on the ground of someone who is already subject to the public order of law in which she happens to find herself.

The legal subject thus accepts that the modern legal order is legitimate even when some or many of its norms do not correspond with her sense of justice. She in a sense relativizes her convictions in regard to both the convictions of her fellow subjects and the public judgments that are established as mandatory by the law. She can do so because, when political judgments are put into legal form, they accrue legal legitimacy, gained through the transformation of might into legal right. Successfully converted norms are norms capable of being concretized by legal officials in ways that display the norms’ identity with the legal order understood as a meaningful whole, which requires presupposition of the basic norm. This requirement is deeply pragmatic, an achievement of constructive juristic activity which depends on whether the material content of particular norms can be interpreted so as to display this identity. It is best described as a regulative assumption: an assumption that we need to make in order to make sense of our practice, but also one which we must maintain by ensuring that our practice conforms with it.

The more the legal order is not an order of peace in which subjects can recognize that the law protects their interests, the harder it will be to achieve this goal, and the more precarious the order will become. This factor sets both a sociological and a normative outer limit on legal order. The limit does not dictate what content the order should have. Rather, it marks not very precisely a border that is crossed when a law or set of laws puts a class of legal subjects beyond the pale of subjectivity. The limit is thus more negative than positive in nature, suggesting what kinds of laws will subvert the basis of legal order. It is not, however, wholly negative. Officials who exhibit the judicial virtues on Hart's list have a positive duty to ensure that a law that might, on a literal interpretation, breach this limit is interpreted and applied in a way that preserves to the greatest extent the subject status of those affected by the law. If they are unable to come up with such an interpretation, the law will be suspect as law no matter how well it complies with the formal criteria of validity in that legal order.

The limit also does not dictate the institutional make-up of the legal order. But it does provide a kind of internal imperative to reform legal order in such a way as to make it better able to live up to the aspiration of legality; to deal, for example, with the category of laws that are legally suspect despite their formal validity. Put differently, to the extent that a legal order lacks the institutions necessary to implement, interpret, and enforce the law, it will be defective legally speaking. From the perspective of the legal subject, there is a dynamic inherent to legal order that requires that she be able to raise and get an answer to questions of the form, 'But, how can that be law for me?'

But just as there is an institutional transformation in the transition from what Hart calls a primitive order to a complex legal order, so there is a transformation in the internal point of view. Raz's description of the legal man applies only to the point of view of the individual of a primitive order. As Hart and Kelsen both pointed out, in such an order the individual regards the public

norms as directly binding in that there is a complete coincidence between the individual's sense of justice and these norms. More precisely, the individual has no sense of justice apart from the content of these public norms and so for him the issue of the legitimacy of the law does not arise. (Kelsen 1945b, pp. 422-423; Hart 1994, pp. 91-92)

The issue of the legitimacy of law can arise, then, only in a context in which at any time at least some individuals will find themselves subject to public legal norms whose content they find unjust. Such subjection involves what Kelsen in his work on democracy calls the 'agony of heteronomy': the pain that accompanies conceiving of oneself as an autonomous individual who can and should decide for herself how best morally speaking to live, but who accepts that she has reason to abide by mandatory public norms that she would not herself choose if she had the power to do so and which may even strike her as unjust. (Kelsen 2013, p. 27)

Democracy can alleviate the torment and help to explain why she should have this stance of acceptance because it preserves for her the equal chance of participating in making such norms. There is both a formal and a substantive aspect to such preservation. The formal aspect is that the political process is as open to her participation as it is to everyone else in the political community. The substantive aspect is that the maintenance of this openness recognizes her status as a free and equal political subject.

That the norms decided on in the political process must enter into the legal order before they can be concretized, applied and enforced also plays an alleviatory role with equivalent formal and substantive aspects. The formal aspect has to do in part with the fact that an answer to the question, 'But, how can that be law for me?', is one that will be produced in accordance with legal procedures. But it also has to do with the formal criteria that have to be met for a public policy to be converted into law, to take, that is legal form, for example, generality.'

Substantively, the content of the norm must be interpretable as consistent with the content of other relevant substantive norms of the legal order. Since that content will be an order of peace—one that reflects a compromise of interests between the different social groups subject to law—if any particular norm is to support rather than undermine the postulate of unity, it must be interpretable as maintaining the subject status of those subject to it. Just as the democratic political order must maintain the *political* subject status of those who end up forming the opposition to a particular law, so the particular laws of a legal order must maintain the *legal* subject status of those subject to them.

The distinction between these two statuses should not, however, be exaggerated. The very conception of the individual as a legal subject is political in that it is formulated in order to explain why it might be rational for an individual to subject herself to the public norms established in a legal order. And it is intrinsically connected to the status of the political subject of democracy.

This is the case even when one notes that some proponents of social contract theory, notably Hobbes, thought that democracy is only one of the forms of government consistent with this claim. While one can try to imagine an autocratic political order in which the leader governs in accordance with the rule of law, it is unclear why the leader would accept this kind of constraint, even whether it is accurate to call this order autocratic. The leader's submission to this kind of constraint creates a tension within the autocratic system since he thereby accepts that all his political judgments have to be put into proper legal form and so be interpretable as answering the subject's question 'But, how can that be law for me?' He is not an autocrat, a natural person with more power than anyone else who uses the form of law when and only when it is convenient to exercise his political judgment that way. Rather, he is an artificial person, constituted by law, and relates to his subjects through law and thus in a way that makes his judgments answerable to them. One may say that constitutionalism is set in motion.

If the motion continues, the direction is democracy because of the combination of two ideas: the acceptance by legal subjects is constitutive of the authority of the legal order and the judgments made by public officials must be answerable to subjects. Any form of political rule that is undemocratic is in tension with this combination. Here we have the reason why early modern writers, notably Hobbes, who were concerned about the dangers they saw in democratic rule could find only pragmatic arguments tied to their contexts to support the claim that political power is best concentrated in the hands of a monarch. The same reason explains why they also insisted that the monarch enjoyed something like democratic legitimacy because he got his authority from a social contract between the individuals who were transformed by it into his subjects.

But the other direction is always a practical possibility. Even within a democratic order there is no guarantee that either the political or the legal subject statuses will be maintained. One way to try to secure such maintenance is to put in place a written constitution with an entrenched bill of rights—both political and individual—and to give to a formally independent judiciary the authority to invalidate laws that it regards as violating the rights. But it is clear that no guarantee comes with even this kind of constitutional dispensation. In addition, it is not at all obvious that legal orders in which there is parliamentary supremacy and an unwritten constitution do a worse constitutional job of maintaining these statuses.

For this reason, legal theory can be agnostic on the question whether this kind of constitutional judicial review is necessary for maintaining the authority of legal order. But there is widespread agreement in legal theory that it is a requirement of legal authority that in every national legal order there should be a body of officials, a judiciary, independent of those who implement and enforce the law, who have the role of ensuring that the latter act within the limits of the law, with such limits understood as both formal and substantive.

Such agreement strongly supports a claim that this kind of review authority is a necessary condition for the maintenance of legal authority. It is also usually taken as a necessary condition for the maintenance of the rule of law. For when a legal official makes a decision affecting the rights and interest of a subject, the subject has no way of ensuring that the decision is according to law if she is unable to get an answer to her question—‘But, how can that be law for me?’--from an official independent of the first.

From a legal theory perspective, more important than the content of the actual debates about appropriate constitutional design is that the subject matter of these debates is about how to realize the project of constitutionalism set in motion by the very attempt to understand legal order as a matter of authority, which is to say from the point of view of the legal subject, someone with her feet planted firmly on the ground. I shall now argue that the reasons that count in this space are more political than moral and the ground is both sociological—based in acceptance in fact—and normative.

Acceptance, Legitimacy, and the Social Contract

The claim that the ground is political more than moral is intended to indicate an important though not hard and fast distinction. The Anglo-American debate in legal theory over the last fifty years or so has been shaped by a dualism about law and morality in which it is assumed that the key issue for philosophy of law is whether a necessary connection can be demonstrated between the content of the positive law of any legal order and the personal morality of individuals.

On the one hand, Hart’s and Raz’s legal theory of legal authority is that it is *de facto* authority, based on the fact of acceptance of a certain set of institutional arrangements for making, applying, interpreting, and enforcing mandatory public norms. As such it is normatively inert. (Gardner 2012,

p. 23) That is why, on the other hand, Hart and Raz are committed, willy-nilly, to an anarchist theory of moral authority, according to which law becomes normatively active only when it has the content it should have according to liberal morality, in which case it is morality not law that is the activating agent. Both fear that if they were to concede any normative force to law as such, they would be forced to embrace the reactionary horn of the dilemma that Hart took to be the problem of natural law theories.

Kelsen, in contrast, has a political rather than moral conception of the legal subject. It includes the subject's personal morality, while explaining why the subject might find reason to subject herself to laws that not only fail to reflect that morality, but also should be rejected from the standpoint of liberal moral theory. The main reason is the constitutionally-mandated, dynamic or constructive juristic activity that applies general norms to the concrete situation of the legal subject in a way that preserves that individual's subject status. On that terrain, one can properly address the topics of how legal subjects constitute law's *de jure* authority through their acceptance, which in turn conditions the shape of the legal institutions and the content of the laws

That acceptance does not quite amount to a social contract, in either the sense of the actual contract which Hume is generally thought to have successfully debunked, or a hypothetical social contract, which it is thought to have met the same fate under fire from Dworkin. (Dworkin 1981, p. 185) Rather, it partakes of elements of both the idea of actual acceptance and that of the hypothetical reasonable person

It partakes of actual acceptance in just the way that Austin's much maligned idea of a habit of obedience suggests, but understood in terms of the actual beliefs of those in the political community about what it takes to vindicate claims of right, not fear of sanctions. It partakes of the idea of the hypothetical reasonable person in that it postulates or better bets that the tacit habit of acceptance would become explicit if put to the test of that person's scrutiny. This test is not

altogether hypothetical. It depends on the *fact* of widespread acceptance, though on condition that this fact cannot plausibly be claimed to be the product of coercion. The more legal subjects have available to them the institutional means of contestation of the mandatory legal norms the content of which seems unreasonable *to them*, the less easy it will be to make the claim that acceptance is the product of coercion. The task of exploring this phenomenon—the question of how legal order helps to convert might into legal right—belongs to ‘political legal theory’.

Towards Political Legal Theory

The point of political legal theory is to establish the principles of order that mark the distinction between a condition in which individuals are subject to unmediated coercive power and a civil condition in which they interact with each other within a stable and secure framework of laws. A mark of this conception of the political is that political order is always legal order, in that the subjects of the law can demand of officials that they justify their coercive acts by showing that there is a warrant in the law for these acts, not only in the positive or enacted law of the order, but also (where relevant) in the constitutional principles of that order. Even when there is deep controversy over their application, they are still considered as the principles that constitute the political realm, so that the disagreements are to be worked out within the institutional structures of that realm.

This jural conception of politics is liberal, but only in the following sense. The very idea that individuals do not have to consider themselves as striving to achieve some highest ethical good, but simply as members of a jural community in which coercive state action has to be justified as being in accordance with law may in our era favours liberal ideologies over others. Indeed, the claim that authority is a matter of reasoned justification is strongly associated with both liberalism and the constitutionalist tradition.

The theoretical problem Williams detects with liberal political theory is that its claim that only liberal states are legitimate makes it relevant to a very small number of states and to quite recent times. In other words, if an understanding of legitimacy is central to political theory, liberalism is too reductive in that it reduces legitimacy to correspondence with one or other candidate for 'the' liberal position. As I understand his argument, such a reduction is problematic because it does not so much offer an understanding of the concept of legitimacy as eliminate it from political theory altogether. It puts in place too robust a sense of justification because in political theory a claim that a command is legitimate is a claim that it should be accepted even though its content is not in accord with a particular moral position.

The problem with the elimination of legitimacy is not, then, merely conceptual since the point of the concept is to explain the gap between what I take to be moral and what I take to be legitimate or authoritative over me. If we are interested in the idea of legitimacy in political theory, we should not narrow the scope of our inquiry to societies that we think are legitimate because they already subscribe for the most part to a liberal political ideology.

The point of the concept is normative within prescriptive, political theory. To recognize a command as legitimate is to acknowledge that it is authoritative over me neither because the person issuing the command can punish me if I do not comply, nor because the content of the command corresponds with my sense of what I think I ought in any case to do. Rather, I acknowledge the command's authority for the reason that it addresses me in a way that preserves the political order that is the solution to the first political question and thus also preserves my status in the jural community--the political community of the modern legal state.

It is, I have argued, a necessary condition of such a political order that it manifests itself as a legal order, which is to say as a constitutionalized political order. Despite the association these days between such an order and a written constitution which entrenches rights and makes judges their

guardian, the actual form of the constitution of such an order is contingent on its political history. Whether it is written or unwritten, whether if written it entrenches rights and makes judges their guardian, is in a sense of secondary importance. Only in a sense because of course the form of constitution is a major factor in expressing and conditioning the political culture of a society. But whether that form is legitimate depends not on abstract considerations about whether written constitutions are better guarantors of rights than unwritten constitutions, or whether judges or legislatures should have the 'last word' about the interpretation of fundamental rights. Nor does it depend on arguments about whether the constitution is ultimately legal or political in nature, since it is both. (Mac Amleigh, 2016; Dyzenhaus, 2016). Rather, it will depend on how successful that form of constitution is in the society when it comes to providing answers to the question, 'But, how can that be law for me?', and thus in maintaining the social contract that undergirds the constitution of that jural community.

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