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JOSEPH RAZ ON MORALS AND LAW WITH SPECIAL REFERENCE TO A CONCEPT OF PUNISHMENT.

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ABSTRACT

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JOSEPH RAZ ON MORALS AND LAW

WITH SPECIAL REFERENCE TO A CONCEPT OF PUNISHMENT

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Over the last twenty seven years Joseph Raz has written, mainly in a series of articles, a considerable amount in relation to Law, Authority, Morals, Ethics and Freedom. Yet he has not ventured upon the subject of Punishment. It is an object therefore to investigate Raz's philosophy with a view to extending into this field.

In order to do this it is first necessary to establish the general suppositions requisite in a concept of Punishment and this is covered in part I. From there it is necessary to examine Raz's philosophy to establish corresponding base positions. This process, which is in part II, itself reveals possible areas of conflict with other approaches.

In part III the device of extrapolation is used first. Extrapolation, in the way I use it, is a dual procedure in which one first deduces starting points or foundations within the philosophy; from there one can then proceed by parallel reasoning to an extended field. Extrapolation has a dual advantage for it not only enables us to glean an insight into the allied field within the framework of the defining philosophy, but it tests that very philosophy itself.

The test by extrapolation is more rigorous than mere critical examination, for it requires both analysis to establish relevant foundations, but then requires a building upon them. By putting weight on the foundations it affords a practical test of their strength. Where a weakness occurs it may, as I have done with respect to Intentionality, be possible to suggest a means of rectifying it, and thus strengthening the philosophy. Alternatively it may simply reveal intractable omissions or flaws.

Next I proceed to check the extrapolation by providing an answer to the same question using methodological deduction.

Finally, in the Critique and Annexe A, I seek to provide an alternative approach whereby the weaknesses revealed in Raz's philosophy, which relate to the definition of 'Rights' and 'Interests', and the lack of functionality of jural relations between 'rights' and 'duties', maybe overcome. In addition I argue for the necessity for the inclusion of Intentionality in areas where Raz ignores it, and the paramount necessity of distinguishing between, and giving the proper place to, Justice with its distinct philosophical input, as opposed to the normative law.

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D. O. Humphris-Norman.

ABBREVIATIONS

In the footnotes Raz's principle works have been abbreviated as follows:-

C. of L.S. = *The Concept of a Legal System.*

P.R. and N. = *Practical Reason and Norms.*

A. of L. = *The Authority of Law.*

M. of F. = *The Morality of Freedom.*

E. in P.D. = *Ethics in the Public Domain.*

JOSEPH RAZ ON MORALS AND LAW WITH SPECIAL REFERENCE TO A CONCEPT OF PUNISHMENT.

INTRODUCTION

Joseph Raz has written a great deal; on legal systems; on authority of law; of morality; of freedom; and of Ethics. Yet, curiously he has not ventured upon the subject of Punishment. His is a developed, consistent liberal philosophy and thus it should be possible to glean an overview of what a Razian philosophy of Punishment might entail. This might be done by several means; by selecting indicators from Raz's writings and assuming a further step or steps; by combining selected extracts; by looking for pointers of principle; or by other similar deductive or syllogistic methods. However, I have chosen a different approach which involves both analysis and extrapolation. The approach is difficult and not without its own possible pitfalls, not the least of which was that there could always prove to be insufficient basis to make the task completeable via this approach, and that the whole project would then collapse.

Why then embark on such a possibly perilous course? Because it has two tremendous advantages. First, while Raz's philosophy has mainly been set out in a series of individual articles, it requires us to analyze his philosophy as a whole. We need to determine the foundations from which he formulates his conclusions, and to proceed from there in a similar manner to work out an application of

the philosophy in an extended field. Secondly by determining the foundations and then attempting to build on them another advantage occurs. It provides a test for determining any weaknesses that might otherwise not have become apparent. To use an analogy extrapolation is rather like extending a cantilever bridge as opposed to adding bricks or a coat of plaster to a free standing wall. It is thus one of the more rigorous tests that can be applied to a philosophy.

Although difficult, the procedure is generally applicable. For example, taking any philosophy e.g. Rawls one might posit the question - Utilizing such a philosophy how can we build a theory of law? In Raz's case I have chosen the question - How can we build a concept of punishment?

As each section proceeds I shall go into further detail of the method used. Basically there are three major divisions into which the development falls. In the first place it is necessary to establish the general presuppositions which relate to the field which we wish to cover. I deal with these in Part I. They are general to the field and are not drawn from Raz's philosophy, rather they relate to the criteria which it will be necessary for Raz to have covered in one way or another in his writings if we are to find sufficient on which to base a Razian theory of Punishment.

In Part II, I cover the Razian approach wherein is set out aspects of his philosophy covering the general fields established in Part I.

In Part III there is the difficult task of the establishment of bases paralleling the requirements in part

I from the analysis of Raz's views in Part II, and to the extrapolation therefrom of a Razian Theory of Punishment.

The extrapolation itself is then tested against a Methodological Derivation of a Theory of Punishment utilizing Razian methodology. We are fortunate in this respect that Raz has provided us with the basis for this in *Practical Reason and Norms*. The reason for doing this is that it confirms certain discrepancies. Most interestingly, these discrepancies are brought about by philosophical assumptions made by Raz which do not have a consistent methodology with the remainder of his philosophy. These may have been introduced to reach a desired conclusion or for some other end but they are revealed as technical impurities.

Finally, whereas in Part III, the extrapolation, I assume the philosophical assumptions made by Raz are sound, in Part IV in the Critique I subject Raz's philosophy to criticism in the light of the weaknesses revealed in the course of both the analysis, and the extrapolation. This criticism is based on arguments supported in the Annexe. These arguments are separated into the Annexe so as not to disrupt the continuity of Parts I - IV. Also in part IV the Concept of Punishment is assessed, and the overall soundness, strength and appeal of the Razian approach is reviewed in the light of doubts arising as to the soundness of the foundations on which it has been based.

PART I

PRESUPPOSITIONS WITH RESPECT TO A SYSTEM OF PUNISHMENT.

In order to extrapolate a theory in an extended field from a philosophy dealing with a plurality of related fields it is first necessary to establish the foundations necessary for an adequate coverage of the new field. In Part I it is therefore my intention to set out certain presuppositions with respect to forming a theory of Punishment. These are presuppositions which I have derived myself. They do not, unless stated, necessarily represent Raz's views. Rather they are the presuppositions against which I shall be comparing Raz's approach. They form the base ground from which I approach the subject. In Part II we shall analyze how Raz has treated these or analogous matters, which treatment will form the basis or foundations for the extrapolation and testing to follow. We shall note the effect of this on the development of a basis for a theory of Punishment. While one purpose in Part I is to establish a base ground from which I proceed, another is to avoid inadvertently misrepresenting any of my views as those of Raz.

The basic fields we have to cover are:-

1. The Legal System
2. The necessary aspects of Punishment.
3. The relationship of Punishment with the Law, State, and Justice.

CHAPTER. 1. Presuppositions with respect to legal systems.

For any Legal System to exist, there are several things that are generally supposed. First there must be a Society or group of people (usually defined as a nation,

tribe etc, but it could be a sub-culture such as a religion) to whom the legal system applies. I shall not at the moment consider the question of international legal agreements which for the present purposes can be considered as additional laws incorporated voluntarily into the system.[1]

Second there is a need for a Law-Making Authority of some form. This may be an absolute dictator, a Monarch, a Parliamentary body or a Religious or other body. Whatever it is, it in effect makes laws which it intends should be obeyed. At this point there is a discrepancy of views which may have an effect on our deliberations and it is therefore wise to note them. Very generally they may be divided into three for our purposes:-

i) There is the view that the Law making Authority is supreme. This is the positivist view, though it does not exclude the possibility of review of the laws, i.e supreme is not necessarily used in the sense of 'absolute', or the 'Divine Right of Kings'.

ii) The alternative Strong liberal or Egalitarian view is that the Law Making Authority is merely the representative of the society, formed to enact the society's wishes for the benefit of its members. (John Rawls is a good example

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[1] I appreciate that this is a considerable over simplification from a jurisprudential point of view. It is nevertheless a simplification which will have no adverse effects on our considerations with respect to the basic concepts of punishment. The question as to whether an international view of morality and justice is to take preference over the state or territorial legislation is a fascinating but primarily a political question. As will be seen from Fig. 1. in chapter 3, post, it may have an effect at either the normative law or Justice level.

of such a strong liberal approach).[2]

iii) Finally there is the Natural Law viewpoint that law may be reduced to universal moralities upon which it is based.

Depending on the viewpoint taken, the validity of various laws may be regarded in different lights, and this will affect the attitude of the public towards obedience. Thus those taking a strong positivist view will maintain that the validity of the law lies in its manner of establishment or enactment. In addition, Hart introduces the concept of acceptance, but limits this to the law enforcing agencies, so that provided the laws are so accepted the system is valid. While the strict positivist looks to the manner of enactment to establish a law's validity the Natural law exponent and the Egalitarian will look to the law itself and its content in considering validity, a validity which will be affected by moral considerations in the case of the Natural law exponent; and political, or political and moral, considerations in the case of the egalitarian. As we shall see these variations in approach will have an effect on views as to what may be deemed punishable and to what degree, and thus will affect the philosophy of punishment.

Now one can see, as a logical consequence of the strict positivist view, the possibility of a society under

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[2] In practice this really resolves itself into a question as to whether a society is to be regarded as a top down or bottom up structure. Again history has shown that societies (except for very small communes) are in practice top down structures. Even democracies, allegedly professing to enact the will of the people, of necessity develop into top down structures. This pragmatic fact is recognized by Positivists and we must remember that Raz is a positivist (subject as hereinafter specified).

a ruthless dictator, who has an army of faithful followers amongst whom are the law appliers, passing laws which may well be deemed to be morally repugnant. Nevertheless such laws would be considered valid by a strict positivist. Raz has obviously seen this as a pitfall and although he does not set the argument out in this way, one can almost feel his adverse reaction. He is keen to attempt to reconcile the Natural law viewpoint because under such a view such laws would tend to be regarded as invalid, and one senses that he is emotionally tied to that viewpoint. The effect of these viewpoints will reflect itself in the attitude towards obedience.

Even so one may very well obey an invalid law because one:-

a) agrees with it;

b) is ignorant of it, but acts so as to conform to it; or

c) while knowing of it, is totally indifferent as to its validity or contents, but conforming action suits one's purpose of the moment.

On the other hand one is less likely to obey if its contents are objectionable and its validity in doubt. The problem here arises from a tendency to equate validity with morality. This is a problem caused entirely by Natural law theories which have consistently been applied to normative law rather than to justice. In my submission it is entirely possible to have perfectly valid laws which may be both unjust and morally repugnant. I shall give but two examples:-

1). The law against homosexual activity was long considered unjust (morally repugnant) by homosexuals. Equally there will be those who consider the present more liberal law permitting certain homosexual activities, to be totally morally repugnant. Both laws have nevertheless always been treated as valid.

2). If someone such as the racing driver Jackie Stewart had been caught on the motorway doing 120 mph, he would have been fined and his licence suspended. (I refer to Jackie Stewart because he is internationally renowned for being the most safety conscious racing driver perhaps of all time). However, he would, in practice, have represented no danger to anyone. On the other hand, a friend and I, driving separately down the motorway at a legal 65 mph, whilst busily discussing natural justice over a radio telephone, might well be considered to be a menace to navigation, and it would be just and morally right to reprimand us. We would not however have committed any offence for which our licences could be suspended. But these are laws of Mandatory guilt or innocence. They are none the less regarded as valid.

So we can and do have totally unjust laws, laws which are morally repugnant, and laws which apply to people innocent of the evil to which the law relates. These are all considered valid and indeed as a matter of practicality are necessarily so. The natural law theories in my submission do not fail, as many have argued, but make sense when applied to the concept of justice, but not to the normative law. My reason for going into this point at

length here will become more apparent because, as we shall see, Raz leans towards reconciliation with natural law which might, in my submission, weaken any position with regard to punishment.

Next one should dismiss a presupposition which some might also seek to establish, namely that there should be a Law adjudicating means, i.e. A body that is capable of deciding whether a law is or is not valid. Such a presupposition is open to two objections; First those objecting to the law on say moral grounds would not be prepared to accept the decision of the body if that decision were made, say, on purely positivist grounds. Secondly, and far more important, if the society were a dictatorship, or were governed purely by religious laws, such a body might well not exist. The society and its laws would, nonetheless, continue to exist and function. The existence of a law adjudicating means is not therefore a necessary presupposition, particularly in relation to punishment. However such a body or means is a necessary presupposition if one is considering Justice. This again emphasizes the distinction between law and justice, a distinction often blurred and sometimes completely ignored. The distinction will necessarily re-occur as the question of 'justice' is applicable separately both to law and to punishment. Thus it is possible to be treated justly even by an unjust law, and to be punished unjustly under a just law. (see also chapter 3 post in which I set out my theory of the relationships involved).

Then there is the question of a law enforcing

body which is responsible for the application of the law. It would seem that such must be necessary for it is almost impossible to imagine the fruitful existence of any laws without a means of applying them.

The next presupposition relates to the necessity for a law interpreting or application means or body. This is deemed to be necessary because all rules are by their nature generalities. They are thus, by definition, often over inclusive or under inclusive and it is necessary in a society such as ours to have a means of interpreting their application. This also involves us in questions as to the law making role of the courts which will be referred to later. However there are those who believe in an absolute liability situation, i.e. that the crime as specified under the law either did or did not occur, which decision is determined entirely by the physical facts and events, i.e. intentionality is omitted. Upon establishing the facts it will found that the specified 'crime' has been committed. The person is thus 'guilty' but the punishment or remedy depends entirely on the circumstances and the nature (or health) of the agent. This I generalize as the Laing/Wooton approach. I do not propose to go into this approach as it is applicable more to the nature of punishment and nowhere does it seem to be put forward by Raz. However it is noted because as will be seen Raz's manner of creating jural relations could also have an effect on his attitude to certain types of punishment even though he has not written directly on the subject.

In most current western civilizations the

functions of adjudication as to a law's validity (of enactment) and law interpretation is carried out by the courts. The function of law enforcement, originally by the police and the courts, is nowadays increasingly carried out by a growing number of authorized bureaucrats (in the form of Inspectors, Welfare specialists etc.), the police, and the courts. While the rise of this third group is of vital importance politically and socially it will not be dealt with here as it is not relevant to foundations of punishment, though of course it may have an effect as to the type of punishment.

So far we have:-

LAW MAKING AUTHORITY

LAW REVIEWING AUTHORITY

(Interpretation & Application)

LAW ENFORCING AUTHORITY

SOCIETY

We then come to one of the most difficult and fundamental questions in considering any philosophy of punishment - the connection between Law and punishment, or more precisely the connection between normative rules of behaviour and punishment for the breach of such rules. In order that the laws are effective it is, as we have seen,

necessary to enforce them. It is possible to regard punishment in the light of redressing a balance, ie. that in the face of a breach of the rules of behaviour the balance of the society can only be restored by the imposition of a compensating redress. This is a complicated theory of harmony and restoration of equilibrium. It is not an annulment but more a compensating balance. While it is a theory which instinctively appeals to me I would be the first to admit that it is riven with difficulties. On what grounds do we justify such a harmony or balance? If punishments are altered, as they often are, how does this affect the balance, and if not, why not? Raz does not pursue this link - his references being mainly applicable to the deterrent value of S-laws (his sanction laws), and I refer to it merely to illustrate the complexity of some of the arguments which a complete philosophy of punishment would have to resolve.

The questions with which we are concerned relate not only to the relationship between the positive normative or regulatory laws and punishment (in Raz's case the D-laws, PR-laws and S-laws[3]) but the philosophical justification of punishment. We shall find that Raz provides us with such a philosophical justification.[4] Answering the question as to what provides the philosophical link between law and punishment is very necessary as this could well provide a guide to the resolution of many of the outstanding problems relating to

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3 See chapter 4 post.

4 This is discussed in chapter 6, post.

this subject. It is thus a most important factor in any attempt to extrapolate into any extended field.

Nevertheless a partial answer to our question may be derived on the practical grounds that it is necessary to have some means of ensuring that the society is at the very least, encouraged to obey the laws, and/or discouraged from breaking them. It would of course be possible to reward obedience to the laws rather than apply sanctions for disobedience. However as it is desirable that the majority, and preferably everyone, should obey (and in the case of natural law theorists, because it is obvious that they should) it is more practical to apply sanctions to the smaller group, i.e. those who do not obey. And indeed if one were theoretically to follow the inducement option, i.e. rewarding those who did obey, the lack of inducement (reward) for those who do not comply could, in effect, be regarded as a punishment - all we have done is to alter the polarity, so that the two systems are basically similar.[5] So we must presuppose that there is some inducement/sanction which encourages the majority to obey, in addition to any moral or other inclination such as practical reason.

Thus societies generally, rely on punishment for

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[5] It is true that this is similar to J. Austin's 'Nullity' argument, ie. that the nullity of a non-conforming act under a regulatory statute (ie. a non criminal law such as the provisions for making a valid will) is a 'punishment'. H.L.A. Hart argues against this on the legal technical ground that a nullity cannot be a sanction. I would nevertheless argue against Hart in support of Austin, because, in my submission, what we have to look at is the intended effect on the agent - I shall be referring to this in depth in part IV where weaknesses are discussed. Thus the disappointment of not effecting that which one desired is the equivalent of a sanction when what we are looking at is the end effect ie. would the agent be pleased/not pleased with what happens as a result of the agent's actions.

breach of the law but punishment itself can be regarded in three lights; Retribution / Prevention / Reform - Cure, and philosophers differ in their attitudes to these. It will be part of our task to see whether Raz's theories provide any guidance as to the principal means of regarding punishment.

For example it is interesting to speculate whether, if there were such a thing as natural law (as opposed to natural justice) it would be obeyed automatically by those with the correct moral attitude. In this case deviation, or non obedience, could be ascribed to mental illness, a thought almost too frightening to contemplate. Of course some (Laing/Wooton) tend, as I have already indicated, to take this approach, and it is not necessary to be a 'natural law' theorist to do so. Nevertheless it would be another argument against the adoption of a natural law approach.

Therefore we will be looking to discover Raz's view as to why the laws are to be obeyed. We know that he is a positivist and does not believe that the laws are natural based, whereby logic and morality would, or at least should, incline all right minded people to obey them naturally or as a matter of course and of choice.

In fact in our society at the present time we know that the laws are now so complicated and intrusive that they can in no way be regarded as 'natural'. Some of them are highly artificial and of a detail and complexity which can only be explained as ideological convenience rather than sociological convenience.

Ultimately, in considering the society I shall

regard this in a positivist light as does Raz. i.e. that society is controlled by those in authority and that authority (which may to a certain extent listen to the views of those governed) does not consider itself purely bound to carry out the wishes of that society or even a majority thereof.[6]

In this sense Raz takes a much more pragmatic approach than Rawls or Nagel. Although Raz tries to reconcile Positivism with Natural law theories to some extent, his is nonetheless a Positivist outlook. The validity of the law does not, according to him, depend directly on its morality. However in part IV of "*The Authority of Law*" Raz argues that there is no obligation to obey the law though there are 'reasons.'[7] An obligation is, according to Raz a 'protected reason'.[8]

Consent or acquiescence by the public: Naturally no law would work if no one in the society were prepared to obey or enforce it. An extreme example of the practicality of government being dependent on its ability to enforce the laws came about with the Unilateral Declaration of Independence by Rhodesia.[9] Raz says that while most people feel under a strong form of obligation to obey the law

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[6] Raz argues against the approach of both J. Rawls and T. Nagel in 'Facing Diversity: The case for epistemic Abstinence' in *Ethics in the Public Domain*, chapter 3, and elsewhere.

[7] The A. of L. pp. 234 & 235.

[8] See chapter 5 post.

[9] Here the jural relations were those of Normative U.K. law. Once the whole country effectively decided to ignore this the law became effectively unenforceable. This I regard as another proof of my contention (not to be imputed to Raz) that power is prior to rights - See Annexe A and discussion in part IV post.

there is, in his view, no such definitive moral obligation.[10]

Does one have a duty to obey? Raz's approach here[11] is that a duty is established by virtue of a person's interests giving rise to a duty in another. His solution to the apparent problems raised by his conclusion that there is no moral obligation *per se* to obey the law will be examined in detail - a solution which interestingly may be argued to possess advantages and disadvantages. The advantages I shall put forward in the extrapolation in part III. On the other hand it could also be argued that this provides one of the main weaknesses of Raz's theories. This is because it is not a duty arising from a Hohfeldian claim right, but rather it is no more than a moral obligation. I shall argue the stronger case that the law imposes a duty to obey, because it provides a claim to a penalty if one doesn't. On page 240 of 'The Authority of Law' we shall find that Raz rejects arguments that people are bound to obey the law on quasi estoppel [precisely the grounds on which I believe they are bound to obey] because such an argument is morally pernicious. One can sense a great fear that one might have to accept a morally pernicious law as valid. I would argue that the pure positivist's view should be that such laws are valid. However I would also argue that it is an entirely separate issue as to whether a valid but morally unacceptable law should be obeyed. It is a question as to when a duty to obey might be overruled, not

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10 The A. of L. p. 235

11 Ibid. pp. 235-7.

a question as to the existence of the alleged duty. There is still in my submission, but not in Raz's, a prima facie duty to obey. But one doesn't always do one's duty. This will be discussed further under Part IV, where the effect of fundamental assumptions on which the extrapolation was based will be discussed.

Finally in order for a law to be effective there must be some compelling reason for the majority of people to obey it. It would seem that some form of punishment or disadvantage associated with breaking a law must therefore be a presupposition of a legal system and that this should be in addition to any moral imperative inherent in the content of the law. The fact that there may be a moral imperative of obedience because 'it is the law' is a separate incentive and one that could conceivably lead to a conflict of moral incentives. It will therefore be necessary for us to consider how Raz deals with this question, when considering his 'Morality of Freedom'.

CHAPTER 2. ASPECTS OF PUNISHMENT.

a) Definition

b) Necessity

c) Purpose

d) Justification.

Having outlined some of the main presuppositions of a legal system it is possible to proceed to a review of certain aspects of Punishment which will enable us to determine basic presuppositions.

a) Definition of Punishment.

In considering our benchmark definition of punishment we are not aided by Raz because the nearest he gets to the subject is his provision of S-laws and the apparent acceptance of coercion - See b) Necessity. First, it must be emphasized that we are solely concerned here with State Punishment - The punishment set out by the state for the infraction of its laws.

In the absence of Raz's comments the best source for a definition lies with Hart. This is not only because of the excellence of his definition which is widely accepted, but also because we know that Raz worked with Hart and was influenced by him. We therefore turn to Hart who referred to S.I. Benn and A. Flew. His central case of punishment contained five elements:-

"(1) It must involve pain or other consequences normally considered unpleasant.

(2) It must be for an offence against legal rules.

(3) It must be of an actual or supposed offender for his offence.

(4) It must be intentionally administered by human beings other than the offender.

(5) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed".[1]

This masterly definition covers the basic legal aspects of punishment without presupposing any of the philosophical arguments. The only comment I would make is that, in my submission, the reference to pain is not as important as the feature of unpleasantness. One notes that Hart refers to 'normally considered unpleasant' and this raises a very important point. Normally considered unpleasant, by whom? It is one of my contentions, though Raz's philosophy does not lead us far enough to consider this in detail, that one of present day society's great mistakes is that it attempts to provide punishments in which the answer to the question is that the punishments are normally considered unpleasant by society in general, or to be more specific by 'the man on the Clapham omnibus' - i.e. a generally law abiding citizen.

The mistake lies in the fact that the punishment, if it is to be effective in any of the ways that we shall be considering later, must be considered unpleasant by the **recipient**. Unfortunately the effect of concern for the prisoner's well being, and their rights, both being positions which, as we shall see, are supported by a Razian

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[1] H.L.A.Hart *Punishment and Responsibility*. 1968 Clarendon p.4.

philosophy, have resulted in regimes in prison which were described by one young car thief recently as " a holiday camp".[2] The point I seek to make has nothing to do with the severity or non-severity of the regime in question, but rather the fact that the man on the Clapham omnibus would have no doubt considered being in prison, even if it were like a holiday camp, a totally mortifying experience, and certainly not one that would ever have been admitted in public. In short it might be argued that much more attention has to be paid to the 'critical reaction' of the public.

b) Necessity.

One factor, and the principal one, is as we have seen, the necessity for sanctions as part of a legal system. There is no society which does not incorporate some form of punishment. Indeed were one to presuppose a society in which there were no official punishment, merely disapproval by one's peers, as in the case say of a sophisticated religious organization, then that disapproval would of necessity rank as a form of punishment. Indeed it is possible, as I have begun to suggest above that that disapproval actually plays a greater role than has been allowed for by Raz and others.

Raz maintains[3]:-

"Coercion is the ultimate foundation of the law, in the sense of being (part of) the standard reason for obedience to some D-Laws*

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2 BBC.1. Kilroy Debate on Car theft and Joy riding.

3 *C. of L.S.* p.186

that are presupposed in many enormously varied ways by all the other legal norms, and, through them, by all the other laws of the system".

* Raz interprets his concept of a legal system as a system of norms and breaks down laws into various types. D-Laws are duty-imposing laws and Raz modifies H. Kelsen's account with some of Hart's views.[4] A non-legal, duty-imposing norm is in effect what I would describe (along with Hart) as a moral obligation[5], and deviations meet with critical reactions. Raz, in a footnote, feels Hart's conditions are too severe pointing out that hypothetical expressions of opinion and manifestations of attitude are also relevant to the existence of rules.

One must also remember that Raz believes that duties arise by virtue of there being a third party interest sufficient to create a duty. This view I dispute in so far as it provides, in my submission, one of the weaknesses in Raz's philosophy which could be argued to undermine his ability to provide a comprehensive support for a theory of punishment. - See part III against my point of view, and part IV for the argument. Nevertheless Raz is agreed as to the need for "S-Laws" (Sanction Laws).

Apart from the necessity for any such laws the presuppositions of Punishment also relate to

c) Its Purpose.

One should perhaps raise a point here which is that the object of punishment (one of its purposes) is to

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4 See Raz C. of L.S. p. 147.

5 cf. Hart *Concept of Law*. pp 79-88.

ensure conformity with the rules in the most efficient way possible. It is the efficiency of punishment in effecting this objective that is a factor often introduced into discussions. However that object can be affected by many issues such as the likelihood of being caught; and if caught, of being prosecuted; and if prosecuted, of being convicted; and if convicted, of the unpleasantness of the punishment; and finally of the reaction, if not of society then certainly of ones peers to the fact of conviction. These matters relate to the practical issues with respect to punishment and are not the direct subject of discussion herein. For this reason I have distinguished them, quite arbitrarily, under the term 'object' of punishment as opposed to the 'purposes' of punishment. Even though we are not directly concerned with these aspects in deriving a Razian theory, the tenor of the underlying philosophy will have an effect on them and it is necessary therefore to mention them at this point as aspects to be born in mind.

With respect to the purposes of punishment there are three further aspects of punishment which fall under the headings of:-

i) Retribution

ii) Deterrence &

iii) Reform or Cure.

There is a great deal of confusion over these because they are not mutually exclusive and indeed **i)** and **ii)** are to an extent (though the quantum of that extent is arguable) inter-related. The principle arguments occur as to which should be the primary purpose of the punishment

and which is the most effective in accomplishing the primary objective of compliance with the law. It is not our purpose to argue the relative merits of these aspects in detail, interesting though they are. Rather it is necessary to examine the attributes of each to see which might most readily be supported by Raz's philosophy.

Matters are comparatively simple with respect to Civil Law. Where damage occurs, usually as a result of a breach of contract, or negligence in the case of a tort, the preferred manner of dealing with the matter is to assess the damage and award compensation. Obviously there are cases where a writ of Mandamus leads to orders for specific performance, where that is a) possible and b) considered desirable (the object being as far as possible to put the parties in the position they should have been in had the breach not occurred, or, where this is not possible, to compensate the loser). Thus where loss (damage) has occurred, compensation will usually follow.

However the concept of restitution or compensation by the criminal strangely does not play a large part in western law (though there are moves in this direction). Theoretically it should be as possible to determine the compensation for damage caused by a criminal act as it is in the case caused by negligence. However in a high proportion of cases it is unlikely that the criminal could compensate the victim. There are moreover, two essential differences in the case of criminal law. The first is that society as a whole can be offended by the infraction of criminal law because the rules concerned are

of general applicability. In the case of a breach of a specific contract, or of a tort, it is usually only the parties involved who are concerned as to the outcome. The breach of the contract does not (usually) involve the odium of the general public, whereas a burglary does. Is it just that the rest of us could not, without our active participation, have been a party to the contract, whereas the burglary could have involved us? Is it a matter of fear?; or moral outrage? These are interesting questions that need to be pursued in a comprehensive theory of punishment. The second difference relates to the factor of **intentionality** (actual or construed). This factor can affect the seriousness with which any offence might be regarded. For example there may be a death caused by accident, negligence, or intentionally, and in the latter case that case may be further divided into actual or construed intention. We shall see that while Raz is much concerned with 'reasons' he devotes very little consideration to intentionality.

i). Retribution.

In most societies the idea of vengeance for a wrong suffered does not lurk very far below the surface. The Vendetta concept is prevalent where there is no other adequate means of law enforcement. The *lex talionis*, is often used as an example of the crudest form of retaliation, an eye for an eye, by those wishing to attack the concept of retribution.[6] In fact it is not as crude as

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[6] cf. Nicola Lacey. *State Punishment*. Routledge 1994 p.17.

is generally supposed for in its true interpretation it is negative, and designed to place a limit on the retaliation sought. ie. If the injury is the loss of an eye, then one shall not exact more than an eye in retribution - it is not permitted to seek death for an eye. This actually is a limiting principle of justice and relates to the quantum of retribution rather than the vendetta aspect of retaliation. However it has been misrepresented for so long that it will no doubt continue to be used to illustrate a rather cruder concept.

The subject of retribution is perhaps best dealt with by Hart[7] where he explains the strict or strong theory of retribution as containing three conditions:-

1). That a person may be punished only if he has a) Voluntarily done something that is b) Morally wrong.

2). His punishment should in some way match or be related to the wickedness of his offence and

3). That the justification for punishing under such conditions is that the inflicting of suffering in return for an act falling within 1) is in itself just and desirable.

Kant goes so far as to add that the punishment of the offence is not merely desirable but obligatory.

The retributive theory need not necessarily be in the strong form but the essential ingredients will remain. *Mens rea* normally plays a part in it, though as can be seen with the introduction of modern strict liability crimes, e.g. speeding, intent may be eliminated. It is an interesting

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[7] H.L.A.Hart. *Punishment and Responsibility*. Clarendon 1992 p.231.

point, though unfortunately beyond our present scope, as to whether such strict liability crimes do not in fact aid in bringing the law into disrepute - such is the innate response, at least in modern western societies, to the concept of intentionality.

While strict equivalence of punishment is no longer advocated, the idea that there should be some degree of relative proportionality between the severity of the crime and the severity of the punishment, is retained. Indeed it would be possible to argue that proportionality is an intuitive concept of justice. This idea seems to be common to both retributive and deterrence theories, including utilitarian ones. There is however a further problem because the criterion used is often that of the amount of damage done, rather than the subjective wickedness of the agent.

We shall therefore look to Raz to see what his approach is both to *mens rea* and moral culpability related to damage done. We shall also be enquiring as to how Raz, if he adopts a retributive approach, deals with the objections that two evils (of suffering) do not make a good.

ii). Deterrence.

Most forms of retributive theory also imply that punishment is justified as a means of preventing crime. The fact that suffering will be imposed as a punishment is estimated to cause a degree of fear of the consequences of committing a "criminal" act.

This concept of fear as a deterrent may be justified on two grounds:-

1). Where the crime is one which is morally condemned the punishment may be justified as an expression of the moral condemnation of that society. Without wishing to appear too cynical, despite the often substantial justification pleaded for punishment on these moral grounds, it does seem that there may equally be said to be a strong whiff of vengeance attached to them - perhaps another rose by a different name.

2). Where the crimes are not necessarily morally condemned, eg. speeding, then the punishment is exacted on the utilitarian grounds of its value as a deterrent.

There are many and continuing arguments as to the relative effectiveness of different punishments as a deterrent, but generally it is accepted, for example, that the driver with 9 points for speeding already on his licence will tend to think more about his speed for fear of the next step, i.e. losing his licence altogether.

However the whole question of deterrence is open to the problem that the punishments are set according to the society's general view of the relative severity of the offence (see Proportionality) rather than with respect to their subjective effect on the prospective offender. The young joy-rider, addicted to the thrill of speed, may have no licence, and is quite oblivious to either the morality of the danger he may cause, or the punishment. Against this it is argued strongly that the degree of certainty of being caught, and if caught convicted, will have a major effect

on the deterrent - i.e. where the chances of either not being caught, or walking away with a caution, are high, the deterrent effect of the punishment will be largely nullified.

Proportionality

It is often argued that proportionality is justified in a retributive theory by equating the punishment with the moral condemnation of the action. In fact Raz takes the approach that the sanction may in part replace the critical reaction.[8] While this may be true by inference, it seems to me that proportionality is explainable as a matter of justice and that this is something which has both a moral and an ethical or social input.[9]

Thus while it is true that defined crimes will be regarded more seriously when they are regarded as morally wrong, the public will also assess crimes which have little or no moral ramifications. These are usually offences which arise from a necessity to organize the society along the best lines of the current political thinking. Though most of these offences are usually regarded as less serious than offences with a moral connotation they are none the less

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[8] It would be my argument that any such substitution would be a mistake and undermine the deterrent effect. The essential difference with critical reaction is that it remains. The man is a condemned felon. The moment one starts to minimise critical reaction by taking the attitude that the moment the punishment ends, the criminal emerges as a jolly good fellow just like the rest of us, one has removed a great deterrent effect. However this leads to an argument as to the effectiveness of stigma, and while this is beyond our present scope, there is no doubt that a Razian rights based concern with personal freedom and autonomy founded on the individuals rights of well-being can and have had a marked effect on the leniency of the system.

[9] See Chapter 3. fig. 1.

assessable and are treated accordingly. The very fact that they are rated less seriously is evidence that they are comparable - at least so far as any two crimes can be compared - a comparison that by its very nature can be emotional and subjective.

There is however a public or composite sense of justice which can be detected in our comparatively free society by expressions of outrage at unfair sentences passed by the courts, or of unfair acts of Parliament. At this particular time the social sense of justice would seem to favour harsher sentences for certain crimes, and at the same time that the courts should be given discretion over the current mandatory destruction of allegedly dangerous dogs. These reactions no doubt exist just as strongly (if not more so) in a rigidly dictatorial society; it is just that they would not be expressed so openly. It is the freedom of expression in our society which permits us to verify the existence of this 'sense of justice'.

However I do not wish to suggest that what is deemed just or fair could not be influenced by the state. For example in wartime Japan it was considered morally correct that one should obey the edicts of the God Emperor. These would not even be questioned, unlike our current society where it has become almost fashionable to oppose everything in the name of independence. At the same time moral values can also change independently of the state, so that, for example, adultery, which is still held by Islam to be an offence punishable by stoning, is often widely regarded in other societies as being of little

significance. It is not even a crime in western cultures. Again I hope to point out, in chapter 3, a way in which the interaction of these factors may be separated for analysis.

In any event, as we have seen, the concept of proportionality applies equally to both retributive and deterrent theories.

iii). Reform or Cure.

The third concept of Reform or Cure can be argued by some (for example the Laing/Wooton approach) as an alternative to the retributive or deterrent theories, or as a system to run in parallel. Basically the concept is that 'punishment' should be devoted to curing the offender and that in this regard the treatment should be personalised with respect to the offender rather than a generalized set punishment or imposition of suffering.

Unfortunately our knowledge of motivations and psychology do not appear, at this stage, to give any real hope that this approach has any greater likelihood of preventing recidivism; certainly if applied along the Wooton line of making all 'crimes' absolute and only considering intentionality etc. when considering the 'cure'. Nevertheless, one cannot be instantly dismissive of the concept because, if nothing else, it highlights the possible need for a flexibility of punishment for an offence, so that the deterrent effect could be tailored more closely to the offender. This however goes beyond the scope of the present thesis.

It will be necessary therefore to examine Raz's

approach to morality, and reasons for obeying the law to see in which direction his philosophy inclines us. We already know that he is in favour of S-Laws (Sanction Laws) and that he will therefore not be generally supportive of the strong form or Laing/Wooton approach tending to treat offenders as patients.

d) Justification

Finally there is the difficult question of the justification of punishment. Assuming that we accept that punishment is necessary to ensure the efficacy of the legal system; And further if we accept that its purpose is one or more or a compendium of **c) 1-3** above, and that if it is to be a just punishment it must have regard to proportionality, we are still faced with the question of the justification of punishment in general.

One can of course argue that the answer to **a)** above, - its necessity, overrides everything, and that without punishment we would have no means of enforcing the laws, but even this would not answer the secondary question of justifying individual punishments. The answer would seem, as is the case with all questions relating to punishment, to be extremely complex. In one sense it is political - the State places a value on the importance of the offence by the punishment it imposes. But the State usually, and particularly nowadays, is pragmatic. Unless there is a reason, e.g. external security, there is no point in placing a penalty on some activity to which the society as a whole sees no objection. Thus there is a moral

input to justification. This is why both laws and punishments change. The punishment is considered just when it meets the moral criteria of the society. As I point out in chapter 3, I consider the concept of Justice to reflect the moral and ethical perceptions of the state and people of the particular time.

"The ultimate justification of punishment is not that it is a deterrent but that it is the emphatic denunciation by a community of a crime." [10] It could be argued that this statement by Lord Denning accords more with my compensating balance theory which would maintain that a crime disturbs the equilibrium of society. Punishment is then that which the state considers sufficient to restore the equilibrium. As to whether the people consider the punishment just depends on their accord or disagreement with the view of the state. Again these are my views and it remains to be seen to what extent they are supported, rebutted, or an alternative is provided by Raz.[11]

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[10] Per Lord Denning in the Report on the Royal Commission on Capital Punishment s.53.

[11] See Part II chapter 6 particularly the section Autonomy and the harm principle, under F. Anti-Perfectionism v Perfectionism, post.

CHAPTER. 3. THE RELATIONSHIP OF PUNISHMENT TO THE STATE, THE NORMATIVE LAW, AND JUSTICE.

Having examined the presuppositions with respect to the legal systems, the law and the aspects of it relating to punishment, it is important to try to establish the form of relationship between the various constituents. This appears to be an area which is largely taken for granted or even ignored. However it is my contention that it is of great importance particularly when it is used to establish the predominant philosophical inputs to the various subjects involved. As we shall see there tend to be differing philosophical inputs to different sections. Moreover in considering the relationship we are bound to consider a whole new area, namely that of Justice, and its bearing on our deliberations. Finally this would seem the appropriate place to consider the question of the actual philosophical justification of Punishment. The areas will be considered in the following way:-

a) The State

b) The system of Jurisprudence

c) Justice

d) The Relationship

e) The Justification of Punishment

a) The State.

The state represents the law making body. Within the political philosophy the system of jurisprudence is contained, and the state sets out the laws and sanctions

which it deems appropriate. The State may or may not have a constitution. It is my argument, though it would not necessarily be accepted by Raz, and certainly not by others, that this is irrelevant. Any constitution is, in my submission, no more than a series of normative laws which are enshrined with a special status which makes them more difficult to amend. But in all cases any constitution can be changed, suspended, or even swept away, however difficult that may prove to be. This is because Power is prior to Rights (a point of view which does not appear to be shared by Raz - See Part II c.4.) and constitutions merely set out certain desirable Hohfeldian privileges or freedoms which, by virtue of their incorporation into normative law, give rise to claim-rights which are sometimes falsely alleged to be inalienable. Inalienability, it could be argued, like equality, is a myth.

This question can be important because if one takes a 'rights' based approach, i.e that rights are fundamental pillars of the fabric of the state, then in that case certain of the so called "rights" could be held to affect punishment, and thus also the philosophy of punishment. Although Raz is a positivist we must not forget that he is anxious to reconcile certain "natural law" concepts. He is greatly concerned with rights, which he devolves from interests in a person, such interests being sufficient to create a duty in others. The effect this might have will be discussed further in parts III & IV.

b) The system of Jurisprudence.

This may be defined by the state, or, more often, will have evolved by common practice. Raz maintains that the establishment of the system is a pre-requisite to defining law. While I can see the connection in that law is made under and by virtue of the system, I would argue that the defining of the system is not a pre-requisite to the definition of law as I shall be using the word, and thus it is not a pre-requisite to defining punishment for our purposes. In practice I believe that this aspect, although it reveals a possible difference of approach, does not create any difficulties in this instance simply because Raz is basically positivist in his approach. In a Rawlsian contractarian approach it could possibly affect the state's approach to punishment, but Raz rejects both Rawls and Nagel.

c) Justice

Where I believe that a great confusion can occur lies in the habit of not separating the concepts of law and Justice. Justice is a subject which can be considered completely in isolation from the law. It involves concepts such as fairness, impartiality, even-handedness etc.

While it would be my concern that the principles of justice should always override the law, sadly this is not so and as we have seen that in a complex society the needs of expediency and administration can be seen to outweigh the requirements of justice. It would be possible, however, to have a legal system in which the concept of

justice played no part. One can envisage a society in which offenses would be defined and no extenuating circumstances allowed. Such law would be rigorous and unbending. However it could be argued to provide the merit of certainty. We would not like such a system but there is no doubt that it could be made to work. In some instances it could prove to be just, as we define the term, in other instances it almost certainly would not. However the point remains - Law can exclude justice.

It is important to realize therefore, that, because it could theoretically be excluded, justice is not a necessary constituent of punishment. In practice in Western philosophy it plays a considerable part and thus while it is vital for us to consider it, it is separable. A great part of our idea of justice involves intentionality, and this plays a far more important part in criminal law than it does in civil law. In civil law the damages are often definable, and whether the breach of the contract giving rise to such damages was deliberate or accidental does not necessarily affect them. In the case of punishment much may hinge on the intention involved. Thus it will be necessary for us to look for Raz's views and discussion of justice and intention.

d) The relationship

We have seen that the necessity for punishment is almost universally accepted, and certainly it is by Raz in his recognition of S-Laws. However its inter-relationship with the normative law, the State, Justice, and indeed the

society rarely seems to have been clearly defined. I consider this is important, not only for the reasons given above but because the type of philosophical input differs and it is necessary to know in which general direction we should be looking for possible answers to our questions. Without a clear picture in mind it is quite possible to attempt to explain in moral terms a matter which is primarily governed, say, by a political input.

In Figure 1, set out below, I have described my view of the best differentiation of the subjects, showing their primary philosophical inputs. Obviously these inputs are not rigidly confined. For example Moral thinking can have a considerable influence on the type of State and the normative law. Nevertheless it is my contention that it is necessary, for example to emphasize that the primary input to Justice is governed by moral and ethical concepts, whereas the normative law is governed primarily by jurisprudential considerations and the manner in which the State wishes to control the society.

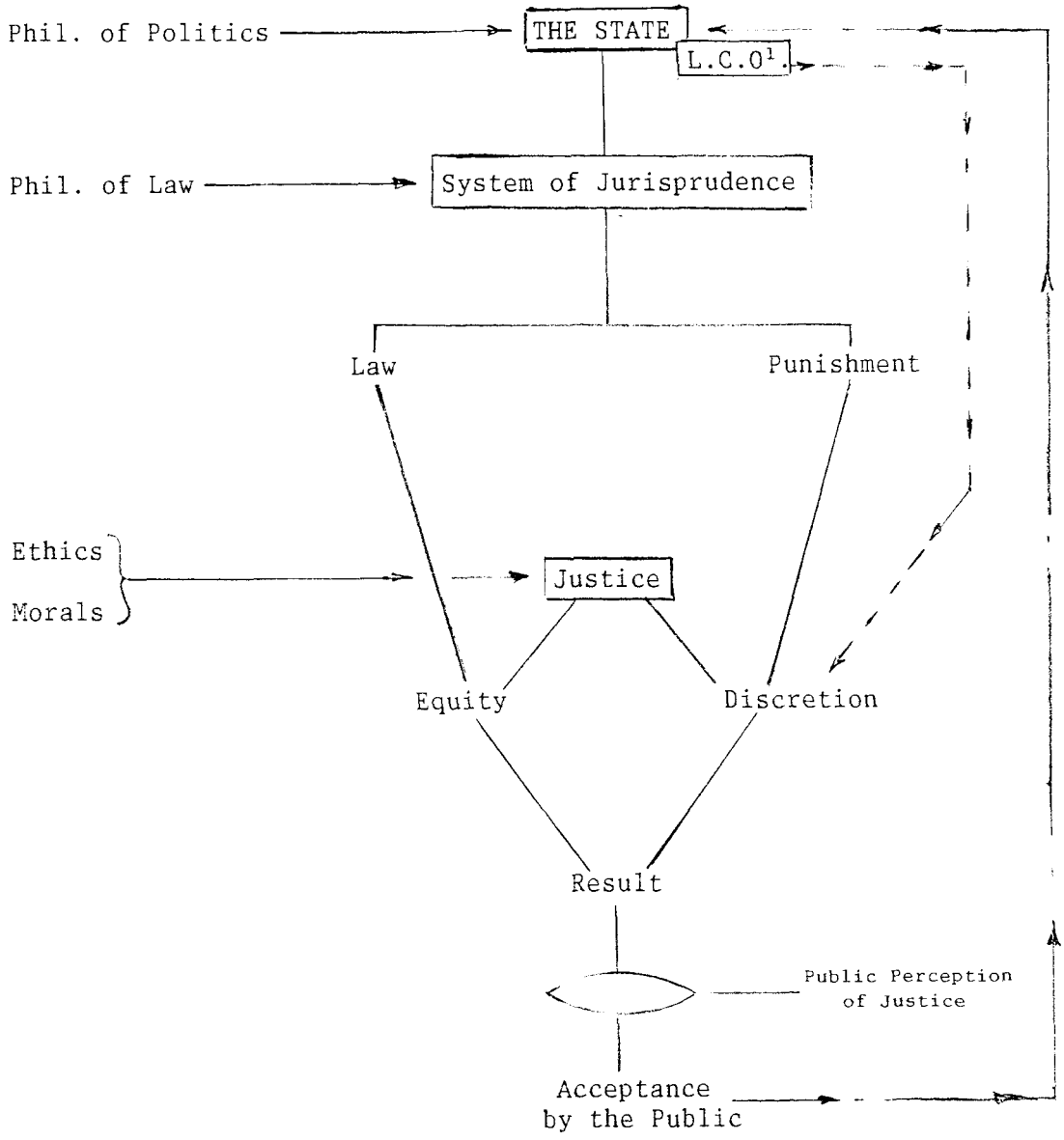

Fig.1

The State I have used as an illustration is one such as the U.K. Without bearing the above relationships

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[1] This portion shows one of the peculiarities of our system. It is not strictly necessary for the purposes of our analyses but it illustrates clearly why we need to establish the relationship and the sources. For example in the U.K. The Lord Chancellor's Office [L.C.O.] which is primarily an arm of the state (political) has been known to write to magistrates concerning the length of sentences they may have handed down. The Lord Chancellor's Office may, for example, encourage less custodial sentences, as indeed it has done, not on moral or philosophical grounds but on the purely pragmatic grounds that the prisons are too full. The effect of this on the public conception of justice may be one of moral outrage (feeling prisoners are getting off too lightly) but it is absolutely essential in assessing the results, to realize the actual cause. - ie. here a perception of justice is distorted by a political and not a moral act.

in mind it is very easy to misconstrue or place the wrong philosophical interpretation on any situation. Unfortunately most writings on the subject appear to contain no such analysis, relying on their readers to carry it or a similar one in their heads. This certainly adds to difficulties of interpretation. In order to understand any part it is necessary to locate it in the system.

In the above relationship I have made the following assumptions:-

Law:-

Law is merely that which is enacted. It has no substantive per se existence. It is also Law insofar only as it can be enforced. I am not referring here to degrees of failure to enforce a law which could be enforced, but rather the basic inability to enforce as for example in the case of Rhodesian U.D.I. where we claimed our law to be that of Rhodesia. The Rhodesians merely took no notice and went about their business.

Punishment:-

Punishment is regarded primarily from the pragmatic point of view. It is basically the sanction for the non performance of the normative laws. Its raison d'etre is to ensure obedience to those laws. The degree to which it does so is related to its effectiveness. Secondary objects may be to indicate the offence's severity in the

scale of things; to provide retribution; to act as a deterrent, and even possibly to effect reform or provide a cure.

Justice:-

The concept of Justice involves Equity, the question as to whether the law is fair / the punishment is fair. It involves the Moral and Ethical perceptions of the State and the people of the particular time. These things are in fact mutable and change with time.

The above point with regard to change was most effectively made,in actual practice with respect to law, by Roscoe Pound when he traced twelve concepts of law from the divinely ordained to the late nineteenth century concept that law was made up of the dictates of economic or social laws with respect to the conduct of men in society. He went on to point out that

"each of the foregoing theories of law was in the first instance an attempt at an explanation of the law of the time and place..." [2]

He did not do the same with respect to justice but it is my contention that justice also must be based on the concept of the morality of the time and of the particular society at that time.

Thus it is my belief, that in considering any

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[2] cf. Roscoe Pound. *An Introduction to the Philosophy of Law* where he points out that the law has been used to serve many ends each of them being the law of their times. pp.25-30.

philosophy of law, Punishment or Justice, it is imperative to keep two things firmly in mind; 1) The relationship that I have set out in Fig.1. and 2) The primary philosophical inputs governing the individual parts. It is by this means that I believe we actually can go further than Raz, by reconciling concepts of'natural justice' (involving equity and discretion) as opposed to 'natural law' with the concept of positivist normative laws. Unfortunately a detailed consideration of 'natural justice' is beyond the scope of this thesis but it must be emphasised that in my submission the concept of 'justice' in general varies in accordance with the morals and ethics of the day and of the society.

For example it is no longer considered morally justifiable to set 'man traps' to catch poachers. A concept of moral injustice will filter through the public reaction to a law or judgement, and be fed back, in a society such as ours, to the State, who may do something about it - as in the case of man traps, or not - as in the case where it is often suggested that the majority might want to reintroduce capital or corporal punishment. In the U.S. on the other hand, some states have actually re-introduced capital punishment in response to such reactions. Thus the various parts inter-act or to use Raz's words, though in a different context, there is an internal relationship.

In the case of punishment we have both the Judge's discretion and the reaction of the public to sentences. This is an increasing factor in today's society due largely to the far greater ease of communication.

Unfortunately the very means of communication may also be a means of influencing those informed, which is why it may be argued that it is necessary for governments to be free to use their own ultimate discretion. It will be necessary for us to consider how this relates to a philosophy of punishment, and it is dealt with partly by Raz in considering 'reasons' for punishment.

e. The Justification of Punishment.

Because of its apparent necessity, its presence in all legal systems, Punishment per se is not frequently the subject of philosophical justification. Moreover it is always easy to fall into the trap of justifying the particular punishment in terms of its deterrent, retributive, value etc. In addition it is easy to confuse the justification with the legal relationship. For example to confuse the justification say with a breached duty on the part of the perpetrator of the crime. It is a subject where the edges seem more blurred than most. Nevertheless a philosopher's attitude to this question will help determine the type of punishment which is considered necessary, or indeed, in some cases, whether punishment is required at all.

J.S. Mill believed in securing the just rights of others as an aim of punishment[3]. F.H. Bradley who opposed this[4] thought that Mill took the view that punishment was justifiable only as a means of benefiting the offender and

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[3] Examination of Sir William Hamilton's Philosophy 1872 p.597.

[4] *Ethical Studies* (first essay) 1876.

protecting others, and while Bradley thought these aims desirable side effects he took the main characteristic to be the destruction of guilt, which created a criminal desert in the offender. i.e. a substantially retributive approach. Later[5] he took the view that punishment was a reaction of the whole community against an action that weakened it. Moreover punishments need not be 'genuinely moral', being overridden by the good of the social organism.

It is interesting to note the early appearance of references to 'rights'[6]. T.H. Green took the view that punishment was justifiable by virtue of the offender's violation of someone's rights[7]. As this was Punishment by the state for breach of publicly supported rights this separated it from private vengeance. Bosanquet also saw punishment as the State's maintenance of rights by use of force. It was an annulment of the wrong act, which was necessary to prevent the setting of a precedent. It thus maintained moral standards and acted as a cancellation of the wrong act, negating the bad will of the criminal[8]. One could perhaps describe this as the atonement justification and there are a great many arguments in its favour. It is not strictly bound to morals even though 'it maintains the

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5 International Journal of Ethics 1894.

6 It would appear that these rights were almost universally considered to be a type of Hohfeldian claim-right with its concomitant Duty. It is the breach of this which causes the punishment to be applied in 'compensation'.

7 Lectures on the Principles of Political Obligation. *Works of T.H.Green* Vol II. 1885.

8 Bernard Bosanquet. *The Philosophical Theory of the State* 1899.

moral standard of the general mind and will', nor necessarily to 'curing' the wrongdoer. Nevertheless deterrence and reform are treated as part of the whole of Punishment.

Those who argue against the retributive theory often do so on three grounds:-

1. Pain and sin cannot be equated
2. An addition to the pain for reform would be unjust and
3 Retribution makes forgiveness always wrong.[9]

There is also the utilitarian approach that punishment is justified in defence of the public good, but those who do not accept the utilitarian approach feel that deterrence is a result of publicity and Mabbot quotes a criminal as saying "To punish a man is to treat him as an equal. To be punished for an offence against the rules is a sane man's right".[10] A similar argument to 2) above was used against the lex talionis by Blackstone who argued that one could not equate for fraud or forgery etc.[11]

In many respects the views of J. D. Mabbott[12] are particularly helpful, whether one is persuaded by them, as indeed I am, or not. This is because he takes a strong line in which he separates retribution from both deterrence and

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[9] I would argue against these on the grounds 1. Punishment is not related purely to sin and morality. 2. It is not possible to assess these relative to each other (throwing their own arguments for 1) back at them, and 3. Forgiveness is for the victim, Retribution is for the state, and in any event the punishment of the criminal is an aid towards forgiveness by both the victim and society.

[10] J. D. Mabbott 'Punishment', *Mind* Apr. 1939

[11] Though a great admirer of Blackstone I submit that this is one of his sillier arguments. Because a spanner does not fit every nut on my outboard motor, I do not therefore heedlessly throw it overboard. I use it where it is appropriate.

[12] J. D. Mabbott 'Punishment' *Mind* Apr 1939.

cure. In accordance with his theory punishment relates solely to retribution.

> "The truth is that while punishing a man and punishing him justly, it is possible to deter others, and also to attempt to reform him, and if these additional goods are achieved the total state of affairs is better than it would be with just the punishment alone. But reform and deterrence are not modifications of the punishment, still less reasons for it."

In fact he goes on to make his point for separation with extremely good examples, and equates the claim of 'right' to punish with reparation and places the question of forgiveness solely with the victim, and not the court or society. Like Hohfeld his ability for separating disparate issues is acute.

But what is the relevance of these different approaches to Punishment? The answer is that the approach or underlying philosophy may colour the whole subject. For example we shall see that Raz takes an entirely different approach to Mabbott in that he relates morality to validity with respect to a law and this will have a powerful influence on his approach to punishment

Hart's views, insofar as they are referred to by Raz, are discussed later. However it must be noted here though that Hart introduces us to a useful division of the subject into definition, general justifying aim, and distribution. Distribution covers liability to be punished and degree of punishment. He also introduces considerations of Justice in that the insane should not be punished.

RESUME and LINK TO PART II.

In considering the presuppositions underlying the formation of any theory of punishment we have noted the requirement of a Societal group; a Law-Making Authority which makes laws that it intends should be obeyed. We have noted the difference between the contractarian ideal society in which the society would agree the laws which should be obeyed (the Rawlsian approach) and the positivist's view that the law making authority is supreme, and we have noted Raz's positivism (though we shall find in part II how he puts a libertarian gloss on it). This will be important with respect to views on punishment. We have also made reference to the natural law theory and we shall see in part II how Raz's desire to integrate this view introduces a moral element, though not as a guiding principal, into the law, and thus logically into any extrapolated theory of punishment.

We have also referred to the possible effects of the above on attitudes towards obedience. This is of particular importance when considering validity because we shall see later that arguments that morality can affect validity (a view with which Raz is sympathetic) could present a weakness in a corresponding theory of punishment. This, as was pointed out, is quite separate from the question of a law adjudicating body, which body is not strictly necessary, even though many societies have such a body. Finally amongst the legal presuppositions we touch

briefly on the question of duty to obey the law, pointing out that there are contrary views as to this. As we shall see Raz takes the view, which I shall argue is a weakness, that there is no duty, as such, to obey the law.

With respect to punishment itself we have accepted , as does Raz, Hart's definition and put the primary object as being to encourage conformity to certain rules (laws). We have briefly reviewed the purposes of retribution, deterrence and reform (though it will be seen later that this can be affected by the philosophical justification of punishment). In this respect the difference has been noted between civil law, where the primary purpose is to reinstate the parties, as near as may be, to their former positions or to compensate the loser.

In criminal law compensation has played a comparatively minor role, the principle being one of punishing the perpetrator of an offence rather than compensating the victim. There is no general requirement under the criminal law that the criminal shall recompense the victim. It is true that in recent years a state scheme of compensation has been introduced. However this is purely external, i.e. it is not compensation arising from any jural relation between the criminal and victim. The idea that there could be such a jural relationship brought about by the breach of a duty to obey the law could only be established philosophically where there were deemed to be a specific Hohfeldian duty to obey the law. This is why it is important to examine the philosophical reasoning underlying Raz's approach to the law before we can attempt an

extrapolation of a theory of punishment.

We have also noted the importance of 'proportionality' and its relation to the 'morality' of the crime or the public sense of justice (which may be seen more clearly in free societies). Insights as to this will come from Raz's approach to morality.

At this stage I sought to review the relationship of the State Law, Punishment, and Justice. In this I have particularly set out my own views in Fig. 1. as I feel most strongly that the separation of the elements, and the relationships of the philosophical inputs is something which cannot be overlooked.

Finally there was a brief review of some of the conflicting views on the philosophical justification of punishment noting that they can themselves affect any resultant theory of punishment. Fortunately we can find, in Raz's writings an approach to this.

It will be appreciated that while each of the above areas is the subject of debate it is necessary to give an overview of the prerequisites of the legal system, justice and punishment in order to proceed with our enquiries into Raz's philosophy, which now follows.

We are therefore to proceed in Part II to review Raz's philosophy, particularly those parts relating to the legal system, morals and ethics which will give us leads relevant to establishing a Razian Concept of punishment.

PART II

ANALYSIS - THE RAZIAN APPROACH

CHAPTER 4. LAW AND LEGAL SYSTEMS.

It is necessary to deal with Raz's Concept of a legal system in a certain amount of detail as it is his first major work and we need to ascertain his view with respect to the following:-

1) The coercive nature of law which allows for punishment;

2) The fact that he does not regard all law as coercive which could presumably raise the question "need any laws be coercive?", or what is it about some laws that require them to be coercive?

3) We shall also note some apparent assumptions such as the assumption of volition; attitudes to Hart's Habits of obedience and his references to "rights", which will play a large part in our overall considerations.

4) We will also see his interest in the idea of 'standard reasons for obedience' and his development of the importance of "reasons" underlying his arguments.

5) We shall also see how we can deduce his acceptance that power is prior to law.

6) We shall see how he separates his laws into a number of types, Duty-imposing D-laws and Sanction imposing S-laws being of particular interest. At this point he introduces 'critical reactions' and their importance to law and alliance with sanctions.

In 'The Concept of a Legal System' Raz is concerned

with studying Legal Systems, ie. the systemic nature of Law and the fact that Law necessarily belongs to a system, English, Roman etc. He argues that a theory of a legal system is a pre-requisite to any definition of a law. While it is apparent from Fig 1., which I deduced as a generalized basis for any examination of the philosophical inputs, at least for any system in general use today, that laws, as such, are part of and formed within a system of jurisprudence, it is less clear that Raz has made an absolute case that it is necessary to define the system before one can define a law. My inclination would be to argue against this. However I submit that discrepancies of view on this point are not relevant to substantiating a basis for a philosophy of punishment from Raz's work.[1] Nevertheless in his development he covers basic elements that we require in order to develop a theory of punishment.

First, he makes the point very firmly[2] that laws are Normative, Institutionalized and Coercive (in that obedience to it and its application are guaranteed, ultimately by force). He seeks, by comprehensive investigation, a theory of a legal system which would be true of all legal systems.[3] He looks at four problems; "An existence criteria", which he maintains there must be, "The criteria of Identity of the System" which again he maintains there must be, "A common Structure to various systems" which

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1 cf. Chapter 3 section b ante.

2 The Concept of a Legal System 2nd ed. 1980 Clarendon (C of LS) p.3. of the Introduction.

3 Introduction p.1 of C. of L.S.

he maintains is not necessary, and "Are there naturally recurring laws?" to which his answer is again, not necessarily. This latter is important, because although he is a positivist he is at the same time anxious to try to reach some reconciliation with the natural law view. In this latter case, the occurrence of naturally recurring laws could have an effect on a philosophy of punishment (particularly if any of these laws proved to be Raz's S-Laws) and is therefore a point which will have to be reviewed in more detail. While we both are looking to a means of reconciliation with Natural law theories my argument would be that any such reconciliation would occur in the area of 'justice' and not the normative law. My arguments would therefore be less germaine to a basis for a philosophy of punishment than those of Raz.

In establishing his positivism Raz's first criticism relates to Austin's contention that supreme power limited by positive law is a flat contradiction in terms. The argument is well put in Raz's quote on p.30 from Markby's *Elements of law* (1896) where he compares the right of the sovereign to a tax, with the right of a citizen to collect a debt. -

> "The citizen holds his right to recover his debt, but can only exercise and enjoy that right at the will and pleasure of another, namely the sovereign who conferred it upon him."

[i.e by virtue of the laws passed by the sovereign (state), thus making it, in my view, a Hohfeldian claim-right].

With respect to the demand for taxes by the sovereign -

"although the sovereign has expressed in specific terms, and therefore for the moment limited, the duty to be performed towards itself, it follows from the nature of that sovereignty that by the sovereign will that duty may at any moment be changed..."

Thus far there is no disagreement but Markby goes on

"...It is impossible to conceive a right of so fluctuating a character.. because we cannot conceive a right as changing at the will of its holder."

Raz then puts this in his own words

"A person cannot have a right over which he has both exclusive and complete control."

Now this seems in error. One can have exclusive control without it being complete, (One can have exclusive control of an aeroplane without being able to fly properly so one's control is not complete) but how can one have complete control without it being exclusive? The moment it ceases to be exclusive it can no longer be complete. So what it boils down to is that Raz is saying that one cannot have a right over which one has complete control. If he means that a right is subject to having the power to enforce it I would agree with him. Certainly as Kocourek has pointed out[4] this is necessary in the case of a duty. The explanation becomes clear when one realizes that Raz's concept of rights is different from others. He conceives of rights as being born of interests 'sufficient' to create a duty in others. I on the other hand consider such rights with correlative duties to be born of a jural relationship

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[4] A. Kocourek. *Jural Relations* 2nd Ed. 1928 Bobbs-Merrill p.342.

which is itself a creature of the law.[5]

What we are concerned with here is that the extent of 'rights' might be such as to be applicable to 'a right to punish' or at least to the right to inflict a certain punishment e.g. death, which apparently conflicts with 'a right to life'. So while Raz is showing that punishment is a necessary part of law we must also keep in mind the question as to whether or how he will justify punishment. [See also Critique chapter 10, Ref. A. post].

Raz next proceeds to show that Austin's theory of obedience is defective in that there is no explanation of continuity and argues that Austin's attempt in explaining the nature of law, to define the supreme legislator by reference to these habits of obedience caused him to fail to provide a solution to the problem of identity and existence of the law - these being the two crucial points which he claims are required. Here the arguments seem unanswerable and again this is important because 'habits of obedience have a direct bearing on the necessity for punishment.

KELSEN & BENTHAM

In dealing with both Kelsen and Bentham his arguments are much more detailed and he devotes considerable time to a masterly analysis and criticism, particularly of Kelsen, before developing his own Normative based theories[6] based on Kelsen amended by virtue of arguments based on both

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[5] cf. Hohfeld p.31; Aycock v Martin (1867) 37 Ga.; also Kocourek *Jural Relations*. See Annexe A and Chapter 10 Critique, post.

[6] C. of L. S. Chapter 6.

Bentham and Hart. According to Kelsen Legal norms are commands, permissions or authorizations, therefore they are neither true or false but rather valid or invalid. In contra distinction Normative statements convey information and can therefore be true or false. Raz criticizes Kelsen and maintains[7] that a statement is a legal normative statement only if the existence of a legal norm is a necessary condition for its truth.

In considering Bentham he proceeds from Bentham's assumption that there are two things essential to every law; an act being the object of a wish or volition and the wish or volition of which the act is the object.[8] He views Kelsen's structure of the norm as similar to Bentham's.

> "The norm is the expression of the idea that something ought to occur, especially that the individual ought to behave in a certain way."[9] "Kelsen's ever present 'ought' corresponds to Bentham's 'aspect', and the individual and his behaving in a certain way correspond to the agent and the act which were distinguished in Bentham's theory. Furthermore norms according to Kelsen are characteristically conditional. Their 'condition' is none other than Bentham's 'circumstances'.."[10]

I regard the acceptance of Bentham's assumption of the act being an object of a volition as most significant

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7 C. of L.S. p.49.

8 Ibid. p.55.

9 Kelsen *General Theory of Law and State* p.36.

10 C. of L.S. p.59.

because it accords with Davidson's interpretation of actions. Significantly I believe that Raz later neglects this view.

Unlike Bentham, Kelsen's norms are not complex, each one covers a single provision and he maintains that all laws are norms granting liberties ie permissions to do or not to do an act. Further all norms are coercive norms, providing for legal sanctions. Raz prefers this version of Kelsen's definitions which come from the General Theory rather than the version developed in the later Pure Theory of Law.[11]. and he distinguishes Bentham and Kelsen as follows:-

> "..a Kelsenian law amounts to two Benthamite laws. Bentham's principal law, imposing an obligation on x to behave in a certain way, say A, and his punitive law, imposing an obligation on another person, say y, to apply a sanction against x by doing B, if x fails to fulfil his obligation to do A, become in Kelsen's theory one law: A permission to do y to B if x does not do A.
>
> ..Kelsen regards the application of the sanction as permitted..Bentham regards it as obligatory... Bentham regards the fact that the legislator expressed his intention that a sanction should be applied as making its application a duty, provided that disobedience were punished by some other sanction. The further sanction is merely a necessary, and not a sufficient, condition for the existence of a duty to apply the first sanction. Kelsen, on the other hand, makes the sanction for the failure to apply the first

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[11] Ibid. p.83.

sanction, or to do any other act, both a sufficient and necessary condition for the act's being a duty, and regards the intention of the legislator as irrelevant."[12]

Hart criticises Kelsen's approach because it fails to distinguish adequately between a criminal law imposing a fine and a tax law. Also the distinction is important in that it will be seen by a reference back to Fig 1 that I have a Benthamite separation in my diagram. Raz in fact goes on to criticize Kelsen[13] for excluding the possibility of 'punitive internal relations'. Here he is referring to Austin's concept that a law containing an imperative is not an independent law unless there is a corresponding punitive law.[14] Also Raz feels that explaining the law cannot be separated from the common-sense concept of law and that Kelsen's principle of individuation 'pays no heed to the need of relative simplicity.'[15] I am satisfied therefore that Raz's views accord with the separation shown in fig.1.

The reason for covering the above is that Raz then proposes to provide modifications to Kelsen's imperative theory of norms based on some of the ideas of Bentham and Hart. In doing this he starts with the four ideas that are basic to Kelsen's concept of a norm as an imperative. Norms are:-

"1) Standards of evaluation,

2) Guiding human behaviour,

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12 Ibid. p.86.

13 Ibid. p 114.

14 Ibid. p.24

15 Ibid. p.115.

3) Supported by standard reasons for compliance in the form of some evil ensuing upon disobedience, &

4) Created by human acts intended to create norms." (Emphasis mine)

It must also be noted that a norm stands as a direct standard of evaluation of acts within its immediate range (and an indirect standard of all the acts belonging to its total range).[16] Guides to behaviour are also standards for evaluation, but not vice versa. For a standard of evaluation to be a guide it is necessary

1) That the standard relates to human behaviour,

2) That the existence of the standard (or the facts giving rise to it) will be a reason for people to choose an act having a preferred value. (Kelsen acknowledges similar reasons to those used by Raz, including advantages as well as disadvantages and indirectly, according to Raz[17], the personal authority of the author of the norm). The 'ought' thus implies both can and can abstain.[18]

Raz then develops his arguments against the basic norm which Kelsen regards as the source of validity and unity of legal systems. Every positive norm relies for its existence on the existence of another norm authorizing its creation.[19] Infinite regress is avoided only by assuming the existence of the basic norm. Kelsen regards the basic

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16 Ibid. footnote 4 p.123.

17 Ibid. footnote 1 p.126.

18 Ibid. p. 124.

19 Ibid. p.130.

norm as the transformation of power into law.[20] Now this I regard as particularly interesting as it shows quite clearly Kelsen's acknowledgement that power is prior to law.(and hence to 'rights' which word cannot therefore be used in a sense which includes power as is so often the case amongst those who do not have regard to Hohfeld's distinctions.) Raz states this simply "Legislative power is simply the ability to create or repeal laws". He argues most cogently that the assumption that a man can have legislative power only if it is conferred on him by a law is mistaken.[21] In this way he rids us of much of the confusion surrounding Kelsen without destroying the framework of the theory. But it does seem that at this point Raz has accepted Kelsen's view that power is prior to law. This is of importance in considering the relationship of the individual and the state, and the manner of enforcing laws, i.e. by punishment.

The individuation of laws

Basically Raz feels that the problem of the individuation of laws contains the link between the analysis of a law and a legal system[22] and maintains that the principles of individuation of laws are determined by legal theory but the contents depend on contingent facts concerning the system. Thus the principles of individuation determine the internal relations but the complexity of the system determines the existence of these relations (the

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20 Ibid.p.134 from the General Theory p.437.

21 Ibid. pp. 138-140.

22 Ibid p.70.

example he gives is that if no laws in a system were backed by sanction then there would be no punitive relations between the laws).

However he argues that the system must be of a certain minimum complexity and that every system must regulate the existence and operation of some courts and must stipulate sanctions. Thus the minimum content and complexity determine the internal relations common to every system. He states that he does not feel that it is necessary to formulate the principles of individuation but rather proposes to lay down broad guidelines for individuation of laws. These are of two kinds; 'guiding' setting forth "the aims that the principles of individuation should attain' (primarily principles of selection), and 'limiting' requirements specifying "pitfalls to be avoided" (primarily principles of exclusion).[23]

Although Raz prefers Bentham's principles of Individuation to Kelsen's he maintains they are far from satisfactory (p.146). The laws so individuated are over repetitive and removed from the common sense concept of law. The trouble, Raz claims, is because Bentham regards every law as a norm and every norm is duty imposing. Raz feels both propositions must be rejected.

Duty imposing Laws - D-Laws.

Given that every act-situation guided by law should be regarded as a core of a law, individuation must allow for duty imposing laws. The question he asks is when

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[23] Ibid. pp. 141/142.

do law creating acts impose duties and when should a law be regarded as a D-Law? He looks at Hart on Social Duty rules, i.e. that one ought to do A in C. Such rules exist in a group if:-

1) On most occasions members do A in C.(ie. there is a regular pattern)

2) Non-conforming members encounter a critical reaction,

3) Such critical reactions are regarded as legitimate and unobjectionable by most members.

4) The existence of conditions 1-3 is widely known.

5) The social pressure is serious &

6) The conduct prescribed by the rule usually conflicts with the wishes of the person who owes the duty.

Raz feels many social rules allow for control by individuals over the incidence of duty (parent-child etc.). Also they may impose duties on themselves by promises etc. The rules may of course apply only to parts of the group. Raz feels that three of the features in Hart's analysis are relevant to Duty imposing laws:-

a) Whenever an act is imposed as a social duty, non performance is 'less eligible' than its performance. This says Raz, provides a standard reason for its performance.

b) The facts making up the standard reason depend on voluntary human conduct 'caused or motivated' by the fact that the duty-act has not been performed.

c) The existence of the duty imposing rule depends on patterns of behaviour encompassing a large part of the group in which the rule exists - consisting of critical reactions which are regarded as legitimate and generally approved.

At this point Raz gives an example of one of Bentham's Natural Sanctions such as not putting one's fingers in the fire.(150). With respect this does not seem to qualify to relate to a social duty. It does not appear to qualify to support a duty or even a 'moral obligation'. However he continues that the second feature must be present in order talk about norms, thus orders backed by threats are norms but they do not impose obligations - That requires c) the critical reaction of a large part of the group. Here I would agree with Raz's use of the word 'obligations'. Obligations are brought about by peer pressure, duties in my opinion are something quite different. In fact I believe that a clarification with respect to 'duties' is long overdue. Hohfeld was concerned by the discrepancies in the use of the term rights and analyzed it but he did not, unfortunately, go on to look at duties.[See also Critique chapter 10, Ref. C post]

However it is clear by this point that Raz's theories are consistent at least with the top part of the diagram set out in Fig 1.

He goes on to point out that Sanctions differ from critical reactions in four respects:-

1) Only depravation of legal rights or status or the imposition of legal duties e.g. deprivation of life, liberty, health or possessions plus a small number of other similar measures which may vary from society to society are sanctions.[24] Raz claims critical reactions include these

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[24] I maintain that there are some thirteen categories:- 1. Death; 2. Mutilation - (Islamic); 3.Infliction of pain (physical) - Islamic; 4. Infliction of pain (mental); 5. Exile; 6. Branding; 7. Incarceration (gaol); 8. Forfeiture of property; 9. Forced

and other manifestations.

2) The implementation of the sanctions is backed by force. Raz says this may, but need not, be the case in social rules. Again I would have thought that force was the prerogative of the state and that it could not permit force to be used by others to enforce purely social rules. This is a fine point, for example the case where a member of a club enters the restaurant unsuitably dressed, sits down and demands service. Obviously the service can be withheld, but can he be picked up and ejected? A member of a club may be expelled from membership but the cases show that they are not necessarily without judicial rights.

3) The sanction is determined with relative precision in law. In the case of social rules the sanctions are not so limited.

4) The persons applying the sanctions are usually regulated by law. e.g. the courts, police etc.

Raz comments

> "Though in the law sanctions replace to a large extent critical reactions as the characteristic fact giving rise to the existence of duties, they do not replace them completely. It is characteristic of the law that violations of legal duties are encountered by critical reactions even from people who regard the law as bad, though not atrocious. No doubt absence of such critical reactions does not mean that the legal duty does not exist. Nevertheless, the existence of the critical reaction of ordinary citizens may still be a factor in determining the character of the law as

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Labour; 10. Ridicule; 11. Fines; 12. Forfeiture of rights; and 13. Medical treatment.

a D-Law, e.g. by helping to distinguish between prohibiting an act and taxing it."[25]

He goes on that the critical reaction of the law applying organs, characteristically expressed in their reasons for judgement, is more important in distinguishing between a sanction and a coercive administrative measure such as compulsory purchase, destruction for sanitary reasons, etc.

"..Whenever a disadvantage of the appropriate kind is inflicted on an individual as a consequence of his behaviour, and is regarded as necessary, either as restoration of the status quo or as compensation for some damage caused by the behaviour of that individual or as punishment (i.e. as retribution, prevention, deterrent, correction etc.) the disadvantage is a sanction and the act of the individual is a violation of a duty. Thus both criminal punishment and a great variety of civil remedies are sanctions giving rise to duties.

The fact that the nature of a law as a D-law depends on the critical reactions of the courts and other law applying organs means that the character and interpretation of legal material can be changed without any intervention by the original author of that legal material."[26] (My emphasis)

The above passages have been quoted at length because they contain some of the most important references to Raz's thinking with respect to punishment and obedience to the law. There are I think four main points to consider:-

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25 C. of L.S. p151/152.

26 Ibid. p.152.

I. He regards sanctions as replacing (to an extent) the Critical reactions as 'the characteristic fact' giving rise to the duties'. I think one should point out at this stage that there appears to be a step missing here which will be dealt with more fully in part IV. [See Critique chapter 10, Ref. C post]

II. His reference to the critical reaction of the law applying organs resulting in their ability to vary the law without any intervention of the original author. This is quite different from a delegated authority to assess the applicability of a law, stated in general terms, to a given set of specific circumstances. This provides variations governed by critical reactions i.e based on moral and ethical input. It provides the variations served by 'Justice' on the diagram of fig.1. and is a most important feature of his thinking.

III. He distinguishes clearly between the civil law objects of 'return to the status quo' or, where this is not possible or desirable, 'compensation', and the factors involved in punishment - 'retribution, prevention, deterrence, correction etc.' He does not go into them in detail.

IV. He refers to the criminal act as a violation of a duty[27], but in the next sentence he refers to the sanctions as giving rise to the duty. However I would argue that the professional burglar feels no duty to obey even though Raz and I both do. So as I would argue, the reason for obedience is not necessarily the sanction. For example,

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27 Presumably the Duty to obey, - my 'Command-duty'. See part IV.

remove the sanction, thereby removing the thing giving rise to the duty (per Raz), but even with that removed, Raz would in fact still feel a duty not to steal. This is important in that it illustrates that we may not just be governed by laws with sanctions or critical reactions of a moral nature but rather that we might react in accordance with implanted ideals of honesty, integrity and truthfulness which would persist even in the absence of sanctions or indeed of critical reactions of the general public. In fact Raz picks up this point in the postscript to the second edition of *Practical Reason and Norms* and takes it further:-

> "It is not a fault in me that the reason I never killed anyone is simply that I never felt the slightest bit inclined to kill anyone, that the thought never crossed my mind. My failure to become a murderer was not motivated by the fact that it is wrong to kill. Such ignorance would be wrong. All I mean is that.....the thought of doing so has never crossed my mind. I never had any reason for my continuous omission to kill. And that is, I believe, the best mental background for this, as for many other ommissions to commit wrongful acts. That is, I feel that the moment we are morally motivated in such cases we are behaving in a less admirable way than those to whom the thought of the wrongful simply does not occur.[28]

In addition it could be argued that the ideal of obedience to the law could be one of the causes of critical reaction being present even when the law is not really approved.

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[28] Pr. R and N. p. 181.

Next, Raz tackles a very important problem by asking the question 'Can there be legal duties not backed by sanctions?'[29]

One area which he investigates is the imposition of sanctions on high ranking law-applying and law-creating organs. As he rightly points out these people need a relative immunity from the consequences of mistakes or malicious accusations. This usually means that they are only responsible for gross misconduct. This does not mean that this is unjust it is merely a need arising from the job they do. It is an example of different groups of people being treated differently. Injustice usually only occurs where similar people are treated in a dissimilar fashion. However it would be possible to give a group an advantage or disadvantage that might be deemed to be unfair to other groups.

In some cases where a person can get damages from a public body Raz says it seems appropriate to say that the official violated a duty. "This" says Raz "amounts to the assertion that law-applying and law-creating officials have a duty not to purport to use powers which they do not possess and that they have a duty to exercise their powers in accordance with some general principals." Raz argues that where, apart from critical reaction in the form of criticism, when such acts are condemned as against the rules, "then the critical reactions and the existence of a legal remedy seem to indicate to me the existence of a legal duty imposing law, though it is not backed by any sanction

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[29] C. of L.S. pp 152/154.

stipulating law". Again I would argue against this - [See part IV. Chapter 10, Ref.D]

Raz then asserts eleven propositions of which the first four are of most importance to our considerations, though it will be necessary to refer in general to the remainder as they lead into his introduction of reasons and rights:-[30]

i) Every legal system contains D-Laws

ii) Every legal system contains S-laws

Imposing duties is the most important way in which the law fulfils its function to guide and regulate human behaviour. Raz maintains that all the other ways it fulfils it function depends on the imposition of duties. He maintains[31] that the existence of every D-law does not depend on the existence of a corresponding S-law. The exceptions relate to D-laws directed at officials, and further that there can be no officials without D-laws directed at non officials. I am not too happy about this last qualification. It is appreciated that if an official is to apply laws there must be someone to whom such laws are directed. But what if officials are given "absolute power to keep the dictator's peace."? Perhaps this is a limiting case.

iii) Punitive relations are internal relations.

iv) In every legal system there are internal Punitive relations.

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30 Ibid. pp155-171.

31 Ibid. At p.156.

D-laws directed to officials and not supported by S-laws have internal relations to the laws, providing the remedies necessary for the existence of the D-laws.

Before developing the propositions further Raz goes on to consider power conferring norms in more detail. He reiterates that norms are guides to behaviour and that D-laws are an explanation of legal norms prescribing behaviour. He, along with Hart, considers them to be prescriptive rather than imperative norms unlike Bentham, Austin, and Kelsen who thought that every norm was an imperative norm. Prescriptive norms guide human behaviour in the same way as imperative norms 'through the existence of certain standard reasons for compliance with them[32].' 'Given the desirability that every act situation guided by law should be regarded as the core of a separate law' this makes possible the existence of Power conferring laws or P-laws. He goes on that all P-laws are Norms,'i.e. they guide behaviour'. However although he talks of power conferring laws he seems to be referring here to the power to make wills, execute contracts, etc, not the delegation of power to a minister or to the courts. As Hart points out[33] such laws do not impose duties or obligations, they 'provide individuals with facilities for realizing their wishes'. This cannot be the same as delegation of power, for if the state were say to delegate absolute power to a court, then it would be the court's wishes, not the state's which would be satisfied. I therefore question that all P laws must

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32 Ibid. p. 157.

33 Concept of Law p.27.

necessarily be norms. Indeed Raz comes to the same conclusion that not all laws are norms. He states (at page 158) that 'If they are laws, they are laws which are not norms but have internal relations to laws that are norms.' In fact Raz refers to PR-laws, Prescriptive Regulatory laws. There are also power conferring or delegatory laws, eg to courts and ministers. These laws also have no corresponding S-laws.[34]

At this point Raz relates the laws to norms insofar as prescriptive norms prescribe behaviour and are a special case of O-norms which depend on 'widespread known and uniform reaction to human behaviour.' (page 162) and that when people react generally in this manner they do so 'for similar reasons'. I would question that this is necessarily the case. Further I submit that it is an indication that Raz tends to overlook varieties of motivation which is one of the factors giving rise to great difficulties especially with respect to questions surrounding punishment. Raz argues that PR-laws stand in relation to D-laws, 'They regulate behaviour by stipulating consequences', therefore Raz thinks they are a type of O-norm.[35]

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[34] I find Raz slightly confusing here simply because he starts with P laws, claiming " all P laws are norms, i.e. they guide human behaviour", and then goes on to PR laws without defining the relationship between the two. I would suggest that the simplest way for our purposes is to look at the laws in terms of their relationship to punishment. We have D-laws with their corresponding S-laws, their punishment; we have PR-laws regulating or facilitating activities, failure to conform to which merely results in a nullity. Such a nullity, though irritating to the agent, does not involve a prescribed punishment. Finally there are Power conferring or delegating laws - e.g. to Courts, Ministers, Judges etc. which are not norms. There are no corresponding S laws and as I have pointed out it is the state which takes responsibility.

[35] Ibid. p.163.

He then proceeds to claim that Norms conferring legislative power, PL-norms, are a type of O-norm. This is only understandable when one finally realizes that he considers powers to make contracts legislative powers, and power to make wills as regulative powers (page 165) I mention this because most lawyers certainly would not regard this as a legislative power and it is easy to think that Raz was arguing against the position formerly taken that certain laws are not norms. Certainly his arguments in relation to delegated power are not wholly convincing because he does not clearly separate the two. What is the relevance of this to punishment? It must be remembered that the Minister responsible, the Home secretary has considerable powers with respect to punishment and sentencing, some of which are currently being questioned by the European court and while I suspect that this goes beyond the scope of the present work, it should not, just for that reason, be allowed to escape notice.

Permissions and M-laws

Raz in chapter VII takes the view that every act-situation which is not prohibited is permitted, and he also takes the view that M-laws permitting laws act as exceptions to any D-laws with which they conflict. I am not sure that I agree that this proposition[36] is true, for surely it would rule out the possibility of certain retro-active legislation. It may well be that this is his intention, in which case I am totally in agreement with his objectives,

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[36] (xii) on page 171

but the fact is that we accept retro-active legislation which had no antecedent legislative justification. While I would like to argue that any such legislation is ultra vires, I believe that one can only sustain the argument that such legislation is grossly unjust. A case for arguing natural justice as opposed to natural law.

He then comes to an important point - laws instituting rights. This is important because later we shall see that he says that rights are created when a person's "interests" are sufficient to create a duty in another.

Laws Instituting rights

According to Raz, many laws a) are concerned with The institution of rights or b) Presuppose the existence of rights. We are in some difficulties because Raz has not defined rights. In fact he goes so far as to say.. "No classification of, or distinction between the various types of rights will be attempted".[37] It is of course my contention that Hohfeldian claim-rights involving a correlative duty (the only type we are concerned with in punishment) can only be created by law or by actions performed in accordance with one of Raz's prescriptive legislative or PL-laws, e.g. the making of a contract will involve rights and duties. This actually accords with Raz's view on the role of D-laws and P-laws in instituting rights (page 175), though, I suspect, for very different reasons as we shall see.

Rights, according to Raz, are relations between

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[37] Ibid. p175

right-subjects (people, corporations, bodies) and right-objects (people or physical objects). Every statement of a person's rights will be a 'key statement'. Every law containing a key statement is a law instituting a right. Those laws are investitive, divestitive, or constitutive (specifying the consequences of being a right holder). These consequences are either another key statement or designate the existence of a duty or power. At this point Raz launches into an attack on Hohfeld which is completely uncharacteristic in its vehemence, using expressions such as 'completely unfounded', 'impossible', 'mistaken' etc. In this regard he appears to have allowed himself to be persuaded by A.N.Honore, on whom he seems to rely for his arguments. I submit that this is unfortunate because Hohfeld's analysis and definitions (which he never claimed were absolute) can be of great help, but an appreciation of the discrepancies in the uses of the word "rights" is mandatory to an understanding of the subject.

Part of Raz's attack is necessary because of his suggestion (at page 181) that the analysis of P-laws 'suggests that power can be defined ultimately in terms of duties'. Hohfeld could certainly not be used to support such an idea. Raz also feels that the possibility of analysing rights (and therefore laws defining them) in terms of powers and duties and therefore in terms of D-laws and P-laws is of the utmost importance. He feels that.."rights concepts are.. of paramount importance.. in simplifying the structure of laws". In view of the fact that he has so far involved us in D-laws, S-laws, P-laws, PL-laws, PR-laws, M-laws, MS-laws,

Investitive, Divestitive and Constitutive laws and norms of varying denominations, any simplification would be more than welcome. Unfortunately, we do not get it. My concern is not that Raz has failed to accept Hohfeld, who never maintained that his definitions were absolute, but rather that, having rejected them, Raz has singularly failed to provide us with any alternative.

RESUME

From Raz's Concept of a Legal System we have been able to gain several useful features which will contribute towards a philosophy of Punishment. We are also left with several questions.

First we have as a basis, Raz's assertion that law is coercive. In fact the first laws he refers to are the Duty imposing D-laws and Sanction imposing S-laws. It is true that he then goes on to assert that there are other laws which are not norms and which carry no corresponding S-laws. These are of course the laws which I call regulatory, making wills and contracts, but which Raz subdivides into regulatory PR-laws (wills) and legislative PL-laws (i.e. where the agent is then free, as is the case under a contract, to make his or her own arrangements and create duties and sanctions. Now while these are duties and sanctions they are duties and sanctions inter partes or what Hohfeld would probably have described as Paucital as opposed to general duties (Multital) applying to all as appropriate. At first it appeared that this distinction might have an effect on a theory of punishment but as developed by Raz they do not.

There is a further species of law which has no corresponding S-laws and that relates to those delegating powers to Courts, Ministers, Judges, Administrators etc. However as I have pointed out these laws are very much of a parallel to Agency laws, i.e. the Principal, the State, tends to be responsible for what is done by the agent and these laws would not have a direct effect on a general philosophy of Punishment. They have however a marked effect on any administrative theory of Punishment. i.e the capacity of Judges to set sentences, of Ministers to review them (currently under dispute). Thus although for our purposes such laws may be put to the back of our thoughts, they must not be overlooked entirely because of their ultimate importance in a detailed theory of Punishment, and their position in the scheme of laws had therefore to be noted.

Next there is a point that may prove to be of great significance, and that is Raz's treatment of "rights". As will be seen from Part IV I consider this one of the weaknesses in Raz's philosophy. A second is that he often downgrades the Agent's role in "reasons" by the omission of intentionality. I am also greatly concerned over Raz's view that Duties and powers may ultimately be defined in terms of Rights. It is my contention (See Annexe A) that it is logically necessary that Power is prior to Rights and this may well have a serious effect on a philosophy of punishment. It is therefore a major point to be born in mind in our progress.

Finally Raz, partly I suspect to overcome the problems raised by the foregoing, introduces 'reasons' for

obeying the law. These will prove to be even more important to a philosophy of punishment and he goes into them initially in his later work 'The Authority of Law' and with respect to justice in his works on Ethics and Morality. First we must turn to an examination of the Authority of Law.

CHAPTER.5. HIS REASONS FOR OBEDIENCE.

Having considered the legal System as such, we now need to examine Raz's philosophy in order to determine his views as to as to other matters in order to substantiate a basis from which we might extrapolate to a theory of punishment within the system. We shall need to consider his approach to:-

A. The Concept of Legal Authority;

B. The connection between law and Morality;

C. Existence, Efficacy and Validity of the law.

D. The conditions necessary for the law to command respect.

E. The Obligation to obey.

A. THE CONCEPT OF LEGAL AUTHORITY.

Raz points out in the Introduction to The Authority of Law that one of the main stumbling blocks for legal positivists is the use of normative language; the description of law in terms of rights and wrongs which causes support for the claim by the natural lawyer that all law is essentially moral. Raz disagrees with this.

In Practical Reason and Norms he states;-

> "It does not seem natural to say that the statement that it will rain is a reason for me to take an umbrella. It is either the fact that it will rain or my belief that it will which would be cited as a reason.* (* I

shall argue below that facts are reasons..)"[1] [See also Chapter 10 Ref.a]

By the time we get to The Authority of Law[2] we have the following:-

> "That it rains for example, is a reason for carrying an umbrella. So is the fact that one wants to be outside and not get wet. But in a perfectly straightforward sense both are just parts of one reason. We can distinguish between partial reasons and the complete reasons of which they are parts. It is in terms of complete reasons that the attempt to analyze authority will be made.[13]"
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> 13."...One must defend, in other words, the belief that promises are reasons for action.".[See Chapter 10 Ref.b].

Raz is concerned with Authority because, he says, it involves paradoxes not only with respect to incompatibility with reason, (and we shall see later my concerns over some of his views about reasons), but also because of paradoxes with respect to autonomy. Autonomy, he says, entails action on one's own judgement on all questions. Submission to authority may require the suppression of reason and therefore, so it could be argued, submission to it is both immoral and irrational. Raz feels that these arguments have some force.[3] This of course could be dangerous ground for the whole object of punishment is to ensure conformity and if it were to be to something that was not only immoral but irrational it would be a strong

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1 Practical Reason and Norms Princeton 1990 p.17. However it will be argued in part V Critique that facts can never be reasons. (Quite apart from the fact that facts cannot exist in futuro i.e. 'it will rain' can never be a fact. 'It has rained' or 'it is raining' may be a fact.)

2 A. of L. p.12.

3 A. of L. p.4.

argument for not conforming, and thus would not support punishment. However I actually do not agree that the arguments are as strong as Raz makes them out to be.[4] Raz takes the view

> "Some of the classical authors sought to explain the nature of authority by explaining the way in which it came to accept the authority...Discussions of the concept were mixed with descriptions of the evolution of society, of conquests, or of social contracts. Modern authors have avoided this confusion.."

He does not describe what the purported confusion is and so I remain largely at one with the classical authors feeling that the confusion appears with Raz's "reasons". Later he says

> "I share the belief that a legitimate political authority is of necessity effective to a degree. But this is a result of substantive political principles (e.g. that one of the main justifications for having a political authority is its usefulness in securing social co-ordination...." [5]

Now it may be argued that this smacks more than somewhat of one of those classical explanations which he claims are confused.

However Raz takes the view that Authority is Normative power[6], and he also feels that the notion of effective authority cannot be explained except by reference to legitimate authority. He accepts Robert Paul Wolff's

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[4] My feeling is that these are imaginary windmills at which he tilts. I would argue - Not at all, it is rational for a gregarious animal to surrender some things to others and it is not irrational to accept decisions made by them. I do not want to fly/go to sea with Raz if he feels it is irrational to submit to the pilot's/Captain's decisions and would rather do it himself. In my view Authority is part of a pragmatic solution and therefore not explainable or justifiable on a theoretical basis.

[5] A. of L. pp 8/9.

[6] A. of L. p.7.

definition "Authority is the right to command, and correlatively, the right to be obeyed". However he criticises this, saying that it is inaccurate because authority includes other things such as the right to legislate, grant permissions etc.[7] He thus prefers John Lucas's definition:-

> 'A man, or a body of men, has authority if it follows from his saying "Let X happen", that X ought to happen'[8].

From this Raz goes on to assume that if X ought to ϕ then he has a reason to ϕ (which, subject to my reservations as to Raz's reasons, I would accept). However he then proceeds "and that if he has a reason to ϕ then he ought to ϕ" which, bearing in mind the agent's pro attitude with respect to the situation, need not, in my submission, necessarily be true. He then admits that he does not consider that Authority can be explained only in terms of reasons but says he prefers a reason based explanation in that he believes

> "reasons provide the ultimate basis for the explanation of all practical concepts, namely, that all must be explained by showing their relevance to practical inferences." [See Chapter 10 Ref.c]

He refers to the simple explanation, developed from Lucas as

> "X has authority over Y if his saying, 'Let Y ϕ', is a reason for Y to ϕ,"[9]

He then compares orders, requests and advice and

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[7] In my view, but not Raz's, these could be construed as falling within the concept of command on the basis that the greater includes the less.

[8] John Lucas, The principles of Politics. Oxford 1966 p. 16.

[9] A. of L. p.12

points out that all three are identified by the attitude of the source rather than the way they are received by the addressee which may vary with the circumstances, and says that there is no necessary difference between being ordered, requested and advised. [See Chapter 10 Ref.d]

His primary concern is with the ability of authority to change reasons, i.e to provide 'protected reasons' (reasons which overcome certain other contrary reasons). He goes on to set out how power utterances can change protected reasons in three ways:-

1. By issuing an exclusionary instruction (= a protected reason), by using power to tell a person to ϕ, the power utterance is a reason for that person to ϕ and also is a second order reason for not acting on (all or some) reasons for not ϕ-ing.

2. By making a power utterance to grant a permission to perform an act hitherto prohibited by an exclusionary instruction (a Cancelling Permission).[10]

3. By conferring power on a person. This enables a person to change protected reasons.

Given these classifications says Raz[11] Authority is the ability to change reasons; Power is the ability to change protected reasons; Authority is basically a species of power. He does not attempt to provide a comprehensive defence of this view "which requires showing that rules and commands are protected reasons and that all authoritative

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[10] Now obviously if we are to work on the strengths of 'reason' this must be a stronger reason than a 'protected reason' because it cancels a protected reason. This is not commented on by Raz.

[11] A.of L. p.8/9

utterances are power utterances"[12].[See Chapter 10 Ref.e]

The Claims of Law.[13]

Raz starts by positing that to hold that a government is a de facto government is to concede that its claim to be a government de jure is acknowledged at least by a sufficient number of powerful people to assure it of control [i.e, in my submission, to make it an effective authority]. He then says the reasons for accepting the authority do not belong to the analysis of de facto authority ("The population may acknowledge the legitimate authority of a person on the grounds that he is in control"). Raz maintains that acceptance of a claim to legitimate authority is a logically necessary condition for the existence of de facto authority. This is in reality acceptance of the purely pragmatic view that if the authority is effective then it is for all intents and purposes legitimate i.e it cannot be denied. This is interesting because it conflicts with his attitude in trying to reconcile morality with validity.

Raz feels that the law also enjoys effective authority if its subjects regard its existence as a protected reason for conformity.[14] Reason here, says Raz, means valid or justified reason for it is legitimate authority which is thus defined. But he has just spent a lot of time convincing us that de facto authority is legitimate authority. And he goes on "It is indeed plain that to

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[12] Ibid. p. 19.

[13] A. of L. Chapter 2.

[14] Ibid. p.8/9.

determine our proper attitude to the law we must examine whether the law has authority over us which we should acknowledge". But the law claims legitimate authority. Is this legitimacy only evidenced by the effective application of the law and if not is a previously illegitimate law legitimated by subsequent effective application?[15] [See Chapter 10 Ref.f]

B. THE CONNECTION BETWEEN LAW AND MORALITY.

That there are moral aspects to the law there is no doubt. Raz is concerned to investigate these and this is of importance because if our approach is purely positivistic it may be argued that punishment is simply a necessary part of that positivist law and that its sole justification is to aid implementation of that law.

If however the law is a natural phenomena, being derived solely from a moral input, then the question of punishment must also be subject to screening from that point of view. He therefore defines three possible stances or theses:-

Social: What is Law and what is not is a matter of Social fact.

Moral: The Moral value of the law is Contingent on its content and the values of Society.

Semantic: Terms such as rights and Duties do not have the same meaning in Legal and Moral contexts.

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[15] Such arguments can give rise to very difficult problems, where, for example, under a dictatorship say, a new occupant purchases property from the government, lives there, sells it on etc. Subsequently the dictator falls and the original owners, who had been forced to flee, reappear.

Since the social thesis argues that what is law is a matter of fact posited (created by human activities) - hence positivism - and the identification of law involves no moral argument it follows that conformity to Moral values or ideals is in no way a condition for anything being a law or legally binding. Hence the law's conformity to moral ideals and values is unnecessary. It is contingent on the particular circumstances of its creation or application.[16]

The Moral thesis is that the moral aspect of the law depends on purely contingent factors. It must depend on the type of society. A dictatorship can get away with laws which may be regarded as thoroughly immoral and which would not survive if they had been passed in a liberal society. Hence the semantic thesis that because words like rights and duties are used with respect to both law and morals, they must have different meanings in the different contexts.

Raz then states that he has argued elsewhere[17] that both arguments are fallacious and that neither the moral or semantic theses follow from the social one. His principal worry seems to be the claim that rights etc have different meanings in the different contexts.[18] Raz has previously gone to the trouble of subdividing laws into many types, why, one wonders does he gybe at doing the same thing for rights etc.? He quite rightly says that even if what is

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16 A. of L. p.38. Nonetheless as a matter of pure pragmatism in a liberal society where it is necessary to have at least partial support from the people, I would argue that the laws are required to be just. This involves the current morals of that society and therefore the laws will usually reflect these to a greater or lesser degree.

17 In PR & N p.162 and A. of L. ch.8.

18 At this point I would argue that if a correct usage of "rights" and "duties" as defined by Hohfeld, Kocourek and others were used the inconsistencies could be avoided.

the law is a matter of social fact it is still possible that that social fact could still have endowed the law with a moral character.

It is at this point that Raz declares that he will be arguing for a moderate version of positivism. He puts forward three examples of views normally associated with natural law theories which are compatible with his version of positivism:-

1) Legal duty is one which one has because the law requires the action.

2) There is a necessary connection between law and popular morality.[19]

3) Every legal system's claim to authority is justified.

The argument proceeds as follows. The social thesis[20] is at the foundation of positivist thinking about law. The social thesis most correctly reflects the meaning of "law", but there are still some problems re other uses of the word; eg laws of nature, moral laws etc. Secondly, the social thesis is recommended because it separates a description of the law from its evaluation. However this does presume the thesis is true. Third, adhering to the social thesis eliminates Moral bias. Finally, Law is a social institution. It obeys the social thesis. To test for its identity and existence there are 3 tests:-

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[19] I could, of course, argue and say the connection is between 'justice' and popular morality (see Fig.1), though I concede that acceptance of a law may depend on the current morality of the society.

[20] Whereby tests for identifying the content of the law and its existence depend exclusively on facts of human behaviour, describable in value neutral terms, and applied without resort to moral argument.

1. Efficacy
2. Institutional character
3. Sources

A legal system is not in force unless adhered to and accepted by at least a section of the population.(ie. it is an actual system, not a defunct, or an aspiring one.) It distinguishes between effective and non-effective law not between legal and non-legal systems. The same applies to social morality.

The Institutionalized character: It is widely agreed (and by natural lawyers) that a system of Norms is not a legal system unless it sets up adjudicative institutions charged with regulating disputes. It must also be authoritative and supreme.[21]

Most natural law theories are compatible with the Institutional concept of law, but some are not. This is because the Institutionalized concept puts limits on the system, i.e. it only relates to those standards connected with the adjudicatory institutions. It does not contain all justifiable standards moral or otherwise. So it is a sub-set. Secondly one cannot impose moral qualifications which are not also reflected in its institutional features.

If law is a social institution then all laws are social rules irrespective of their morality. There can be no independent moral conditions.

The Sources of Law:

Most positivist doctrines rest on Efficacy and

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[21] A. of L. p.43.

Institutionality as the only conditions. Raz says, let these two be called the WEAK SOCIAL THESIS. Now, Raz argues, suppose the law requires that those cases where the law is unsettled be determined on moral considerations (not social morality which is based on sources of current practice). Therefore it could be argued that moral considerations have become part of law of the land. Now this conflicts with the strong thesis but is compatible with the weak.

> "The difference between the weak and the strong theses is that the strong one insists, whereas the weak one does not, that the existence and content of every law is fully determined by social sources".

Now Raz wants to argue for the strong thesis because, he says, the weak thesis is compatible with:-

a) Sometimes the identification of some laws turns on moral arguments, and

b) In all legal systems the identification of some laws turns on a moral argument.

Whereas we can just about get away with a), Raz says that b) asserts the necessity of testing law by moral argument.

Raz therefore argues for a strong social thesis which he calls THE SOURCES THESIS. A law has source if its contents and existence can be determined without using moral arguments (but allowing for arguments about people's moral views and intention which are necessary for interpretation). The sources of law are those in virtue of which it is valid and which identify its content.

Raz gives the reasons for accepting this as twofold. One it reflects our conception of the law and two there are sound reasons for maintaining that conception. He cites the fact that in judges we seek two qualities, a very sound knowledge of the law and wisdom and understanding of nature, moral sensibility etc. Similarly when evaluating judgements we discriminate between the legal decision which may be correct and the gross insensitivity in the light of modern thought etc. Judicial arguments are legally acceptable or not irrespective of the moral arguments. The moral arguments are distinguishable from the legal ones. It is a common view that judges both apply the law and develop it. The important point is, he says, that it is our normal view that judges use moral arguments (inter alia) when developing the law and they use legal skills when applying the law.

Finally there is the distinction between settled and unsettled law - it is here the question of Justice and morals creeps in.

Raz feels the sources theory solves this. According to it the law on a question is settled when legally binding sources provide its solution. Here the judges apply legal skills in reasoning from those sources. If there is no established law the court breaks new ground and takes in other than legal considerations.

This is a nice explanation and I agree with Raz's desired position. Unfortunately while his explanation may work for **Rylands v Fletcher** (1868) L.R.3 HL 330 it does not

for other cases. In **Rylands v Fletcher**[22] there was no law on the point to be decided, and the rule, now known as the '**Rule in Rylands v Fletcher**' was created on equitable principles by the court, and has remained in force now for 127 years. However the explanation does not work for **Palsgraf v The Long Island Railroad Co.** (1928) 284 NY 339, or the change from **In re Polemis** [1921] 3 KB 560 to the decision of **The Wagon Mound** [1961] A.C. 388. It is worth referring to these cases, although they are civil law cases, because they illustrate so well the problem of the making of 'new law' by the courts, which concerned Raz. At one time the law of strict liability was well established, and was exemplified by the leading case of **In re Polemis**. In this case the owners of the ship *Thrasyvoulos* chartered it to Messrs Furness, Withy And Co. who loaded it with petrol in tins. During the voyage they leaked and there was a considerable quantity of petrol vapour in the hold. At Casablanca the Arab stevedores (who were servants of Furness Withy) negligently caused a heavy plank to be dislodged. It fell into the hold, causing a spark which ignited the inflammable gases and the resultant fire destroyed the ship. The employers were held strictly liable for all losses flowing from the initial negligence. This rule could result in some very harsh results.

However the law was completely changed without legislative intervention by both the **Palsgraf** case in the United States, and **The Wagon Mound** case in the U.K. This

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[22] For a review of the facts and further discussion of this case see Part IV Ch. 10 p. 12 post.

latter was actually an Australian case on appeal to the House of Lords. In the **Palsgraf** case the facts were an almost perfect textbook case for a challenge to the strict liability approach. Here a man with a parcel under his arm, raced for a train that had started to move. A railway employee, against regulations (negligence), attempted to help him and he dropped the parcel. The parcel, which contained fireworks, fell under the wheels of the train. Mrs Palsgraf was waiting further up the platform by some scales but the resultant explosion from the fireworks shook the station causing the scales to fall on her, thus injuring her. She sued the railway and, had the **In re Polemis** approach been applied she would undoubtedly have won. However Cardoso J. in a brilliant judgement, held that the damages were too remote. It was unreasonable i.e unfair (and thus impliedly immoral) for damages to flow beyond what was reasonably foreseeable. The English courts subsequently followed the same line of reasoning in **The Wagon Mound** (a case of another ship) in what has become known as '**The ambit of foreseeable risk**' approach. In particular the **Wagon Mound** and **In re Polemis** could almost be said to be on all fours yet the court introduced and applied the concept of reasonable foreseeability to effect a reversal of the decision which would be expected from an application of the former strict liability case. The **Polemis** case should have governed the result of the **Wagon Mound** beyond a peradventure if Raz's theory were right.[23]

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[23] It is true that Raz does say that 'one need not assume complete convergence between the distinctions mentioned above and the sources thesis', but it does seem that the cases I have cited point to a direct contravention..

Thus while I agree with Raz's desired end I do not agree with the arguments leading to it. The difficulty however resolves itself when one adopts my distinction between law and justice and their relative position in the system.

Raz continues his argument: The Sources thesis captures and highlights a fundamental insight into the function of law - Social life requires forbearance, co-operation and co-ordination between different viewpoints. It is an essential part of the function of law to mark the point at which a private view of members of society becomes a public view ie binding on all members whether they agree or not. It provides a publicly ascertainable way of guiding behaviour and regulating ways of social behaviour. It helps secure social co-operation not only by its Sanctions providing motivation for conformity, but by providing a yardstick. In support he cites both Locke and Hart.[24] However it does seem that it is one of those arguments by which classical authors explain things and which Raz has previously labelled as "confused" (see p.3, ante).

Most societies have a way of distinguishing between different views, demands, and rulings. Not all rules are laws or all systems of rules are legal systems. But making a rule legally binding marks it as an authoritative rule. This indicates the existence of an institution claiming authority over the members of the society and claiming conformity to standards chosen by that authority regardless of whether they are otherwise justifiable or good

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[24] A. of L. p. 50 & 51.

or bad. Therefore it must be possible to identify those rulings without resorting to a justifying argument or moral argument.

Thus it is a basic function of the law to provide publicly ascertainable standards by which members of the society are held to be bound and cannot excuse non-conformity by challenging the justification of the standard. This is why we distinguish between the court's application of the law (standards which are publicly ascertainable and binding), and the court's development of the law.

Comment: I would conclude that Raz has not been entirely successful in arguing for the strong social thesis. The explanation appears to be that law, so far as it exists by virtue of statutes and generalities, is in accordance with the strong thesis. Where it has to be interpreted or new law created it will consider many social aspects one of which is the current moral view. But this situation obtains when, in a modern western society, laws are formulated in the first place. The considerations and deliberations giving rise to any law necessarily contain a moral input, for each and every one of us is affected by our moral training, outlook, beliefs etc.

Where the moral questions are most evident is in the question of equity or justice. This however does not mean that the law is necessarily morally justifiable. Nor does it mean that the judges interpreting it are necessarily in agreement with it. One sometimes hears a judge say 'This is a court of law'. Hart took the view that endorsement did

not imply moral approval. Our laws of absolute guilt, our speeding laws etc offend what I would describe as a principle of justice, that if one intends no harm, and caused no harm one is guilty of no moral offence. However our speeding laws are based on purely utilitarian arguments.

Thus I believe that the failure to distinguish adequately between law and justice is a further weakness of Raz's philosophy. The question is, What effect does this have on punishment? I consider that it does - it allows us to provide with equanimity, for 'no harm' guilt. And while this may be supported on pragmatic grounds, it cannot be on moral grounds. However there is no indication that Raz's philosophy actually supports 'no harm' guilt. It may therefore prove difficult to extrapolate a Razian view on this point.

Reasons and Sources as Reasons

Raz also spends some time propounding that the fact that there is a law stating that 'X ought to ϕ' is a reason for ϕ-ing. But this does <u>not</u> answer the basic question as to why one should obey the law. That there is a law may be an incentive to obey it. It is not in my submission a reason, which could be a) Fear of the consequences of not doing so; b) An inculcated habit of obedience; or c) that it suits the Agent's purposes so to do at that time.

True Raz admits[25] that 'The claim that Legal sources are reasons for action raises many questions. Are

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[25] A. of L. p.68.

legal sources moral reasons or prudential ones? or a specific 'Legal Reason'? Do ordinary legal statements import moral approval of the law? Those questions he attempts to answer when dealing with validity. But suppose, he says, you ask "why is a certain Legislative act a reason for action?" Is it not because of moral grounds that a policeman's order is a reason for action. Some of these grounds are legal but others are not. The policeman's order is a valid reason because generally police act to preserve the peace and are reliable. This is not a legal ground. Another reason is that Parliament conferred on Policemen power to give orders. There may or may not be non-legal grounds for accepting legal sources as reasons but there are always such legal grounds. The abscence of a further law determining the grounds of validity is what makes an ultimate legal rule.[26]

Again this does not direct itself to answer what is the reason. To my mind this merely emphasises that Hart was right in asserting that the rule of recognition rests on social sources, and that Kelsen was right in insisting that the relations between ultimate rules and their sources is different from that between ordinary rules and their sources.

C: EXISTENCE, EFFICACY AND VALIDITY

In relation to EXISTENCE AND EFFICACY Raz argues that there are two views:-

i) a law which has been properly created exists and is

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[26] A. of L. pp. 68 & 69.

valid and its efficacy is irrelevant unless by another law efficacy is a required condition.

ii) The opposite view that laws exist only to the extent that they are socially accepted and followed.

This difference has some importance especially when it comes to the justification of punishment to enforce a law which may be neither respected or followed. (e.g. a 70 MPH speed limit in certain circumstances)
He says that some theories, such as those of Kelsen offer a compromise. He quotes Kelsen:-

> "A general legal norm is regarded as valid only if the human behaviour that is regulated by it actually conforms with it, at least to some degree. A norm that is not obeyed by anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum of effectiveness is a condition of validity". (From The Theory of Pure Law. p 11)

He also quotes H. Laswell and A. Kaplan's argument that 'Laws are not made by legislatures alone, but by the law-abiding as well..'

Raz argues for both views but goes on to the effect that unknown laws should not be regarded as part of the system. At this point I would argue that the Witchcraft act actually remained on the books since around the 13th century. Latterly no one used it, but it, I believe, was raked up in the 1960's for a final time to prosecute someone that could not otherwise be prosecuted. It would be my argument that laws only become invalid when you can not enforce them - For example, Rhodesian U.D.I. Effectiveness involves enforceability

irrespective of public opinion or knowledge.

Raz's compromise is to say that Laws are valid when the law applying institutions recognise it. That is to say **it is the law-applying institutions not the law-creating institutions whose recognition is a pre-requisite of validity.** This is the standard view accepted by Salmond, Holland, Gray, Holmes, Llewellyn and Hart. Thus we are absolved from the difficulties which could have arisen from Raz's starting point.

With regard to **Validity** he treats it as follows:-
Its Nature: Rules, orders, contracts etc can be legally valid or invalid. The following discussion relates to legal validity of rules but can apply to other cases of legal validity. A rule which is not legally valid is not a legal rule. A valid law is a law, an invalid law is not. Similarly a valid rule is a rule and an invalid one is not. Some say this is controversial and that an invalid rule is a rule which lacks the property of being valid (or has the property of being invalid). Here I feel Raz is right, the nature of a rule lies in its applicability. If by being invalid it is not applicable to anything it ceases to be a rule. This view is appropriate if rules are identified with deontic propositions or imperatives.

He considers the example: Parents must support their children - a deontic proposition which is accepted by some legal systems. Endorsement of a deontic proposition or imperative is conceived as somehow analogous to belief of ordinary propositions.[27].

Rules, Raz says, but not propositions, are reasons for action. Now I believe this is a fundamental problem and is where an argument might be made that his philosophy

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[27] A. of L. p. 146.

begins to fail to support a theory of punishment. He takes the same attitude with respect to laws in *The Concept of a Legal System*, i.e. That laws provide reason for obedience. He accuses Kelsen of failing to take into account the attitude of the population.[28] In precisely the same way it could be said that he fails to take into account the attitude of the Agent. (This is discussed further in part IV. Chapter 10 Ref.[g])

Raz then goes on to consider three propositions:-[29]

1. Everyone ought to keep his promises.
2. Women ought to keep their promises.
3. John ought to give me £5 (because he promised to)

Raz says only 1 is a rule, and that 2 & 3 are applications of 1. With laws we can easily see which are rules (laws are the result of authoritative acts). This idea does not apply to non-institutionalized rules such as moral or customary rules. Rules therefore are not statements or prescriptions they are things the content of which are described by normative statements. Such statements are true (valid) if the rule exists and invalid if it doesn't.

This may suggest that explaining what is legal validity is explaining what is law. Not so, says Raz - The nature of the law is explained by explaining what are legal systems. Validity relates to the rules of the system. The system is valid only insofar as the rules are valid. Does the corollary hold? i.e. does legal validity mean simply membership in the system? Raz rejects this because 'legally

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28 A. of L. p.128.

29 Ibid. at p. 147.

valid according to system S' and 'a law of system S' do not mean the same thing. Is a rule valid because it is part of a system or is it part of a system because it is valid? These are not the same because not every legally valid rule is part of the system. We enforce rules of private international law, contracts, rights of religious groups to regulate themselves.

Validity according to law is broader than membership of the system, because while all laws are legally valid [I would submit that they are not necessarily so] not every legally valid rule is a law. The two notions are partly independent.

He then equates 'Legally valid' with 'legally binding' and uses them interchangeably. A valid rule has normative effects. A legally valid rule has legal effects or normative effects in law.[30]

If a legal rule puts X under an obligation then X is under the obligation because of the rule.

If it confers power on Y then Y has power by virtue of the fact that it is a legal rule

This is again his idea that the rule is a reason X is under an obligation. But I would argue that the fact that X is under an obligation is no reason for X obeying it - alone it does not respond to Glaucon's challenge.

This conception of validity of rules, Raz argues, can be extended to explain the validity of contract, sales, wills marriages etc. They are all valid only if they have

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[30] Here Raz briefly approaches the Kocourekian view that it is the law which creates the jural relations between the parties. See Annexe A, but unfortunately he does not follow it through.

the normative consequences they purport to have. This he says is an explanation and adaption of Kelsen's notion of validity. He identifies rules with their existence and to say of a rule that it is valid is to say that it ought to be obeyed. Raz has generalized by saying that the fact that a rule is valid means it has the normative consequences it purports to have. But, he admits, there are inherent difficulties.:-

To natural lawyers valid = justified and required to be observed.

To Positivists it has nothing to do with justification but rather that it is **recognized** as enforceable. How can Kelsen's validity view be reconciled with the fact that the law regulates it own validity (by setting social and factual tests?

How can we state what the law is without endorsing its moral merit?

Raz's answer is based on systemic validity, i.e that - **The Validity depends on its Source and the Source is an action or series of actions. Thus the Validity of Laws is value free and one's moral and political views are irrelevant**[31]

To this he then adds the idea that to the 'External' statements about people's practices and actions attitudes and beliefs about the law, and the 'Internal' normative statements endorsing the rule, can be added a third category, the view of the 'legal man'. This is basically a purely 'objective' view and involves no endorsement by which

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[31] A. of L. p.152.

he argues a certain reconciliation can be made.[32]

D: THE CONDITIONS NECESSARY FOR THE LAW TO COMMAND RESPECT, AND THE OBLIGATION TO OBEY.

Raz is certainly no Contractarian in the sense that he does not seem to believe in a Rawlsian type of contract in which there is an agreed fair society so that one could argue for an obligation stemming from the agreement.[33] On the contrary he argues that **there is no obligation, not even a prima facie one, to obey the law.**[34] This is a curious position and while there is obviously a case made by his arguments I believe it is flawed.
He goes on[35]

Even if society is just there is no obligation, the duty does not exist. The character of the obligation: An obligation to obey the law entails a reason but the converse does not apply. e.g. one may have reasons for not killing, raping etc which have nothing to do with the law. The obligation to obey implies that the reason to obey is the very fact that it is required.[36] Raz himself points out that the reasons may be many. To look for an obligation to

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[32] In my view it is far simpler to regard moral judgement as applicable solely to questions of justice rather than normative law. The normative law is like a black and white film one really cannot judge it on its colour and I take the view that this gives a far simpler and more logical explanation.

[33] See his criticism of Rawls and Nagel in 'Facing Diversity: The case for Epistemic Abstinence', in *Ethics in the Public Domain*. c. 3.

[34] Ibid. p.232.

[35] Ibid. p.233.

[36] Again I see no reason to accept this. The fact that it is required may provide an inducement but inducements are not reasons.

obey[37] the law is to look for grounds which make it desirable that one should.[38] Liberal theory equates obligation with a prima facie reason to obey but Raz feels that an action is obligatory when required by a "protected reason".[39] I feel that this is more simply explained as the establishing of what Davidson would describe as a "pro-attitude" to obey. Pro-attitudes may have many causative reasons.[40] At p.235 Raz again says there is no prima facie reason for obeying the law. I would argue that there is on a *Qui sentit commodum basis*. [h]

It is of interest to note that Raz says

> "that for most people an obligation to obey the law (and most people believe themselves to be under such an obligation) means something far more demanding than a prima facie reason. It means a peremptory reason best explained in keeping with my general analysis of obligation, as a categorical protected reason".

Having gone that far I find it difficult that he maintains the position that there is no obligation to obey. He points out that modern liberal writing assumes that the obligation to obey is not violated when there is a strong moral reason. Now this is an absolutely vital point and we have to be quite clear as to where we stand and what we mean. There are two ways of interpreting this - See part IV [i]

Raz has argued (in Chapter 13) that the obligation

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37 See 'Promises and Obligations' in *Law, Morality & Society*, Hacker & Raz Oxford 1977. Here Raz tends to the view that if x has a duty to ϕ then he ought to ϕ (there is a reason for him to ϕ). I tend to use duty as the jural correlative of a Hohfeldian claim-right and an obligation as a moral duty. In either case there is still a reason for x to ϕ but the reasons may be different.

38 Ibid. p. 234. Again I do not agree - the grounds could be terror of being boiled in oil. This would make it imperative to obey but obedience could still be distasteful and much against the will.

39 A. of L. p. 21-3. A protected reason is a reason for action that is also a reason for ignoring reasons against the action.

40 Donald Davidson. *Essays on Actions and Events*, Oxford 1980 Essay 1.

to obey is based on a general respect for the law, but although this argument is ingenious I shall argue that it still founders on the same questions - whose respect, who judges it, who says when the failure to respect is genuine? Raz does not appear here to be advocating a Hartian majority respect which could be argued to set a pattern, but rather he is discussing the individual right[41] to disobey. I take the view that once one posits the view that there is no "obligation" (in whatever sense one uses that word) there is introduced a consequent uncertainty, and that the libertarian view is doomed to failure on the grounds of that uncertainty.

At 235 Raz points out that the Law's claims for obedience are very different from the current philosophical conception of the obligation to obey the law as the prima facie reason to obey. He says that most of the current philosophical writings assume that the obligation to obey the law is not violated in cases where there are strong moral reasons - even though the breach may lead to conviction.[42] He gives the example of a foreign tourist, speaking little English stealing a rare medicine because he can't afford it.[43] Raz points out that such an act is a

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[41] It is not clear here whether he is talking of a Hohfeldian claim-right, privilege or liberty. In view of his arguments about not having a right to civil disobedience I suspect this is what I would term a privilege.

[42] Insofar as any writings do suggest this they are clearly wrong. A breach is still a breach even if justified or excusable. The moral justification or non-justification does not vary the law. An obligation to obey may be overridden by a superior reason. This may or may not justify the breach what it does not do is render it a non breach. Unless one takes this view one has springing and shifting laws dependant on moral justification.

[43] This example is hedged about with conditions - the tourist is obviously acting irrationally. And it could be further argued that, even if his actions were rational, why should that justify him stealing a rare drug needed to keep someone useful alive? If his

violation of the obligation to obey the law if that is understood as an obligation to obey the law as it requires to be obeyed. He makes the points that

1) The law assumes the right to determine what conditions defeat the legal requirements.[44] So argues Raz the "strong" obligation to obey includes more than a prima facie reason to obey. It includes admission that the reasons have the weight and implications which the law itself determines. He says this does not mean the obligation to obey is absolute for, he says

2) this is a mistake for the claims of the law are not absolute but exclusionary (He refers to ch. 2). The law he says claims that in regarding the law one should disregard the countervailing conditions however weighty. The Legislator or the executive may have to take some action but until they have done so the law is authoritative. Therefore to establish an obligation in the strong sense to obey the law is, so Raz says, to establish that the claim is justified, that the law has the legitimate authority it claims.[45] [See Chapter 10 Ref.j]

Moral reasons to obey[46]

Raz points out that some people such as the

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act causes the death of someone else would it still be justified?

[44] In my view this is explained by the fact that any normative rule is bound to be in the form of a generalization which has to be interpreted in accordance with the principles of justice which unlike the normative law vary slowly with the conditions and precepts of the particular society and which may in fact lead to changes in the normative law.

[45] A. of L. p. 237(top)

[46] Ibid. p. 237 et seq.

Archbishop of Canterbury are morally bound because he should set an example. Also that people may promise to obey, even for valuable reasons, e.g. the crook who promises to go straight if his girl friend will marry him, and that this gives rise to a form of estoppel. He then examines the theory that some philosophers use to develop this into a general theory. Disobedience, even of a bad law sets a bad example and encourages others to disobey. Raz does allow that this is an important argument but in my view he then proceeds totally to underestimate its importance. He argues that at best it merely establishes a prima facie reason to obey, not a pre-eminent reason. (i.e it can be defeated by a superior reason). He also argues that the example only works where obedience is justified. This appears to be contrary to Hart's ideas of a consenting or at least a conforming majority. In Hart's conforming majority the argument that there is a moral obligation to obey is obviously much greater.

The next argument he uses is that many offences are never discovered and that these also show a moral disregard. Here his argument is stronger in that it seems that we do not regard ourselves as morally bound at least in so far as we can get away with it. (This, I submit does not show that we are not morally bound but rather that our moral sense is much weaker than in previous eras). He then argues that the attempts to base obligation on promises or other undertakings are even less persuasive and says that people

often break their oath of allegiance.[47]

In dealing with estoppel he argues that if I induce others to obey the law by causing them to believe that I will myself obey then I should not let them down by breaking the law myself. He then argues that this only applies if by breaking the law I harm him. This is a very strained argument and in fact I would say that in so far as he is aware of my breach I do harm him. I am creating an atmosphere which encourages breaches of the law and that this will eventually lead to precisely the position we are in today in which respect for the law is breaking down with resultant danger to all citizens. No one ever said the harm I do has to be direct and immediate. Raz's main argument is that we don't induce others to obey. That may be true but he seems to confuse inducement with example. If a child's parents are openly thieving, his teachers on strike and picketing, his priest having illegitimate children, the local councillors are into every racket they can dream up, his M.P making any promise to get himself elected and taking bribes to raise questions in the House, and the heir to the throne's valet is making money by breaking his contract and selling the dirt, then even though none of this harms the child it nevertheless has an adverse effect.

Raz argues that even if the law is morally good there is no obligation to obey. But as I would argue that

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[47] Here I repeat my counter argument - nowadays yes, 50 years ago no; What has changed is that we are now in a climate in which we override any obligation to do what we may not want to do on the spurious grounds of having dreamt up some superior moral commitment to do what we want to do. In short Morality has succumbed to the art of self deception. It could even be argued that this was a foreseeable consequence of libertarian encouragement of individualism.

what is morally right is merely the current convention then the example by compliance with the convention is what actually forms the inducement i.e. moral obligation. Here again we are running into difficulties because of Raz's refusal to accept Hohfeld so that there is a slight tendency to confuse duty to obey (with its correlative right to demand obedience) and moral obligation which is brought about by convention - just the thing Raz says doesn't have any effect.[48]

I am not attempting to argue that there is a direct moral obligation to obey the law, I agree with Raz there is not, but I reject the part of his argument that suggests that example is irrelevant. It can and indeed in the past has created an atmosphere in which the moral inducement is towards conformity.

Prudential reasons to obey.

Raz then leads to the basis of his argument. He refers to legal and Social sanctions (which he maintains are unlike moral reasons).[49] These, he says, are good reasons for obeying the laws but are not sufficiently extensive because we ignore low risk areas and break the law. [But, I would argue, as we DO break the law in these areas then obviously there cannot be any REASON which is going to make

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[48] For support for my view of morality and the law see Hart *The Concept of Law* 2nd ed. p. 170 - 175. Also if we are to argue that the morality of the law makes no difference then the corollary of Raz's argument applies and there is no moral obligation to break a bad law. And so we have a Mexican stand off, which is not where Raz wanted to go at all.

[49] I think our difference must be that Raz thinks there is some form of Absolute Morality whereas I am somewhat more sceptical and believe that all morality is only the morality of the moment.

us conform, so Raz's following arguments look doomed by his own judgemental criteria before we begin.]

He continues that there are secondary prudential reasons which apply more widely. They are parasitic on the primary reasons (243). Suppose primary reasons apply to certain cases within a class. And suppose those primary prudential considerations defeat all the contrary reasons if one weighs them all up then it is sometimes best to assume that for all the cases in that class the reasons to obey outweigh the contrary reasons. This then becomes a policy (mandatory) rule for obeying the law in these cases rather than examine each case in detail. [Frankly we could call this obedience by lazy default]. Therefore says Raz 'one may have a prudential reason to act on a policy of always obeying the law rather than examine every case ...' But Raz has already admitted there are different classes of case so we still have difficulties. As he says (at p.244) prudential policies do not provide a foundation for an obligation to obey the law. He then goes on "The obligation to obey the law is generally thought of as a moral obligation." In my opinion this is fundamentally wrong. If we go back to Hart we find that breach of moral codes only causes misapprobation not legal sanction. This is the whole distinction Hart makes and if we say that the obligation to obey law is only moral then we cannot build a system of Punishment in the form of Normative sanctions on this. Or, if we do so attempt we are faced with redefining law as being purely morality. Of course there are those who will take that view but neither Raz nor I do. Raz I suspect is

trying to establish "good reasons" for obedience. I take the Duty approach. Neither of us believes in a moral obligation to obey as being fundamental, though I suspect Raz feels there can be none, whereas I feel it could and should be induced by the custom of obedience. As such it would play a part in the psychology of punishment.

Good laws without an obligation to obey

Raz says this appears paradoxical simply because we think of a moral citizen as one who obeys the law. One can have independent moral reasons for obeying the laws of a good system. Also if the system is good (in that it seems to agree with your own moral code) there is every reason to trust it. But even if a system is just, this is no actual reason to obey it. Kelsen took the view that the legal technique of motivating conformity is to apply sanctions for violations. Should we therefore assume that there would be no law where there are no sanctions as the prudential reasons were not sufficient? Generally disregarded laws should be repealed.[50] Raz maintains the law creates reasons for conformity (sanctions) and in other cases declares standards e.g. for law officers who are actually motivated to obey the law by independent motivations.

He then draws a parallel, between these two approaches and *Mala in se* and *Mala prohibita*.[51] One example he gives is of an act which is useful if a

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[50] I would agree, but there is a difference between the authorities failing to apply the terms of the Witchcraft Act and people ignoring laws e.g. the speed limit, for which sanctions might very well be applied.

[51] A. of L. p.247.

sufficiently large number of people obey. Polluting rivers is one example he uses - If a sufficiently large number refrain they will be clean but if everybody else is polluting there is little reason why I should not. Presumably the opposite is true; if only a few are polluting there is not a need for a law against it. (But I suspect it could also be argued that this is a good example of the point I was making earlier that the purpose of a law is to cause people to set an example which will dissuade others from breaking it).

Thus he concludes there is no moral obligation to obey the laws. In part IV I shall argue that on occasions I believe he is in reality talking about DUTY to obey the laws which is stronger than an obligation because duty is the correlative of a claim right to obey.

Respect for law.[52]

As there is no general obligation to obey it would seem that one should have no general moral attitude to the law and each case should be judged on its merits. However Raz intends to show that we don't need to take this route - The Alternative is respect for the law. He divides this into two parts - Cognitive Respect & Practical Respect.

Cognitive Respect relates to one's moral views; general pride in ones country, belief that its laws are fair and respect for the institution. Also there is a secondary reluctance to change the institutions without very strong reasons.

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[52] Ibid. ch. 13.

Practical Respect includes an attitude of respect and an inclination to obey because it is the law (right as a matter of moral principal). Other variable factors include hostility to law breakers, approval of law abiding behaviour in others, shame and guilt if one breaks the law. He gives the approach which I would normally take (i.e. that even if one considers it to be bad, the law should be obeyed - One may strive to reform it but one is not entitled to break it so long as it is in force) as an extreme practical but not cognitive approach.

Now says Raz: If there is no obligation to obey the law it is wrong to have a practical attitude of respect without a corresponding cognitive respect (moral).[53] He says this would be morally intolerable.[54] He says one should encourage an attitude of being generally on guard and decide on deviation case by case.[55] He then goes on to say that the absence of an obligation to obey does not affect the justifiability of having a cognitive attitude of respect i.e morally good laws justify a cognitive attitude of moral respect.[56] However he goes on that there is no moral fact which could justify a practical respect. He then puts forward the view, allegedly

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[53] If so, what are the parameters for defining this? - My opinion, Raz's, the fatwa against someone? This latter it seems to me, could provide an argument of great moral conviction.

[54] Why? And what happened to the 'Legal Man'? See p. 11 ante.

[55] My criticism here is that this could be argued as a perfect formula for anarchy.

[56] This is not necessarily true - no doubt the law of burning witches received great moral approbation at the time. So if morally bad laws may equally be perceived with an attitude of respect, the significance of the moral attitude is brought into question. Moreover as according to Raz the Practical Respect includes hostility to law breakers, and as witches were regarded as law breakers both moral and practical respect could support an infamous law !

paradoxical, that the practical respect people have for the law is a reason for obeying it. This respect has no external foundation because there is no obligation to respect it, yet those who do respect it "have a reason to obey, indeed are under an obligation to obey. Their attitude of respect is their reason - the source of their obligation".[57] Perhaps one could allow that it gives rise to a prima facie obligation to obey but not necessarily a pre-eminent one. However Raz seems to feel that it is a real imperative reason - "they really are bound to obey".

He goes on to posit that as respect for the law was identified as that kind of moral attitude recognizing moral reasons for obeying, then having concluded that there are no such moral reasons, as indeed he has, then "it seems to follow that practical respect for the law is an unjustified attitude."

Such a conclusion is inescapable if practical respect is derived from an independently based obligation to obey. Practical respect is morally defensible according to Raz's view only if one can reverse the order of justification. In this case the obligation to obey would be derived from an independently defensible attitude of practical respect.[58] He maintains this can be done - it is permissable to respect the law and this respect is a reason for obedience. He then asks the question 'Can it be that respect for the law does not rest on an obligation to obey,

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[57] A. of L. p. 253.

[58] It is interesting to note, in passing, that my theory of quasi or implied contract would provide Raz with just that without further ado.

but is a substitute for it'. i.e. One's respect obliges one to obey. He feels that this is the only answer and proposes to defend this idea by drawing an analogy with friendship.

The analogy with friendship.

I will help X because he is my friend. The agent has a non reason based desire to help.[59]. Raz says failure to perform certain actions would be wrong, because of the friendship not because of the reaction of the friend on learning of the failure. The cultural pattern of friendship requires that fitting action should be taken whether or not one wants to do it.

Raz summarizes the situation thus[60]:-

1) Friends have reasons others do not (to do things which are fitting as determined by the culture).[61]

2) It is morally permissable not to have friends [But none the less such a person would be thought of as a definite misfit]

3) Most friendships are not morally significant but they may be. The choice of friends reveals something of ones character.[62]

4) The obligations are self imposed. The relationship has cognitive and an emotional aspect. It is not assumed or renounced by a single act.

Promises and other voluntary obligations are taken

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[59] Reasons are actually the explanation of a pro-attitude according to Davidson and I would describe the state of friendship as a reason.

[60] A of L. p. 256.

[61] I would query as to whether these are actually determined by the culture.

[62] Sage mir mit wem du umgest ich sage dir wer du bist!

on by acts designed to take on the obligation, friendships are not. People may create a friendship in order to have someone to care for but not to create an obligation to care for someone.

Respect for the law: the analogy

While there is no emotional tie, respect for the law takes time to grow. It also reveals something about the character. It may, but not necessarily does, reflect one's moral character. One may avoid having a moral attitude to the law. This he says may be more or less admirable than respecting the law but this reveals an asymmetry - For, he says, while it is never wrong NOT to respect the law, it is morally wrong to respect it in South Africa (At the time this was written he was obviously referring to Apartheid). Here one suspects that Raz, despite his positivism, is determined to maintain the liberal approach that a person is at liberty to disobey immoral laws. In fact one gets the distinct impression that at heart he would argue that they ought to do so, e.g. that the wartime population of Germany should have reacted against the laws against the Jews in moral outrage.

I am afraid that I would be forced to say that, desirable though the ideal may be, in the real world the practicalities are far more likely to be that when danger threatens the liberal thinkers are the first ones under the bed with the rest of the population. Quite starkly put, there are relatively few who actually take a moral stand when faced with a gun. Apart from that it is interesting to

note that in fact people do not generally react against even bad laws until they are led, and even then they tend only do so when they are pretty sure that nothing too bad is going to happen to them i.e. in a country which permits, or at least tolerates, a degree of civil disobedience.

The worth of respect.

Finally respect, he says, is a reason for action.[63] He summarizes[64]:

1) There is no general moral obligation to obey, even in a good society.

2) It is permissible to have no moral attitude to the law, to reserve judgement and examine each situation as it arises.

3) In all but iniquitous societies it is permissible to have practical respect for the law.

Now, again I must protest that this must be open to serious argument. For example - What about the lazy acceptance discussed ante, and who decides what is iniquitous? - Some Afrikaaners genuinely believed, with religious backing, in their superiority as a race but to

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[63] Yes - but only one amongst many. Does one respect all ones friends? I may not respect the law, but I obey it - perhaps because I accept its protection and benefits. Raz says practical respect is also part of a complex attitude and style of life relating to the whole community, it is an identification with the community. A man is loyal to his society and this may well show itself as respect for the law of that community. I totally agree but this again is a conclusion based on what is well known to be a basic instinct. Boys form into gangs and will go through all sorts of unpleasant initiations to belong, they will obey the dress rules, cut their hair, paint themselves, submit to physical disfigurement etc to belong. Once in they do what they are told. Grown men do the same, they will suffer torture to wear the green beret and be part of the club. Raz has taken us up the mountain and down again to point to something we know just by looking round us.

[64] Ibid. p.260.

others this was iniquitous. In the eyes of Islam the Jews' belief that their race was chosen by God could possibly be regarded as iniquitous. To a tribe of cannibals their law was not iniquitous and they paid great honour to a brave enemy by eating him! Presumably the enemy had different views but it all depends on which side of the pot you are.

4) For one who has practical respect for the law this is a reason for obeying it. True, but again it may be argued that this is only one amongst many reasons and not necessarily the most important or overriding.

5) It is never wrong to respect the law in this practical sense (Here we must remember that Raz argued that this practical respect has a moral foundation - I do not think it does necessarily; the immigrant may respect the laws out of gratitude).

6) It does not follow that where it is permissible either to respect or not, it is morally indifferent whether one does or not. Therefore a person's respect may be qualified. I agree that as a matter of fact in each individual case this may be true.

7) His respect is the source of his obligation.[65]

8) Loyalty to the society can be manifested as trust in the law.

He starts into the question as to which law is worthy of respect and conditions about when respect speaks well of the agent and says that these questions cannot be explored here. However he suggests that even where loyalty

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[65] No, I would argue that respect may be no more than a contributory factor in a pro-attitude and might be overcome by necessity. The starving man steals (but most respectfully).

to the community is morally appropriate, or even obligatory, expressing it through respect for the law may not be appropriate. I think he is getting into dangerous generalities here and also there is another lack of clarity of definition. When one talks of respect for the law this is a moral judgement. He admits it has a moral aspect in its cognitive side. He then states that this respect (the practical aspect) is the basis for an obligation to obey. But can one have a practical respect for the law while having a cognitive disrespect? At 3) above he clearly implies the answer is NO. But, if this is so then ultimately ones moral stance determines ones obligation to obey. But Raz's whole argument is based on there being NO MORAL OBLIGATION TO OBEY. However if one's practical respect (reason to obey) is subject to ones cognitive respect then there is a moral foundation, albeit a negative one, to one's obligation to obey.

Basically what Raz has been saying all along is it is permissible to obey so long as your conscience lets you, i.e. your obedience is morally dictated. It may be argued against him that all he has provided are strong reasons for not obeying and rather weaker ones for obeying. He makes a good case but in order to do so he had to deny a duty to obey the law as a prime imperative for obedience. Later he will argue that there is no right to civil disobedience in a liberal state. His reason for doing this and the manner of his doing so will be the subject of discussion in part IV.

E. THE OBLIGATION TO OBEY.

He reverts to this question of obligation in his later work[66] admitting that the favoured view of many political and moral theorists is that every citizen has a prima facie obligation to obey the laws of the state. This can be based on several premises, e.g the intuitive belief that to deny an obligation to obey its laws would be to deny the justice of the state. Again the instrumentalists argue that without obedience from at least a large part of the population the state cannot operate. The fairness argument is that anyone who denies an obligation to a just state is taking advantage of the remainder. Finally there are the contractarians. All these arguments Raz denies. He points out that most political theorists also acknowledge that there is no general obligation to obey the law of an unjust state. This he says is not a new view and some deny it on the ground that no state can be just.[67] However as Raz points out, if there is no general obligation to obey then the law does not have general authority (authority being defined as a right to rule and the right to rule entails a duty to obey.)[68]

Raz points out, very ingeniously that the argument that one is not bound to obey the unjust state, but is bound to obey a just one, does not work. This is because the more moral a state is the more its citizens would obey anyway and

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66 *Ethics in the Public Domain*. Ch.14.

67 cf. Robert Paul Wolf *In Defence of Anarchism* 1970.

68 It would appear that he is treating this as a Hohfeldian claim-right in that there is a correlative duty. However I would argue that this is not possible as Hohfeldian claim rights require the authority of law, and we start on an endless chain of recession.

therefore it is not a moral obligation to obey the law which governs society but an obligation to obey a morality prior to the law. Therefore any obligation to obey the law is redundant.[69]

Raz argues that the reason for obeying the law derives from the reasons for having that law in the first place. The reasons normally thought of as constituting the obligation[70] to obey have nothing to do with the desirability of having the whole system. He gives a simple illustration of laws prohibiting murder, neglect of children by parents. So far the laws claim in these cases is to motivate those not sufficiently moved by moral considerations. The law is not for the conscientiously moral person. It is for those who deny the moral duties, and sanctions are applied. "By addressing the self interest of those who are not moved by moral considerations it reassures the moral that they will not be taken advantage of by the unscrupulous. All this, he says, can be done by a government without authority (for he has assumed the laws are morally acceptable to all). But he points out governments can also effect what they want without authority, e.g. by economic power of employment, granting contracts etc. While this is not new, the degree of its use is. As governments effect changes by these means it undermines the argument that

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69 I am sure that Natural Law theorists would not agree, claiming that the law is there for certainty and as it reflects the morals of the society it is the moral code of that society and therefore requires to be obeyed. They simply would not admit the paradox which Raz claims is present.

70 Can reasons constitute an obligation? It will be part of my argument that Raz's reasons do not, and moreover, that no reason can constitute an obligation. An obligation is a jural relation with a Dominus and a Servus. A reason has neither.

denying the existence of an obligation to obey amounts to denying the possibility of a just government. So governments can, in principle, operate without authority. This is, he says, a further argument that there is no general moral duty to obey the law.

He gives three examples of citizens being under an obligation to obey:-

1. Safety Regulations: (Planning Law). If I use tools or methods which may be a safety hazard to others, I am under an obligation to obey the regulations.
2. Preservation of the Countryside: (Welfare). Because the regulations may reverse the potential destruction I am obliged to obey.
3. The Construction of Nuclear power plants. Here I disagree and can try to block the roads. This is against the law and if successful will encourage others to do the same. This will undermine the governments ability to discharge its functions. Despite this lapse it is a relatively moral government. I should therefore obey its law and avoid breaking it. In this latter case says Raz there is no evidence that the government had authority over him as it did in cases 1 & 2 which authority gave rise to the obligation.[71] He goes on

> "In all the examples, the law make a difference to one's moral obligations. The moral obligation is a prima facie one; it may be overridden by contrary considerations'. I accept the superior reliability of the law on such issues

[71] This really is a threadbare argument. The 'reasons' are not even consistent, and it could be used to strengthen arguments against punishment in certain cases of offence.

and defer to its judgement[72]...

.. A person who understands the situation will often have reason to go beyond the law, and to do more than the law requires in pursuit of the same co-ordinating goal. Alternatively, he may find that on occasion he has no reason to follow certain aspects of the law. They may be the inevitable simplifications the law has to embrace to be reasonably understood and efficiently enforced. There is no reason for an individual not faced with the same consideration to conform to the law on such occasions. (emphases mine)"

One can appreciate that it is fear of automatically accepting a morally reprehensible law that is motivating Raz's thinking (see p.335) but it is at least arguable that his theory may produce even worse results.

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72 Ibid. pp 332 and 333. Now it could be argued that, on the contrary, I think much of the present law is officious, intermeddling, and often downright wrong. According to Raz's philosophy I should by now have offended so many times I should be regarded as a menace to society and be locked up. Fortunately for society not too many of us subscribe to Raz's theory for obedience. While Raz accuses Dr Finnis of throwaway points(p.334), one could retort that Raz has set himself up as arbiter of when anarchy may break out.

CHAPTER.6. MORALITY, ETHICS AND THE LAW.

At this point, having obtained an overview of a Razian approach to Legal systems, authority, and obligation to obey, we are in a position to examine Raz's approach to certain moral and ethical problems with a view to building additional bases from which we can extrapolate. They are dealt with as follows:-

A. Civil Disobedience.

B. Conscientious Objection.

C. The Boundaries of Authority.

D. The Justification of Authority.

E. Coercion and Autonomy.

F. Perfectionism and anti-perfectionism.

A. CIVIL DISOBEDIENCE.

Raz has already concluded that there is no moral obligation to obey the law. He now asks whether there is a moral right[1] to break the law.

He is anxious to emphasize that his argument for denying a moral obligation to obey turned in part on the fact that on numerous occasions a breach of the law has no adverse effect.

However he states that this is hardly ever true of Civil Disobedience which almost invariably has some adverse consequences. So we see that he has perceived a

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[1] This in my submission would be at best a privilege, unless he is going to argue that there is a correlative duty on the part of society to let people break the law on moral grounds.

need to deal with conflicts which he foresees will arise. Nevertheless he goes on:-

> "No doubt, civil disobedience is sometimes justified and occasionally is even obligatory."[2]

But he then hastily steps back and adds that it is not his intention to justify disobedience but question whether there is, in certain circumstances, a moral right to disobey. Nevertheless questions still abound. For example, one finds this somewhat difficult to square with the preceding statement.[3]

Raz's argument for denying an obligation to obey, stems, as we have noted, from the rather curious reason that certain breaches of the law have no adverse consequences. In an attempt to get out of the dilemma which this approach immediately conjures up Raz introduces a distinction between an unjust state and a reasonably just one, so that "in a reasonably just state any consideration in favour of disobedience has to overcome a presumption against it based on the accompanying undesirable results."[4] But to this one must ask What results? and judged by subjective, utilitarian, or whose standards? Raz does not say.

The question Raz seeks to answer is:-'In certain circumstances is there a moral right to disobedience?' He starts from the presumption, with which he agrees, that

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[2] A. of L. p. 262.

[3] For, unless he is prepared to find for such a moral right one could end up with obligatory civil disobedience unsupported by even a moral right.

[4] A. of L. p.262.

civil disobedience, (which he defines as "a politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one's protest against, and dissociation from, a law or public policy"), is sometimes justified or even obligatory.[5] He says that many authors favour a stronger view that there is a right to civil disobedience. Here, it is not altogether clear as to whether he is referring to a right as something which one is entitled to do, i.e a privilege (equivalent to walking on one's own land) or a full blown claim-right (entailing correlative duties on the part of the law to allow such disobedience to take place); no doubt there are those who hold the full range of views. He attempts to distinguish between the two degrees of right by discussing the moral right to freedom of speech.[6]

Again he is anxious to preserve the idea of a right to disobedience as he says (at p. 266)

> " At first blush it may be thought surprising that one should have a right to do that which one ought not. Is it not better to confine rights to that which it is right or at least permissible to do? But to say this is to misunderstand the nature of rights. <u>One needs no right to be entitled to do the right thing. That it is right gives one all the title one needs.</u> But one needs a right to be entitled to do that which one should not. It is an essential element of rights to action that they entitle one to do

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5 Ibid. p.266.

6 Here again Raz uses 'right' where in some cases the word freedom would be more appropriate, and in others where 'privilage' would be better. Unless the Hohfeldian distinctions are maintained, the only result is confusion.

that which one should not." (emphasis mine)[7]

and (at p.267)

"The evil the disobedience is designed to rectify may be so great, may indeed itself involve violence against innocent persons (such as the imprisonment of dissidents in labour camps in the Soviet Union), that it may be right to use violence to bring it to an end."

He starts from the idea that everyone has a right[8] to political participation. He maintains there are limits to that right, i.e. to respect the right of others to participate. It is, he says right that the restrictions should exist and it is best that they should be enumerated by the law. Then he says, to the extent that they are reasonable they become morally binding. His argument is similar to saying that insofar as the restrictions are just they are valid but, in my view, it is very far from being the same thing. He then says, States divide into those that are liberal (allowing adequate recognition to the principle of participation) and illiberal when it does not. Unfortunately there is no definition of 'adequate' participation and we are still faced with the fact that it is quite possible to have a benign dictatorship with just

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[7] Unless it is very clearly qualified, the underlined statement is quite terrifying. It is the underlying philosophy of every fundamentalist and terrorist that has ever existed. Yet nowhere has Raz imposed a qualification, or managed to establish objective criteria for what is right. This is hardly surprising, such a definition having eluded mankind to date. According to this statement one could justify the murder of Salmon Rushdie, etc. This will be discussed further in the next chapter and the critique.

[8] A. of L. p.271. But as to whether this is a Freedom or privilege, or a claim right he does not say. If the latter it would, in my opinion, have to be based upon an interpretation of our adherence to conventions, or a long standing aspect of the common law. This again shows the weakness of using the term 'rights' in an undefined way.

and reasonable laws which would apparently fall into Raz's 'illiberal' definition.

Nevertheless, Raz concludes, as a result of his stated preference for a liberal state,

1) That all states ought to be liberal and

2) while there is no right to civil disobedience in a liberal state there is in an illiberal one. He argues that, given that an illiberal state violates its members "right to political participation", then people whose 'rights' are violated are "other things being equal" entitled to disregard offending laws and exercise their moral right as if it were law. One must point out however that this reasoning, though sometimes accepted as politically correct today, has certainly not always been so, even in acknowledged liberal societies.

Raz maintains that the case is reversed in a liberal state. This is because one's right to political activity is protected by law. "It can never justify breaking it." However, apparently frightened by such a forthright statement, Raz immediately pulls back from the brink and says "this does not mean that civil disobedience is never justified" and he points out that " a liberal state was defined in a rather technical narrow sense .. It may contain any number of bad or iniquitous laws. Sometimes it will be right to engage in civil disobedience to protest against them or against bad public policies."

Thus presumably only in liberal states where all the laws are good laws, is civil disobedience wrong. However Raz maintains that a person, to justify his act

can show that the act is right. Or, says Raz, he can show that he has a right to perform the act (even if it is wrong). Raz says in a liberal state that the second argument is not available. The only moral claim must be based on the "rightness of the act". But as I have pointed out it may be possible to hold the view, and it certainly was held, even at the beginning of this century, that much of what Raz thinks is right, was then considered wicked, pernicious, evil and wrong. He does however reject the concept that civil disobedience is a matter of last resort.

Raz does not really consider the effect his theories might have on a theory of punishment. His only reference to punishment with respect to civil disobedience is when he maintains that the view held by many, that those involved in civil disobedience should be prepared to accept their punishment as part of their act of defiance is in fact irrelevant to the principles underlying civil disobedience. It is this sort of statement that makes it so important for us to find out just what effects Raz's philosophy has on the question of a theory of punishment. This is because the question of disobedience and its 'justification' must ultimately affect one's basic approach to the law in general, punishment, and the whole society one lives in. Whereas the attitude of the disobedient to acceptance of punishment (because of the so called 'justification' of their actions) may be irrelevant to the principles underlying the disobedience, they certainly are relevant to the question of punishment under the law.

B. CONSCIENTIOUS OBJECTION.

In considering conscientious objection he says one must distinguish between the private act and the public one. However in the case of the conscientious objection the law has to be assumed to be morally valid (e.g. conscription) and the person's view, though deeply held, as wrong. As he very correctly points out one cannot give such a morally wrong view priority just because it is intensely held. However this is directly distinguishable from the situation above, where he allows that a deeply held moral conviction may permit disobedience. The distinction appears to be in the moral validity of the law.

Raz maintains that society is right in that it requires a person to shoulder the responsibility of his own convictions.[9] However he foresees the difficulties of providing a law recognizing a right to conscientious objection as threefold: 1) It is open to abuse, 2) It encourages self doubt, and 3) Unless the basis of a simple declaration is allowed, there will have to be a necessary invasion ofprivacy of the objector.[10] His solution is that the laws should wherever possible be framed so as to avoid conflicts with justifiable minority views. He concludes that this is not an ideal solution and that any right not to have one's conscience coerced must remain a prima facie one. In this respect his views do not conflict, and, in fact support punishment, though he points out cases where there should be pecuniary provisions rather than

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[9] A. of L. p. 281/282.

[10] A. of L. p.287.

imprisonment. All of which, unlike his views on civil disobedience, could well form part of a theory of punishment. i.e. in the case where the law is deemed morally valid he gives us some guidelines even though he admits they are not perfect. The trouble that occurs when he considers Civil Disobedience was that he allowed for a case in which the laws may not be morally valid. Regrettably, nowhere has he given us any parameters for distinguishing between the two.

C. THE BOUNDARIES OF AUTHORITY.

Raz's approach is as usual, from the libertarian viewpoint. One must appreciate however that he does not subscribe to the revisionist theory that liberty is of instrumental value only. He is inclined to the view that it has intrinsic value, though he accepts the strength of the revisionist challenge.[11] But he says if the simple principle that Liberty is intrinsically valuable is valid there is a reason against every restriction of freedom and therefore any restriction requires justification.[12] He would however seek to argue for a liberal morality on non individualistic grounds.[13]

His belief is that while human well-being can best be achieved in communities subject to political authorities, these authorities are bound to promote freedom. In fact he maintains that the violation of the

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[11] M. of F. p.7.

[12] Ibid. p. 13.

[13] Ibid. p.18.

principles of freedom may undermine the legitimacy of the authority.[14]

Basically he takes the view that having authority over another implies a duty of obedience.[15] Thus it is necessary for him to establish the basis or conditions for authority to enjoy legitimacy. Importantly he then argues as to whether political authority, even if it does not meet these conditions, may be validated by consent of the governed. His view is that consent is only binding if it meets conditions which approximate to those conditions governing legitimacy independently of consent. He makes a clear distinction between power and authority over people.

The common view of authority is that it involves the right to rule correlated with an obligation to obey on the part of those ruled. This view Raz examines and points to flaws in the views of Sartorious, Ladenson and Hobbes. In the latter case particularly he points out that the issuance of directives are in reality coercive threats. However he says legal authorities do more, they claim to impose duties and confer rights, and he points out that to threaten is not to impose a duty. Similarly he feels that the recognition conception (which holds that to accept an utterance as authoritative is to regard it as a reason to believe that one has a reason to act as told) is fundamentally flawed because, amongst other reasons, it fails to explain the role of authority in the solution of co-ordination problems. The example he gives is a

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[14] Ibid. p. 21.

[15] See also section [j] in chapter 10, post.

particularly good one i.e. that one really doesn't mind which side of the road one drives on so long as we are all doing the same thing. As the law can only be explained by regarding the authoritative statement as an actual reason for action it defeats the recognitional concept which would regard it only as giving a reason to believe that there is a reason to drive on that particular side. And very clearly in this case this is not so. Nevertheless he agrees that authoritative utterances, though not themselves reasons for action, can affect one's reasoning about practical problems.[16]

So he concludes a person has (practical) authority only if his authoritative utterances are themselves reasons for action. This however is not enough to identify authoritative utterances, for, as he points out, many non authoritative utterances do this. He examines Hart's idea that authoritative utterances are 'content-independent' but again points out that other things such as threats may also provide a reason. His explanation is "that a valid command (i.e. one issued by a person in authority) is a peremptory reason. We express this thought by saying that "valid commands or other valid authoritative requirements impose obligations." While not denying that such commands and requirements impose obligations, I shall later be querying as to whether the manner in which Raz justifies the creation of such obligations supports, is neutral to, or undermines a theory of punishment.

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[16] M. of F. p. 29/30.

D. THE JUSTIFICATION OF AUTHORITY.[17]

Raz is greatly concerned with the manner of justification of authority and this is of concern to us particularly because if the justification for any authority fails then the justification for any punishment must fail with it.

He begins with the premise that Authority involves the power to require action. He then proceeds to three concerns:-

1) That the Authority is legitimate;

2) The general character of the considerations which should guide the actions of the authorities; &

3) The way the existence of a binding authoritative directive affects the reasoning of the subjects.

First he considers the concept of authority as a surrender of judgement. In the first place Raz feels the fact that one may obey against ones judgement is not to surrender that judgement. Nor is it sufficient to treat the authority as another reason for doing (or not doing) the thing in question. He cites the example of an arbitrator's decision, which he claims replaces the reasons of the parties and thus becomes a 'pre-emptive reason'.

> "One thesis I am arguing for claims that authoritative reasons are pre-emptive: *the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.* It will be remembered this

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17 M. of F. Chapter 3.

> thesis is only about legitimate authority. It is relevant for the explanation of the character of de facto authorities because every de facto authority either claims or is acknowledged by others to be a legitimate authority. But since not every authority is legitimate not every authoritative directive is a reason for action."[18]

The point he wishes to emphasize is the challengeability of the authoritative decision. First its pre-emptive status may relate only to certain areas of consideration (e.g. economic), or fundamentally if it 'violates fundamental human rights'[19] or the authority 'acted arbitrarily'[20]. These grounds vary from case to case and determine 'the legitimacy of the authority and the limits of its rightful power'. He feels that authorities are also limited by the kind of reasons on which they make the decisions thus the pre-emption thesis depends on the "Dependence thesis"-

> "All authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to the action in the circumstances covered by the directive." [21]

He points out that this is not to be taken to mean that the authoritative determinations are binding only if they correctly reflect the reasons on which they depend.

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[18] M. of F. p.46. One must remember however that every authority ever known claims to be legitimate and there is a difference between claiming and being acknowledged.

[19] The whole question as to how one determines "a fundamental human right" is left unanswered.

[20] It must be noted that this provides us with what I would describe as a reflexive legitimacy, i.e it is a content controlled legitimacy.

[21] M. of F. p.47.

They are binding within limits even if mistaken. And he distinguishes his views from the idea that the exercise of authority should make no difference to what its subjects ought to do (The no-difference thesis):-

> "The exercise of authority should make no difference to what its subjects ought to do"[22]

Thus he maintains the whole point of authorities is to pre-empt individual judgement so that they thereby replace individual judgement. Nor does it mean that the authorities have always to act in the interests of the subjects.[23]

One important function of authoritative directives is to establish conventions (solutions to co-ordination problems). They thus make a difference to practical deliberations and once established they provide a reason for action. He points out that the dependence thesis does not require an authority to act for reasons relating entirely to the subjects.[24] It may act for reasons which apply to it alone. All it requires is that its instructions will reflect the reasons which apply to its subjects (i.e is justifiable by reasons which apply to the subjects). He gives the example of the needs and limitations of bureaucracies, e.g. the application of the de minimis rule. That is, the authority may rely on reasons which, while not relying on considerations applying directly to the subjects, give a better overall result.

His arguments are, he maintains, strengthened by

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[22] Ibid. p. 48.

[23] But this depends on how you assess a persons 'interests' (as defined by Raz) and individual views may differ, thus affecting views as to what a subject ought to do.

[24] M. of F. p.51.

considering the case of theoretical authority i.e. the authority for believing in things. Experts give advice based on the same reasons which should sway ordinary people but the expert has more knowledge and a better grip of the subject and his view therefore replaces that of the non expert without affecting the dependence thesis. Raz feels that if this is true of theoretical authorities there is strong evidence that it holds for practical authorities as well.[25]

The Dependence Thesis is a moral thesis and is connected with the legitimacy of authority. He then sets out the normal justification thesis

> "The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow reasons which apply to him directly."

Again this is a reflexive definition and it amounts to the same as the normal reason for accepting advice is when it is likely to be sound advice and this is close to authority.[26] He admits that there are secondary reasons for accepting authority, e.g. the desire to be a member of the group, but that these are not sufficient to establish the legitimacy of the authority. This is important as it is here that he distinguishes his views

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[25] M. of F. p.53. I would suggest this is at least questionable.

[26] This is of course a very Rawlsian approach although Raz distinguishes himself from Rawls in other particulars.

from the mere acceptance theory of many positivists.

He concludes therefore that the dependence thesis and the normal justification theses are mutually reinforcing and together

> " they articulate the service conception of authorities, that is the view that the role and primary normal function is to serve the governed"[27]

but not, he emphasizes, each individual interest of each particular subject. And in a sense it will be seen that this really puts a Rawlsian gloss on his positivism even though he is at pains elsewhere to reject Rawls. It must also affect any overall concept of Punishment, to the extent that the emphasis on the duty of the state is made subservient to the interests (presumably well being and autonomy) of the governed. This leaves a great deal of room for argument.

The case for the validity of an authority has to overcome varying considerations such as another authority with an equal or better claim, overlapping authorities (e.g. parents), the intrinsic desirability of conducting ones own life, etc.

The Pre-emptive Thesis.

This follows from the other two and consists in the fact that the rule which is based on general reasons replaces rather than adds to the individual's reasons, i.e.

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[27] M. of F. p. 55/56. This is a concept which is debatable. It is fundamental to the concept of the state, and may be radically altered by the definition of where the 'interests' of the governed truly lie. I suspect that my view might be radically different from that of Raz. It could thus affect the whole concept of Punishment.

it is a pre-emptive reason in Raz's terms.[28] It is therefore possible for the individual to accept the rule as a matter of course without weighing the pros and cons of each instance. It also enables a person to consider and form an opinion in advance of the occurrence of each situation.

His next argument is most interesting, i.e that it allows the creation of a pluralistic culture as it

> "enables people to unite in support of some 'low or medium level' generalizations despite profound disagreements concerning their ultimate foundations which some seek in religion..."[29]
>
> "....through the acceptance of rules setting up authorities, people can entrust judgement as to what is to be done to another person or institution which will then be bound, in accordance with the dependence thesis, to exercise its best judgement primarily on the basis of the dependent reasons appropriate to the case."

This explains why rules generally are reasons for action even though the rules ultimately derive their force from the considerations which justify them.

> "In any case in which one penetrates beyond the directives or rules to their underlying justifications one has to discount the independent weight of the rule or the directive as a reason for action. Whatever force they have is completely exhausted by those underlying considerations. Contrariwise, whenever one takes a rule or a directive as a reason one cannot add to it as additional independent factors the reasons which justify it."[30]

Thus authoritative directives make a difference

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[28] Cf. *Practical Reason and Norms.* Exclusionary reasons p.40-45.

[29] The truth of this seems somewhat questionable - for example look at the question of how many wives we may have.

[30] M. of F. p. 59.

by virtue of their ability (by pre-emption) to turn 'oughts' into 'duties'.[31] One may argue, as indeed he does, that Raz is following the Rawlsian line of the duty to uphold just institutions, but as he says this depends on a [prior] understanding of which institutions are just. Again we see Raz taking a reflexive approach.

The duty to support just institutions he claims is parasitical upon the normal justification thesis and is not an alternative to it. It is narrower than the duty corresponding to the right of a legitimate authority. Thus he concludes that "one has a duty to obey those in authority over one even in circumstances in which disobedience does not imperil their existence or operation."[32]

E. COERCION AND AUTONOMY.

In talking about coercion in *The Morality of Freedom* Raz is particularly concerned with wrongful coercive threats. While, as we have seen, he considers the law coercive, and the threat of punishment is intended to be coercive, they are in the main not wrongful. Therefore, while examining what Raz has to say one must bear in mind that one of the presumptions will have to be reversed.

Raz uses the following definition:-

"P coerces Q into not doing act A only if

A (1) P communicates to Q that he intends to bring about or have brought about some consequence, C, if Q does A.

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31 M. of F. p.60.

32 M. of F. p. 67.

(2) P makes this communication intending Q to believe that he does so in order to get Q not to do A.
(3) That C will happen is, for Q, a reason of great weight for not doing A.
(4) Q believes that it is likely that P will bring about C if Q does A and that C would leave him worse off, having done A than if he did not do A and P did not bring about C.
(5) Q does not do A.
(6) Part of Q's reason for not doing A is to avoid (or to lessen) the likelihood of C by making it less likely that will bring it about.

B P's actions which conform to the conditions set out in A are prima facie wrong.

C The fact that Q acted under those circumstances is a reason for not blaming him for not doing A."[33]

As we can see, A is consistent with punishment, though B is not (save in the case of a completely unjust punishment) and would normally be reversed. But we should note that it is not B that makes a punishment coercive. While it would be unfair to read too much into a situation where Raz is considering a distinguishable set of circumstances, it is felt these views are relevant insofar as we may be able to extrapolate from them. One of the points Raz makes is that "By issuing a coercive threat to another person one invades his autonomy".[34] A second point is "the fact that a person acted under coercion is either a justification or a complete excuse for his action".

This latter is consistent with using the coercive threat of punishment to ensure conformity with the laws. He

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[33] M. of F. p.149.

[34] M. of F. p.150 et seq.

distinguishes threats from offers in that offers do not reduce the options available. While offers may induce people to act against their long term interests they, at least, save in cases where they do not have sufficient knowledge or ability to assess it, are normally the best judges of what those interests are. Raz concludes that the main result is "to cast doubt on the widespread use of paternalistic coercion".

However he argues that coerced choices are not necessarily 'against the person's will' - it may be the lesser of two hard choices but many people are placed in such circumstances without coercion. His definition 'allows that a person may be forced to do what he wants to do anyway'. His action is justified or excused if the coercive reasons for doing the act defeat the reasons against.

Of course he points out that not all forced actions are justified. And whether any such action is excusable depends on moral views. While he feels that all coercion invades autonomy he concedes that "the completely autonomous person is an impossibility"[35]

F. ANTI-PERFECTIONISM V. PERFECTIONISM.

He points out that while sources of the appeal of anti-perfectionism are sound (the worry about letting one segment of the population impose their conception of the good on others) anti-perfectionism would in effect prove counter productive. Perfectionism therefore requires public action (and support) for its viability.

Raz's view is of autonomy orientated individual

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[35] Ibid. at p.155 and 373.

freedom based on value pluralism in which the opportunity for wrongdoing cannot be eliminated [As to whether and what degree of autonomy contributes to our well-being is a separate question]

Autonomy and the harm principle.[36]

Raz varies Mill's view, that the only justification for coercively interfering with a person is to prevent him from harming others, by including themselves. He compares the concept that the harm principle restrains both the individual and the state from coercing people on the grounds that those activities are either morally repugnant or desirable, with the concept of autonomy based freedom the restriction of which restricts their options or the pursuit of projects. This latter way of looking at the harm principle he combines with the concept that the government owes a duty to promote the autonomy of the people[37], so that he argues it may take actions to prevent actions which would diminish people's autonomy and can enforce actions which are required to improve people's options and opportunities. This is in answer to the objection that the harm principle runs into, for example, with respect to matters such as the redistribution of wealth by taxation. While the autonomy explanation is ingenious and has considerable merit, the question as to whether he is entirely convincing in this respect is beyond our present scope. Nevertheless it does

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[36] M. of F. p. 412 et seq.

[37] Note, to do this he would in practice have to answer the question as to why or how the state came to owe any such duty.

support an approach which would permit punishment as coercive means 'in order to stop people from actions which would diminish people's autonomy' (free exercise of their use of goods etc.). Thus it is most important in that it provides us with a philosophical link and prevents us from making any fundamental attack on the extrapolation of a theory of punishment from Raz's philosophy.

> "The government has an obligation to create an environment providing individuals with an adequate range of options and the opportunities to choose them. The duty arises out of people's interest in having a valuable autonomous life. Its violation will harm those it is meant to benefit. Therefore its fulfilment is consistent with the harm principle. Not every tax can be justified by this argument. But then not every tax is justified by any argument. A tax which cannot be justified by the argument here outlined should not be raised." (p.418)

While Raz is here referring to taxes the same argument may be paralleled with respect to a system of punishment, but we must bear in mind the sting in the tail in the last sentence. Could this be used to argue that certain punishments should not be used? Certainly when Raz later refers in passing to punishment he points out that certain actions (offences) should not be punishable by virtue of the autonomy principle:-

> "First it (coercion) violates the condition of independence and expresses a relation of domination and an attitude of disrespect for the coerced individual. Second, coercion by criminal penalties is a global and indiscriminate invasion of autonomy. Imprisoning a person prevents him from almost all autonomous pursuits. Other forms of coercion may be less severe, but they all invade autonomy, and they all, at least in this world,do it in a fairly indiscriminate way.

> That is, there is no practical way of ensuring that the coercion will restrict the victim's choice of repugnant options but will not interfere with their other choices. A moral theory which values autonomy highly can justify restricting the autonomy of one person for the sake of greater autonomy of others or even of that person himself in the future. That is why it can justify coercion to prevent harm, for harm interferes with autonomy. But it will not tolerate coercion for other reasons. The availability of repugnant options, and even their free pursuit by individuals, does not detract from their autonomy. Undesirable though those conditions are they may not be curbed by coercion."

I have quoted the above at length because it not only gives Raz's philosophical foundation for punishment which involves a resort to utilitarian principles, but also because it shows how his philosophy itself would affect the content of what is validly punishable. In this respect it differs from other theories of punishment and at the same time supports his libertarian stance.

Seen in this light he maintains the harm principle allows perfectionist policies so long as they do not resort to coercion.[38] Most interestingly he feels that manipulation should be subject to the same condition as resort to coercion but regrettably this is beyond the remit of the present work. But he also feels that it gives us a very good indication of the way the relative importance of harm is to be judged, - i.e. by the degree of restriction of one's autonomy that it represents. However he is forced ultimately to rely on the fact that 'Autonomy requires a public culture and is consistent with a tasteful rather

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[38] M. of F. p.420.

than a vulgar and offensive environment'. Such a dependence might well be argued to be a fundamental weakness and he gives no rules for defining such highly charged variables as tasteful and vulgar.

CHAPTER 7. Raz on Rights and Conflicts arising.

Finally in this part there is one area which must be considered in detail, and this is Raz's approach to 'Rights'. It is a field in which there are differing views which may be held without necessarily altering the remainder of one's views on the matters previously discussed. Nevertheless the philosophical approach taken will reveal fundamental attitudes which almost certainly will affect the manner of extrapolation towards a theory of punishment, or any other extrapolation of Raz's philosophy. This has been treated as a separate chapter because the subject as treated by Raz appears fundamental to much of his thinking. Unfortunately his treatment of the subject makes this part of his philosophy exceptionally difficult.

Raz uses the word 'Rights' in an entirely general sense and often encompasses meanings as diverse as power, freedom, liberty, and even on occasions authority or justification. His is, inter alia, a 'rights' based philosophy. As such it has a potentiality for affecting his conception of what is, or may be, criminal and thus punishable. For example, any inherent freedom cannot properly be the subject of penal legislation, and we have already seen, (in chapter 3 section C, ante) that Raz's philosophy is capable of putting limits on what may properly be the subject of coercive legislation. This is

what separates Raz from the pure positivist. He spends some time in his writings attempting to find a path towards reconciling positivism and the natural law approach, and while he quite readily admits he has not entirely succeeded it is obvious that he feels the attempt should be pursued. But it is the introduction of his libertarian basis as a starting point for many arguments that leads to certain conflicts with the stricter positivist approach which he is loath to relinquish completely.

Therefore in this chapter I shall point out areas where opposing views may be taken. In part III the extrapolation, I shall be following the line taken by Raz, and developing its advantages. In part IV, I shall assume the role of devil's advocate to show where the arguments against Raz's philosophy could reveal a weakness which might affect the application of a system of punishment.

It is thus imperative that this highly confusing part of his philosophy be analyzed and this preface is an attempt to provide a background to the area that gives rise to the problems. First it must be stated that Raz attempts to provide a comprehensive definition of "Rights" upon which he attempts to base other things. 'Rights' and 'Interests' are central building blocks of his thinking. The way he goes about this is however open to strenuous objection from another quarter, neither positivist nor natural law theorist, but purely jurisprudential, and it reveals, in my submission, a possible fundamental weakness in his philosophy; the reasoning being, if his concept of rights affects what is properly punishable, and that

concept is flawed, then so may any resulting philosophy of punishment.

The problem stems from a position he took up in his earliest writings, namely *The Concept of a Legal System* at pp 179 - 181 where he launched, uncharacteristically, the most vehement attack in any of his writings, against Hohfeld, maintaining, inter alia, that Hohfeld's ideas made the understanding of 'rights in rem' impossible[1]. Now this would have been of no real matter, had the point been confined to a mere understanding of 'rights in rem'. Unfortunately it appears to have led Raz thereafter steadfastly to have ignored anything Hohfeld had to say.

The disadvantage of this is, that whatever views one may hold about Hohfeld, (and many who have studied his work take him to have been one of the undisputed legal geniuses of the century) there is no doubt that his work on the jural relations of the various uses of the word rights, laid the grounds for clearing up a great many of the vague areas surrounding its use, if nothing else. He never claimed that the definitions he used were absolute or invariable, but they have nevertheless been accepted and built on. Of course his approach was primarily that of a lawyer and his conclusions are possibly all the stronger for that. Moreover Raz made a specific point that he wished to keep as close to the common understanding of law as

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[1] In practice Hohfeld's ideas made the comprehension of rights in rem totally understandable, and Kocourek, the doyen of writers on jural relations, accepts and builds on the work of Hohfeld. Not only that but both Hohfeld and Kocourek are cited with approval in the leading books on jurisprudence, whereas Honore, apparently the source of Raz's attack, is not cited at all.

possible, but subsequently proceeded to ignore the well established relationship of certain terms.

HOHFELD on 'RIGHTS'.

The full argument for the alternative approach as defined by Hohfeld, and developed by Kocourek, together with my own extrapolations with respect to the priority of power over rights is set out in Annexe A, so as not to interfere with the development of a Razian theory. However it is necessary at this point to define the problem. In 1923 Hohfeld was concerned that the word 'rights' was used in a generalized way to cover a number of different meanings; meanings which actually involved different legal concepts. In order to clarify the subject he looked at various words lexicographly and legally and defined certain usages (which he did not maintain were exclusive) but which have been largely accepted and developed - in some cases, such as by Kocourek, to the point that Kocourek's analysis is almost assuredly definitive. The main part of Hohfeld's work which is of concern to us is that he defined the principle use of right as signifying a claim (thereafter referred to as a right or sometimes for clarity a claim-right) and it was only such a claim-right that had a correlative Duty attached to it. He divided other uses of "**rights**" into those effectively meaning a **Privilege** (or **Freedom** or sometimes a **Liberty**, these three being almost, but not quite, synonymous); **Power**; and **Immunity**. He then showed that these have **different** correlatives which he listed as follows:-

Jural Correlatives	{Right	Privilege	Power	Immunity
	{Duty	No-right	Liability	Disability

Of these I consider there is a fundamental difference between rights (claim-rights) and Powers. Extrapolating from Hohfeld I believe it is possible to show that Power is prior to Rights.[2] In any event by re-arranging the layout it is possible to group Hohfeld's definitions in such a way that they may be shown in two separate groups as follows:-

I. A RIGHT is a claim v. another [+ or -]
The exercise of a claim-RIGHT invokes a DUTY (Correlative)
Lack of a RIGHT is a NO-RIGHT (Opposite)
Exemption from a DUTY is a PRIVILEGE

II. A POWER is the ability to alter Jural Relationships
The exercise of a POWER invokes a LIABILITY[+or-] (Correlative)
Lack of a POWER is a DISABILITY (opposite)
Exemption from a LIABILITY is an IMMUNITY.

Thus it may be argued that it is extremely confusing to refer to powers as rights. Unfortunately in general use 'Rights' is often used to refer to a claim-right, or a privilege or a liberty (the last two terms often being used interchangeably) but these latter are not the same as a Claim-right. The exercise of a Privilege or Liberty does not invoke any duty and this is where the confusion comes in. We are, in fact, talking about words which have totally different jural ramifications). For example; One may have the power to delegate, but One does

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[2] See Annexe A post.

not have the right (claim-right) to delegate (there is no correlative duty on anyone); One has the privilege of walking in one's own garden (there is no correlative duty on anyone else), but one has the right to require others to keep out (and they have a correlative duty to keep out). The purpose of this is that it is necessary to exclude the principle use of right which is of course - claim-right in cases where it is not appropriate. In that sense 'the right to delegate' is the upward claim that one has the authority e.g. under a statutory power, because that would involve the correlative duty of permitting the delegation to take place. So often words are used interchangeably but wherever there is a doubt that could cause confusion it is best to try to use the word that makes the distinction clear. A fortiori to use 'right' when we are referring to 'power' is even more confusing if one accepts that power is in fact prior to rights.

It is necessary to make the above points clear because Raz will have none of this. He not only claims his definition is neutral concerning such details as to what type of right it is but aims to encapsulate the common core of all rights. But as Hohfeld pointed out all relations between two people involve different standpoints. It is fair to ask therefore, How can there be a common core? It is rather like trying to establish, for example the common core between the moon viewed from earth and the earth viewed from the moon? Kocourek in fact provides us with a viable answer.[3] I believe this is a fundamental mistake on

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[3] See Annexe A, post.

Raz's part - it is rather like trying to produce a neutral definition for an implement for playing a violin, something that propels an arrow, a slip-knot, a ribbon, the sharp end of a boat, and bending one's head forward, simply because the word 'bow' is used for all. In practice Raz spends some time re-inventing the wheel and ends up saying things such as "I shall call this a Liberty right".

RAZ ON RIGHTS (General)

The Main features

In *The Morality of Freedom* at p.166 he gives a definition

> "'X has a right' If and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."

One notes in passing that in a footnote he attributes this partly to Bentham, Dworkin, McCormick and K. Campbell.

At the bottom of page 167 he says Rights are the "grounds for duties". This is somewhat different from being the correlative of duties. Next he considers the duty of an employee to follow the employer's instructions concerning the execution of his job. This he says is grounded in the employer's right to instruct his employees.[4]. He goes on "Thus the employer's right over the employees is a ground for his **power** to instruct them."

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[4] Actually it may also be explained as grounded in the employer's power to instruct his employees and their correlative liability to follow instructions. This power is inherent under the laws of employment and, because there is a contract of employment, written or oral, it may also be viewed as a claim-right under the contract. It is therefore a very difficult example but it confirms Raz's point that legal and moral considerations are involved.

Thus we have the right as a ground for not only duties but power. This is of course quite alien to a Hohfeldian who, at best if they were convinced (as I am) that Power is prior to rights, would claim that rights could therefore not be a ground for power[5]. Unfortunately Raz says "To simplify I shall not dwell specifically on rights as the grounds of powers". This is a considerable misfortune. It would, one is forced to suggest, have been much more useful if each of the available words had been dealt with separately and confined to their own field, as did Hohfeld, whereupon it may have been possible thereafter to seek a common factor and hence a generic background (though I would deny the possibility of achieving this). As it is, although Raz alleges the connections he fails to go further.

He then proceeds to

Core Rights and Derivative Rights.

The example Raz gives is where I own a street of houses:

a) Having bought each one in a separate transaction &

b) Having acquired the whole lot by inheritance from my grandfather.

In case a) Raz says my statement that I own a house in the street does not derive from my ownership of the whole street even though the statement that I own the street entails that I own a house in it.[6] He goes on that

> "in attempting to provide a normative justification for my rights I have to refer to the individual transactions by which I acquired the houses. Had I acquired the whole

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[5] Here the explanation could be that Raz must be talking about another use of 'right' namely as 'authority' so that the authority grounds the right to do something.

[6] This latter is to my mind completely irrelevant; it merely states the obvious that owning the street necessarily includes (rather than entails) owning each house. Also I think he is trying to work backwards from the larger 'entailing' to the smaller 'includes' to show a derivation. In this respect I would argue that 'include' and 'entail' are two entirely different things.

street from my grandfather the situation would have been reversed".

Again I would be forced to argue that the fact is that the rights in respect of each house remain the same whether he owns the one or the whole street. So owning the whole street merely is a shorthand for I own rights to A, B, C, ... etc. The ownership may or may not have been as a block but it matters not because just as Raz would say the rights of No 7 say are derived from his grandfather having left him the street, so the position would be exactly the same if Grandfather had left him only No.7. I suspect Raz is looking at it as if there is some right in owning the street, from which some other right derives to each house. The rights to the street are merely those comprised of the sum of the ownership of the houses. If I have a row of bricks and throw one at you, you will not be hit by a derived part of my row of bricks. Nor does it matter a jot or tittle if I went out and bought them individually from builders merchants or found the whole lot in great aunt Sarah's reticule.

Next we come to Raz standing on his hands (p.169). Now says Raz .."the right to walk on ones hands is one instance of the general right to Liberty. The right to personal liberty is the core right from which the other derives". Now I can see such a basic statement having a considerable impact on punishment. The contra argument is that Personal liberties amount to a cluster of liberties to which we may from time to time be entitled. They do not however interact in a causal fashion as would be the case

if they were derivatively related. For example, it was, I believe, formerly permitted for the owner of a Hackney carriage to relieve himself against the nearside rear wheel of his carriage. Such privilege no longer exists. That may indeed diminish his total liberties but does not affect his liberty to walk on his hands.

Next Raz says the right to destroy the cigarette he holds derives from his ownership. Again I would say this is not so, and I would suggest he does not try it with a schedule II listed building (though many would like to!). The right to destroy the cigarette is a freedom (liberty) which is unrestrained. It does not derive from ownership or I would not be at liberty to destroy the discarded smoking cigarette in the gutter without first establishing ownership (which would involve taking it to the police, claiming it was abandoned, waiting six months for the former owner to claim it, and then claiming it (or by now its remains!) from the police.

It is easier, in my submission, to think of it as a matter of being at liberty to do whatever is not prohibited. In fact it would be more accurate to say one has the privilege (Hohfeldian) of doing whatever is not forbidden. One may be at liberty to do what is forbidden, e.g. pull down your schedule II listed building, but in the latter case you will have to suffer the consequences. So regretfully I must reject Raz's concept of core and derivative rights at least when he is talking of privileges which is what his examples were. However it is quite possible that there are claim rights which may be derived

from core claim rights eg a claim for distraint may be based on a core claim for debt. However I hope I have illustrated that you cannot by enlarging the word rights quietly slip privileges under the same rule to reach some general principle. Hohfeldians do not permit such philosophical slights of hand.

The correlativity of Rights and Duties.[7]

Raz says that it is sometimes argued that for every duty there is a corresponding right but that this does not accord with his definition. Now duties are the correlative of Hohfeldian claim rights and in this sense it is possible to agree with Raz. He is right to criticize Brandt's claim that for every right there is a duty to guarantee the enjoyment or possession of the object of the right. The example he gives is that 'A right to personal security does not require others to protect a person from all accident or injury.' He talks of the dynamic aspect of rights and a right leading to the holding of another to have a duty because of the existence of certain facts relative to the parties. Of course this is so; Rights (ie claim-rights) and duties are dependant on the relationship of the parties. Rights do not exist in vacuo. Raz recognizes the problems caused by his definition but has not seen that it was because one definition cannot encompass the eight ideas of claim-Rights; Freedoms, Privileges and Liberties; Duties; Power; Liabilities; Disabilities; no-rights; and immunities - not to mention

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[7] M. of F. p. 170 et seq.

'Authority' which he also refers to sometimes as a right - or the fact that, as I have illustrated, there is even a subtle distinction between freedom and liberty.

However as we have already seen Raz uses rights in a compendium sense. I believe he is attempting to use the word in a generic sense but it is my argument that he has singularly failed to make his case. Because he does not follow the above simple line Raz is forced to deal with the question of:-

Holding individuals to be under a duty.

According to Raz's definition - If a person has a right then a certain aspect of his well being is a reason for holding others to be under a duty. This is different from a) Rights are a reason for judging a person to have a duty and b) Rights are reasons for imposing a duty on him. According to Raz they are more the former than the latter. He goes on 'Rights are part of the justification of many duties providing there are no conflicting considerations of greater weight.

Rights and duties.[8]

Here Raz says Rights are the grounds of duties in the sense that one way of justifying that a person is subject to a duty is that this serves the interest of another's right. The fact that rights are sufficient to ground duties limits the number of rights one has. Only where one's interest is a reason for another to behave to protect or promote it, and only when the reason is of the

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[8] M. of F. p. 183.

peremptory character of a duty, and when the duty is for conduct making a significant difference in the promotion/protection of the interest does the interest give rise to a right. Thus we now have

> X has a right, if and only if X can have rights (which can be based on the instrumental value of the interest of X), only if his intrinsic well-being is of ultimate value and, all things being equal, his interest is a reason having the peremptory character of a duty for another to behave in a way which makes a significant protection/promotion of the interest of X.

But this is not sufficient. For the right to exist Raz says the right must be of sufficient reason against conflicting considerations and if these outweigh the other reason there is no right.

So we get to the following:-

> X has a right, if and only if X can have rights (which can be based on the instrumental value of the interest of X), only if his intrinsic well-being is of ultimate value and, all things being equal, his interest is a reason having the peremptory character of a duty for another to behave in a way which makes a significant protection/promotion of the interest of X, provided always that conflicting interests to those of X do not defeat the interests of the would-be right holder or weaken their force so that no one could be held to be *obligated* (sic) on account of those interests and where the conflicting interests override those on which the

right is based on some but not on all occasions, the general core right exists but the conflicting considerations may show that some of its possible derivations do not.[9]

The Hohfeldian criticism.

The drawback to Raz's contention above is that, while it is intelligible if you accept the idea that rights are based on interests which are the grounds for duties, it runs into difficulties if you take it further. Where it falls apart is when you come to consider what interests are. If you accept that an interest must be a desired benefit (or even if you don't for that matter) you are faced with determining conflicts of interest in order to assess the ultimate existence of the right. And just how do you do that? on utilitarian principles, or as I suspect you must, on some concept of Justice. And what if your concept of Justice differs and gives a different result from mine or Raz's?

Moreover we must remember that this is supposed to be a generic definition so we ought to try it substituting **Privilege** and then **Power** and **Immunity**. This results in privileges, liberties, power, and immunities being dependent on interests that give rise to duties. It seems that interests must in practice be prior to duties and that it is the duty which is in fact prior to the right because as Raz has pointed out if other interests defeat those of the proposed right holder to the point

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[9] cf. M. of F. p. 183-4.

where there is no duty then there is no right. So Rights cannot be the grounds for duties but Raz says they are. Nowhere does Raz provide us with a solution to this paradox.

Moreover, he says that as rights ground duties it limits the number of rights one can have (183). Here he appears to have merged interests into rights to ground duties forgetting that he had maintained that a conflict of interests can frustrate the formation of a duty, which is what creates the right (in the putative right holder). If he had taken the approach that interests gave rise to rights which then grounded duties it would at least have followed the same logic, though in reverse order. To be more certain I have attempted to reduce this to a flow process chart which will show the short circuit up better than words.

We have to consider

	Right of X	and	Duty of Y
1.	The Interests of X	v.	The Counter Interests of Y et al

2. Where

The Interests of X > The Counter Interests

i) then there is created

ii) a Duty in Y to act to promote

iii) The interests of X

this in turn promotes

A Right in X

3. Where X's Interests < the Counter interests there is no obligation (duty) i.e. the link i) - ii) fails, and therefore the right fails. At no time does Raz suggest any other course. It is the failure to support the DUTY which causes a breakdown.

Returning to Raz's arguments (at 184/5) He says there are two further points which are crucial to understanding the priority of rights to the duties which are based on them, remembering, he is careful to add, that not all duties are based on rights. He says

1. One may know of a right and of the reasons for it without knowing who is bound by the duties. eg a right to education without knowing who is under a duty to provide it, the parents or the state.[10]

2. The implications of a right and the duties it grounds depend on additional premises. These cannot be determined in advance, therefore they could give rise to a previously unpredicted right. Therefore rights have a dynamic character and are not merely grounds for existing duties, but "With changing circumstances they can create new duties."[11] So now we have rights creating duties, which does not accord with his definition.

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[10] This actually could be used contra to illustrate that rights do not found duties, they merely define them. In any event the right he is talking about is a creature of the normative law, prior to the establishment of which one was free, inter alia, to shove children up chimneys (U.K.) or put them in carpet factories (Pakistan).

[11] M. of F. p. 183 (top).

Liberty & Rights.[12]

Raz claims that the importance of rights is emphasized by moral individualists who regard them as a protective shield against moral demands in the name of the well-being of others. The idea of a right to personal autonomy is attractive because it establishes a limit to what can be demanded from an individual in the name of the communal welfare and collective goals. But if rights do not represent the special force of the interests of the right-holder then they cease to be a protective shield.

The well-being of the community is also a matter of rights, rights to a decent standard of living etc., but while there is nothing wrong with these ideals, if rights is given such a weak meaning it looses its ability to give the right holder's interest special weight when it conflicts with other things such as the community's interests.

> "The point I am making is that if 'rights' comes to acquire such a weak meaning then it loses its ability to mark matters which are of special concern because of their importance to the right-holder, and which give the right-holder's interest special weight when it conflicts with other interests of other members of the community."[13]

While there is no doubt that the concept of interests in personal well-being and autonomy giving rise to duties in others, which duties give rise to rights, is exceptionally ingenious, an aspect which will be followed

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12 M. of F. pp. 245-263.

13 M. of F. p. 250.

up in part III in the extrapolation. There are, however, counter arguments.

For instance, it could be argued that Raz has to try, in effect, to limit the devastating side effects of his contention that rights are based on interests. Unless he limits it, the interests of the community would create rights which for a utilitarian at least, but possibly for others, would destroy the individual right to autonomy and the whole pack of cards would come tumbling down. Moreover things such as 'a decent standard of living' are objects of desire - they cannot be rights[14], save only insofar as they may have been incorporated into normative law. The counter arguments of what I call 'Raz's theory of rights' will be examined under part IV.

Legal Rights

Raz takes up his argument with respect to Legal Rights in his later book on *Ethics in the Public Domain* at chapter 11. As he points out the approach to legal rights is not universal - some take Hohfeld as the starting point for dealing with rights in general, others such as Feinburg and Dworkin base their analysis of 'legal rights' on rights in general.[15]

However Raz restates his definition; saying that a person (or group) has a right, is equivalent to saying that an aspect of their well-being (their interest) is a

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[14] As indeed Raz himself showed when dealing with equality.(Mor. of Freedom ch 9).

[15] In practice it must be pointed out that Hohfeld's claim-rights can only be based on rights derived from the normative law, and as such do not include moral rights (which I prefer to refer to as Moral Obligations). - See Kocourek in Annexe A, post.

ground for holding another to be under a duty. His approach is that moral rather than legal rights are the model for the general explanation of the concept and that it applies to legal rights.[16] First he points out that some non legal rights, e.g. Institutional rights, resemble legal rights. These are rights conferred by political parties, trade unions, sports associations etc. There are some other rights that are custom based. They derive from rules and conventions observed in a community. Whereas Institutional rights are custom based, not all custom based rights are institutional.

There are other rights that are arguably not custom based, such as fundamental human rights. Believers in those rights believe that people have such rights even in societies where such rights are not recognized or respected. Now although Raz does not commit himself to this view as his concern is with legal rights (and indeed his criticism of Brandt referred to earlier would incline him against it), it does illustrate a striking point and one which I refer to in part IV as the Myth of the Right to Freedom.

Raz, while citing the legal system as an Institutional normative system, points out that it is primarily concerned with rules which it is willing to enforce and to employ sanctions for disregarding them. Since litigation usually involves the enforcement of rights and duties he claims that some writers have concluded that all rights are no more than the possession of a normative

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16 *Ethics in the Public Domain*. p.238.

power to control duties. They have looked for non legal analogues of legal remedies. This approach he claims gives a distorted view of morality.[17] In this he is quite right as one of the examples he gives illustrates -

> "Many people believe in the right not to be deceived by members of their family....But their belief is not merely false but incoherent if rights consist in controlling another's duty by being able to punish its violation or demand compensation."[18]

It should be noted at this point that the type of right to which he is referring would be analogous to a Hohfeldian right in that it implies a correlative duty on the members of the family not to deceive. There are many moral rights with their correlative duties which are partially analogous to legal rights. The prime difference is simply that they do not have the added backing of the law and its sanctions which is why I prefer to refer to them as moral rights and obligations because moral rights are not enforceable[19]. The dispute however is not with Hohfeldians for no Hohfeldian (or certainly not this one) would equate the presence of a correlative jural relation with the idea that rights consist in 'controlling the duty'. Raz does not cite the source of such thinking but is quite right to condemn it. Again it must be pointed out that correlation is a perspective not a causal relation.

Raz identifies rights, he says, by their role in

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17 Ibid. p. 241.

18 Ibid. p. 242.

19 Even though in some cases failure may be the subject of such strictures by the society that the moral code is rarely broken.

practical reasoning

> "They indicate intermediate conclusions between statements of the right holder's interests and another's duty.... a duty to take some action that will serve that interest....One justifies a statement that a person has a right by pointing to an interest of his and the reasons why it should be taken seriously. One uses the statement that a right exists to derive (often with the aid of other premises) conclusions about the duties of other people towards the right-holder."[20]

He then adds, in Two footnotes that -

> "one cannot specify what importance those reasons must assign to the interest except circularly by saying 'sufficient to justify the conclusion that a person has a right'. One can and should of course, develop a theory of which interests are protected by rights and when."
>
> "A duty is towards a certain person if and only if it is derived from his right"

I think it is fair to say that it is astounding that the fatal admission contained in the first should have been relegated to a footnote. But as he points out his theory of rights does not rely on any institutional features of law. However law can be shown to be a system of practical reasoning[21] because many of its rules are 'nested in justificatory structures'. Nevertheless it is Raz's view that the existence and content of the law can be determined without resort to any moral argument. This is of course

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20 *Ethics in the Public Domain.* ch.11. p. 243.

21 "First some legal rules justify some others. In this they illuminate their point and purpous. The former are invaluable guides to the interpretation of the latter, and they help to decide what weight to give the latter when these conflict with others. Secondly, legal rules constitute legal reasons for developing the law in certain ways." *Ethics in the Public Domain* p.249.

consistent with his positivism.

He continues that people come to have legal-rights in the same way that they come to have duties, powers, liabilities or any other legal condition. Legal-rights statements are either pure or applied. They are pure if its truth is established by reference to the laws alone. They are applied if their truth can be established only by facts which include references to facts other than the law, but it must be remembered that both are subject to Raz's sources thesis, i.e. that their truth can be established without the use of moral arguments.[22] He points out that if a legal rule creates a legal right its consequences are that there is a duty on others to protect an interest of the right holder. Such duties may be directly established as legal duties, e.g. where A has a right to £X against B, or it may be the case that the right can justify the duty only in conjunction with other moral premises. But even though these may be moral premises it is the legal right which is the reason for making it into a legal duty. Finally he confirms the view that absence of a duty is not a right, so that one does not have a right to do those things which one is not under a duty not to do. This I would understand gives rise to a Hohfeldian privilege.

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[22] I would maintain that as much of the law is Judge made and that in making that law the courts apply equitable rules which rules are often based on justice which I would maintain is governed by moral arguments, Raz's case irretrievably founders, but it is not the purpose of this paper to argue Raz's theory of law. Suffice it to say that I regard it in the same light that Wittgenstein regarded Cantor's Theory of transfinite numbers.

RESUME and LINK TO PART III.

In part II we have considered various aspects of Raz's philosophy. First with respect to Law and Legal Systems to establish the basis of punishment within a Razian view of a legal system. We noted his positivism and acceptance of Duty imposing D-laws and Sanction imposing S-laws, and the manner in which he regarded the breach of a necessary regulation as a breach of duty, i.e. the sanction gave rise to the duty. In this respect we noted that Raz regarded the sanctions as (to some extent) replacing the critical reactions of society, i. e. that it was not a *per se* duty to obey the law to which he was referring. (Later we noted his arguments that there was no such duty). This it was felt could have derivative effects on any theory of punishment.

Next we reviewed his concept of legal authority particularly the connection thereto of the concept of validity. He rejected the classical explanations and chose the path of developing the view that Authority is normative power. This approach is a more purely philosophical approach than some of the classical approaches which he rejected. This in fact led to one of the most exciting aspects of his philosophy, the attempt to reconcile positivism with the natural law theory. He is anxious to include morality in a consideration of law though not to the extent of the natural law theory. He remains a positivist but one anxious to reconcile natural law and positivist approaches where possible. While he admits that he has not

effected a reconciliation, his libertarian approach will nonetheless have an effect on any theory of punishment.

We proceeded to examine Raz's views with respect to Authority, Efficacy, and Validity and the conditions necessary for the law to command respect. Lastly in this regard we considered his views on the obligation to obey. Of particular interest was the basis of his philosophical approach - The rights, interest based philosophy with its emphasis on autonomy, well-being, and freedom.

Thus armed with Raz's justification of various viewpoints we proceed to part III in which I have sought to extrapolate a Razian philosophy of punishment. First we will examine Raz's philosophy in order to extract from it those things necessary to meet the criteria of part I. We shall seek a philosophical justification of punishment and some idea of the application of Raz's philosophy to the difficult areas of Deterrence, Retribution, and Correction. In the second section of part III we shall test the extrapolation by raising a theory using Raz's methodological approach. In both sections of Part III it is my intention to put the Razian case. Although I shall note some objections or areas of controversy, these will not be developed but merely noted in passing to prepare us for part IV in which we will examine the contra case.

PART III

EXTRAPOLATION & METHODOLOGICAL DEDUCTION.

CHAPTER 8 EXTRAPOLATION

The concept of extrapolation as used herein requires some explanation. It is at once investigative, synthetic, and testing. The idea is to test the subject, in this case Raz's legal philosophy, by moving from the known to the unknown by developing it into a new field. While Raz has written a great deal on theories of legal systems and separately on Morals and Ethics he has written virtually nothing on the subject of punishment. Punishment is a vexed subject with a range of exponents of various theories, and areas such as retribution, in which there seems to be little agreement. The idea therefore of deducing a potential Razian approach would, it was hoped contribute to the field.

It was also felt that the idea of extrapolation would in this instance provide three research opportunities. The first, covered in part I, was analytical to determine the pre-requisites of punishment and the pre-suppositions required without favouring a particular theory. The second, covered in part II was to analyze Raz's works and to extract those areas which had a bearing on the criteria established in part I. The third, and perhaps the part most open to error would be the extrapolation.

Extrapolation may be performed in two ways. The first, and most common, is the superficial extrapolation i.e. to take a person's conclusions and to simply build on them, e.g. given Raz's views on Civil Disobedience, Conscientious objection, and the part Morality plays in the

validity of laws, what would his view on X be? The second, and more complicated, the analytical extrapolation, is to try, as I shall here, to develop a theory of punishment by building, not directly from his conclusions, but from the foundations of his philosophy. The necessity for this more complicated approach is that, while he may start with a given approach, he may well need to make certain assumptions in order to reach his conclusions. Such assumptions may or may not be germaine to any extrapolation and I would submit therefore that a true extrapolation must start from fundamentals and not simply from specific conclusions.

Nonetheless we are in any extrapolation concerned with moving from a position taken by Raz, and moving from this e.g by combining his thoughts on a parallel or relevant topic whereby we come to a new position. One of the problems here is that it is all too easy to make assumptions based on one's own inclinations which could be quite different from those of Raz. Therefore the question of testing the extrapolation arises. Is it substantially accurate? Does it work? Here we are fortunate because Raz has given us a very good guide in *Practical Reason and Norms* as to how he approaches various problems. We have therefore a difficult but useful means of providing a check on our extrapolation. This forms the second section (chapter 9) of Part III. Here the approach is quite different from, and will be tested against, the method used in Chapter 8, and it will show up the areas in which philosophical assumptions not methodologically deduced may have been made. There as we shall see it is not necessary to utilize his conclusions,

but rather to pursue his method and apply it to the field of punishment.

There is one further advantage of treating a philosopher's work in this manner, and that is that it tests the strength of the derived foundations which have to be built upon - particularly where this can be tested against a methodological approach.

In order to establish the extrapolation various aspects will be examined as follows:-

I. General basis

1. The Legal relationship.

2. Philosophical Justification

3. Reasons for Obedience; the connection with morality.

4. Conditions necessary for the law to command respect.

5. Civil Disobedience.

6. Conscientious objection.

II. Detailed Application to punishment

a) Definition.

b) Necessity.

c) Purpose:Deterrence, Retribution, and Reform.

III. Further Aspects

1) Proportionality.

2) Law, Punishment and Justice.

3) Authority.

4) Autonomy.

I. GENERAL

1.The Legal relationship.

Raz starts from Kelsen's concept of a Norm and the four ideas that are basic to the concept of a Norm as an imperative, viz

Norms are:-

1) Standards of evaluation,

2) Guiding human behaviour,

3) Supported by standard reasons for compliance in the form of some evil ensuing upon disobedience, and

4) created by human acts intended to create Norms.

This gives rise to a standard with its concomitant advantages and disadvantages and these include, according to Raz, the personal authority of the author of the norm. The standard gives a means of evaluating acts within its purview and will be a reason for people to choose an act having a preferred value. While he does not accept Kelsen's basic Norm, which Kelsen regarded as Transformation of Power into Law, he goes so far as to state that legislative power is the ability to create and repeal laws. Thus he appears to accept the view that power is prior to law. Hence he has no difficulty with the creation of Laws and the corresponding S-laws or sanction laws.[1]

He regards the sanctions of the law as a characteristic fact giving rise to the existence of duties. But he stresses that it is characteristic of the law that the violation of legal duties 'are encountered by critical

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[1] I have dealt separately with his suggestion that particularly with respect to court officials there can be legal duties not backed by sanctions.- See Part IV.

reactions even from people who regard the law as bad'.[2] It is the view of many that the current absence of critical reaction in many cases today in fact weakens the likelihood of the law being obeyed. However Raz does not refer to this but confines himself to stating that the absence of such a reaction does not eliminate the legal duty. Rather he feels the critical reaction 'of ordinary citizens' may be a factor in determining the character of the law, e.g. by "helping to distinguish between prohibiting an act and taxing it".[3]

It is important to note Raz's view because this view could have a most important effect on what might be deemed criminal. This will be reinforced as we shall see by his inclusion of morality as a factor in the validity of any law. Thus already we are picking up a hint of what his attitude might be.

He also maintains that the critical reactions of the courts, as shown in their reasons for judgement, is important in distinguishing between a sanction and a coercive administrative measure (e.g. compulsory purchase). This proposition is far less contentious. The disadvantage inflicted on the person is the sanction and this may take the form of a requirement to pay compensation, as

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[2] This used to be true some 50 years ago. Then, the proposition that the BBC celebrate a birthday with one of the Great Train robbers would have met with a mass reaction of furious outrage. This is no longer so. Thus it can be seen that critical reaction, and indeed morality, changes.

[3] C. of L.S. p. 152. Now this seems to be a quite extraordinary proposition, i.e. that the character of the law might be determined, even in part, by the critical reaction to it. One would have thought that the character of the law was fully determined by those making the law. First of all the state determines whether it is to be a criminal or civil offence etc. Thus I would suggest it is just the opposite - the type of law may influence the critical reaction and not vice versa.

retribution, prevention, deterrence or correction, i.e. that both criminal and civil law involve sanctions.

So with respect to the criminal law he recognizes the motives of retribution, prevention, deterrent, and correction, and although he does not go into them in any detail, it is clear that he recognizes their function within the sanction. Thus Raz's philosophy recognizes that there should be sanctions designed, along with critical reactions, as the "characteristic fact giving rise to duties".

There is, in my view, some conflict here to which I have already referred and which I expand in part V. (i.e as to situations where the sanction and the critical reaction are in conflict) but this, though a weakness, does not eliminate the idea of a theory of punishment within his concept of law. According to Raz the criminal law sanctions and critical reactions are designed to give rise to duties to obey the laws. The imposition of these duties is the most important way in which the law fulfils its functions.

Thus we have established that Raz considers

1) The imposition of duties as the prime manner of enabling the law to fulfil its functions,

2) Its function is to guide and regulate human behaviour.

He postulates that punitive relations are internal relations and that in every system there are such internal punitive relations. Raz considers his D-laws are legal norms prescribing behaviour. These are themselves a special case of O-norms, which depend on 'widespread known and uniform reactions to human behaviour'.[4] Like Hart, Raz considers

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[4] Thus we see how the critical reaction is included as a fundamental.

these D-laws to be prescriptive rather than imperative.

Again in his consideration of Authority he accepts that it encompasses the right to command and the right to be obeyed. Thus far his philosophy supports without question the concept of a society governed by laws having also punitive inducements to promote conformity, albeit with the reservations we have noted. Moreover, for him, these punitive laws are not the sole reason for obedience. They form part of the system of reasons (exclusionary, protected etc.) for obedience which he has set out. Here he maintains that Authority is the ability to change reasons, Power the ability to change protected reasons.

He is most anxious to relate law to Morality though not in the manner of the natural law theorist but rather that of the modified positivist, or perhaps more accurately the libertarian positivist. This too will affect his attitude towards punishment. Indeed we should start with his concept of the society. Raz is concerned, not with the old unified "imperial" society of the type in existence in Salmond's day, but rather with a pluralistic culture which enables people to "unite in support of some low or medium level generalizations despite profound disagreements concerning their ultimate foundation". This may well weaken the ambit of what today we consider to be punishable criminal offenses (for example, Bigamy).

His views here are important to punishment because it may well be that we could reach the conclusion from these that were he to turn to a serious consideration of the details of punishment, his philosophy would require a review

of those offenses which are currently deemed criminal and that some of these, e.g. bigamy, would have to be re-classified, possibly even as a civil offenses. Is this a valid conclusion? Does this potential conflict constitute a flaw? The answer is that it does not. Raz could within the parameters of his philosophy deal with this. He could resolve the conflict by relating the unlawfulness of having more than one wife to the vows taken at the time in accordance with the religious or civil standards of the contract of marriage. Or to put it more simply, as an example, the law could be such that a second marriage e.g. for a Muslim could be valid provided the parties knew of the circumstances and were in moral and religious agreement with it. Bigamy would still exist as an offence where the first marriage was intended to be monogamous, or indeed where the second wife was in ignorance of the situation. In this sense it is not that the offence would stand, with exceptions to it, which would be hard to justify, but rather that the offence would be subtly changed so as to encompass the variations brought about by genuine moral beliefs.

Thus while Raz's views give rise to an apparent conflict this could be resolved. I am not implying that Raz would react as I have shown in the above example, merely that such a solution is possible within the confines of his philosophical parameters. It would on occasion mean that the criminal law itself would have to be varied, but it would in no way be undermined. In fact it could be argued that his philosophy could lead to a more flexible approach to a theory of punishment. That flexibility would, no doubt, give

rise to its own set of problems for there are always possible areas of direct moral conflict e.g. freedom and the fatwa. However we are faced with such problems at present, and while Raz's approach, although arguably beneficial in some respects, could even cause some problems in others. Even so no-one would argue that to be a valid system it should cure all our problems.

While we know that Raz has accepted the concept of coercive S-laws he is very concerned with the concept of wrongful coercive threats. He accepts that the law is coercive and that the threat of punishment is intended to be coercive, but he maintains that the punishments must, in the main, not be wrongful. We have seen that he makes the case for 'in the main' because the Agent accepts the laws as reasons for compliance. This the Agent does because, in most cases, they work out to his long term benefit in a manner which makes their acceptance more reasonable than an attempt to weigh each individual case on its merits (not all of which may be readily perceivable). This is a very neat and ingenious way of avoiding pure utilitarian justifications.

We have seen that Raz believes in essence that P coerces Q when P lets Q know that if Q does A, then P will bring about an unpleasant consequence C. As C would leave Q worse off he does not do A. (This is an abridged form of the definition discussed earlier. It is also primarily pure deterrent). He then adds two other conditions, 1) That P's actions are wrong, and 2) The fact that Q acted under those conditions is a reason for not blaming him. It is to be noted however that he doe not make 2) necessarily consequent

on 1). Thus the fact that P's actions are wrong does not automatically give Q an excuse for taking the action. Also Raz claims these two conditions are weak, and as to whether or not they constitute an absolution or a mitigation depends on the related morality.[5]

He emphasizes that issuing a coercive threat invades one's autonomy. Of course he admits that complete autonomy is impossible, but nevertheless Raz's view appears to be that the maintenance of maximum autonomy, so long as it is consistent with not infringing the autonomy of others, is conducive to the agent's personal well-being and therefore beneficial and desirable.[6] A coerced person is forced to act as he did. It is, according to Raz, justified if the reasons for it defeat the reasons against it. Whether or not the action is excusable depends on moral views which have little to do with coercion. Raz posits the view that persons are excused when they acted in order to preserve the life they have (provided their life is not immoral or not worth having[7]). This relates to their personal needs and well-being (and he gives the example of a pianist having only one option to avoid having his fingers broken, even though he could make a good living as a business consultant).

However coerced choices are not necessarily

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[5] M. of F. p.150.

[6] This is a basic assumption which is not justified by Raz (nor indeed by many other libertarians). It may well be true in many cases, particularly amongst the more educated and the more dominant. I strongly suspect that in the vast majority of cases too much autonomy does not bring personal well-being but rather a loss of sense of direction and security. It may well be a case of treating the unequal equally and thereby effecting an inadvertent injustice upon them.

[7] Raz does not say by whose standards the latter assessment is to be made.

against a person's will. A person may be coerced into doing what he wants to do. It may also be the lesser of two hard choices. A person's actions are justified if the coercive reasons for the action defeat the reasons against. As noted above, the excuseability of the action depends on moral views.[8]

2. Philosophical Justification.

While the above gives us an idea of the relationship of any extrapolated theory of punishment to and within the legal system, it is to the concept of the harm principle that we must look for the philosophical justification by Raz of the concept of punishment. In this regard we are most fortunate because the question of a philosophical justification is one of great difficulty and is often ignored, or punishment is merely treated as an assumed deterrent etc. Thus it says a great deal for Raz's philosophy that though he has written nothing directly on punishment we are able to find such a philosophical justification.

As we noted in part II he proceeds from Mill's view that the only justification for coercively interfering with a person is to prevent him from harming others. First he includes the person themselves within the concept. He then compares the concept that the harm principle restrains the state as well as the individual from coercing people - on the grounds that these activities are either

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[8] I shall be arguing later, in part V that this approach could give rise to a possible weakness.

morally repugnant, or desirable - with the concept of an autonomy based freedom where the restriction of this freedom restricts their options or the pursuit of projects compatible with their well-being. He takes the latter view of the harm principle and combines this with the concept that the government owes a duty to promote the autonomy of the people. This is entirely consistent with his concept of a rights based society.

It is important when using the expression 'rights based' that we recall an important distinction in Raz's case. Raz takes the view that for a right to be created the interests of the putative right holder must be sufficient to establish a duty in others. This in fact is extremely ingenious. It accomplishes two things, it restricts the definition of rights and at the same time strengthens it. While I have argued elsewhere that he is not always consistent as to which comes first it must be pointed out that such argument relates to the establishment of certain 'rights' (or Hohfeldian freedoms which have been raised to the status of claim-rights) which may well affect a theory as to what is properly punishable, but it would be justifiable to say that those arguments are irrelevant to the concept that the government owes a duty to promote the autonomy of the individual. My previous argument, while relevant to the practice of a theory of punishment in establishing what is punishable and when it is punishable, fails as a means of undermining Raz's philosophical

justification of punishment.[9]

Thus, Raz argues, government may take action to prevent actions which would diminish people's autonomy and can take actions which are required to improve people's options and opportunities. His theory also allows governments to adopt perfectionist policies but they must not resort to wrongful coercion.

3.Reasons for Obedience; the connection between law and morality.

In any system of law there may be a number of different reasons for obedience. We shall be examining Raz's philosophy with respect to Deterrence and Retribution post but apart from this, which in a sense is an attribution of type or quality to the form of punishment, there must be underlying philosophical reasons for obedience. Raz we know has rejected the concept of a moral obligation per se to obey the law.

It is therefore necessary to find another justification. For this Raz turns to Practical Reason. Basically he is concerned because he feels that authority by its very nature, conflicts with Autonomy (the necessity to view each matter, bringing to bear on it the weight of one's own moral judgement). Furthermore it also conflicts with reason, which may well conflict with the action required by authority.

What then are the justifications for submission to

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[9] I would nevertheless dispute Raz's concept that governments owe a 'duty' to promote the autonomy of the people, but this is an entirely different philosophical point, over which we may never see eye to eye, and it is from Raz's philosophy that we are trying to extrapolate.

authority? Raz solves this problem, not by finding a moral duty but by developing from the assumption that authority is normative power. Moreover effective authority is required by him to be legitimate authority. These requirements are necessary to Raz's concept of authority because his primary concern that authority should have the ability to change reasons. In short Authority, by virtue of being effective, legitimate authority, is capable of providing "protected reasons" - reasons which overcome certain other contrary reasons.

He maintains that the law can do this, firstly by issuing exclusionary instructions. The power utterance here is not only a reason for taking the action, but a second order reason for not acting on some or all of the reasons for not taking the action. Second, the power utterance can grant permission to perform an act otherwise prohibited. It cancels the protected reason. Lastly the power utterance can confer powers enabling persons, such as judges, to change protected reasons. In this way he covers the gamut of the law's powers. We have noted ante, that this approach is not entirely without problems but it nevertheless provides us with a basic answer to the question of obedience.

Now it is important to Raz that the reasons for obedience provided by the law should be neutral. He explains the interaction of positivism and morality by the sources thesis. Thus the law is settled when legally binding sources provide the solution to a problem. The judges apply legal skills when arguing from such sources. i.e. Judicial arguments are legally acceptable irrespective of the moral

arguments. If however there is no established law the judges enter new ground and may of necessity take in considerations other than legal ones.[10]

The court's practice is what makes a rule a legal rule, and is, according to Raz, its source.[11] It is the court's practice to apply the laws made by parliament. The fact that it is their practice and that they hold themselves bound to do so is not a reason why they ought to. It is the rule that they should do this which is the reason. The practice that they do so, says Raz is proof that the rule is a legal rule. *"However it is not a ground for the validity of the rule nor for the action it prescribes".* This says Raz establishes the rule as 'an ultimate rule' (the absence of a further law determining the grounds of validity of ultimate rules is precisely that which makes them ultimate rules[12]). That is, the validity is established when the law applying institutions recognise it.

However although recognition in this manner is endorsed by legal philosophers from Salmond to Hart we must remember that Raz takes the position that there is no moral obligation to obey the law. Thus we reach the position where some heinous law may be recognized by the courts of the land but our moral autonomy might prevail upon us not to obey it.

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[10] I have already indicated that, while I agree the end position, cases can be cited to show that Raz's explanation is not, in practice, always true.

[11] A. of L. p.68.

[12] In short by rejecting the classical approaches which he regards as confused, and by adopting practical reason as an approach Raz has worked himself into a similar impasse to Kelsen with his original norm. Original norm, ultimate rule, but at least Kelsen related it back to power. The fact that Raz's ultimate rules become legal rules by virtue of their application by the law courts, who are appointed by virtue of those ultimate rules would give a number of very nasty dictators the opportunity of claiming their laws are valid. And valid to Raz is legally valid.

Again one feels that this is a logical position which Raz wishes to reach, not one which is thrust upon him.

He goes on

> "Because further legal rules (themselves grounded in social facts) determine which facts create rules and are thus, with those facts, the grounds of validity of those rules, they can be used to identify the rules for the validity of which they are a ground.[13]

Now the legal validity of the rule Raz equates with being legally binding. Thus he says if a legal rule puts X under an obligation, then X is under the obligation because of the rule. As we know elsewhere Raz argues that there is no moral obligation to obey, we can conclude that it is only valid laws we have reason to obey. And their application by the courts makes them valid. Thus the validity of the law and the requirement to obey are separated from the moral content of the law. Legal rules as such are neutral.

To say a Rule is valid is to say that it ought to be obeyed and this is not to be confused either with the positivist validity of recognition or the natural law 'valid' or 'justified'. (though the two are comparable. Raz's view is based on systemic validity, e.g. The legal validity of the law prohibiting theft does not rest on arguments concerning rights to property and wrongs done in infringing it. It rests on the need to have an effective law and the justified authority of those who made it.[14]

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[13] A. of L. p.69.

[14] A. of L. p.152. It could be argued that Raz has come somewhat close here to embracing the social derivation of law which he previously described as "confused".

4. Conditions necessary for the law to command respect.

Raz is relying initially on reasons for obeying the law and not on a direct obligation. That he derives an obligation, we shall see. Therefore it follows that the law must of itself command respect - not necessarily each particular law, for we have seen the reasoning that allows one to accept that the law as a whole may provide overall better reasons for acceptance than the individual assessment of each and every situation might accomplish. This as he pointed out involves "practical respect" for the law as opposed to cognitive respect. Liberal theory generally equates obligation with a prima facie reason to obey. Raz however feels that obligation occurs when there is a protected reason for obedience. (see ante) As Raz points out, the obligation to obey the law felt by most people is far more than just a prima facie reason (which suggests fairly easy rebuttability) and is more of a peremptory reason.

He also draws a parallel with friendship pointing out that while there is no emotional tie, respect for the law can develop over a period.[15] In fact respect for the law might be said to be a reflection of one's moral character. However he is careful to stress that while he considers it is never wrong not to respect the law, it is wrong to, say, respect the apartheid laws in South Africa. This, as has been pointed out before, must have a bearing on a theory of punishment. If it is correct to disobey the law it must be incorrect to punish for such disobedience.

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[15] It can also deteriorate until the law begins to fall into disrepute.

The way Raz overcomes this is as follows:-

1) There is no moral obligation to obey the law, even in a good society.

2) It is permissable, to have no moral judgement with respect to the law and to reserve judgement for each case individually

3) In all but iniquitous societies it is equally permissable to have a 'practical respect' for the law.

4) In one who does so respect the law, 'practical respect' is a reason for obedience to the law.

5) It is never wrong not to respect the law in this practical sense.

6) A person who respects the law expresses this in his attitude to society.

7) However such respect 'can come in measures or degrees'

8) For the person who respects the law, there is an obligation to obey.

9) His respect is the source of this obligation.

Thus we see Raz provides, for people who respect the law, which respect might vary, an obligation to obey based on their practical respect for the law. He does not contradict his concept that there is no moral duty to obey. There are practical reasons for obeying and a respect for the law gives rise to the obligation to obey.

So we see that Raz's obligations of obedience are indeed less strong than in other forms of positivism, providing a different basis for obedience. This, however, is very far from being the same thing as saying that one should not be punished for disobeying a law. Apart from the

criminally disposed who do not disobey the law on the grounds of conscience, but rather of greed or emotion, there are two fields of potential disobedience which will reveal Raz's philosophy in application. Fortunately he has dealt with both of them, namely Civil Disobedience and Conscientious objection.

5. Civil Disobedience.

Although he is intent on not justifying Civil Disobedience Raz does reserve his position that it may sometimes be justified or "even obligatory". In order to modify the somewhat damaging effect of this he introduces the distinction between an unjust state and a just one. This means, he says, that in a just state the reasons in favour of disobedience have to overcome a presumption against it based on the accompanying undesirable results. He does not actually go into these but presumably they must include not only disruption of the state's order but the active bringing of the law into disrepute by virtue of the attack upon it. Moreover he assumes that the purpose of civil disobedience is political - a political motivation to change the law or express an active dissociation from it.[16]

So Raz takes the view that while disobedience may be acceptable in an illiberal state the reverse holds true for a liberal one. Here his criteria is that as one's right to political participation is protected by the law it is not

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[16] I would question that this is always so. In the case of Twyford down, the re routing of the Winchester by-pass had been the subject of innumerable public enquiries etc. for some twenty years. Everyone, and their brother had expressed their opinions all of which had been officially noted. The law could not have been more fully utilized and public consultation was endless. However despite all due democratic process the decision was rejected by some who then sort by civil disobedience to disrupt its implementation.

justified to breach the law to express a political view. But he does not maintain that view steadfastly and points out that even in a liberal state there may be some illiberal laws such that it might be right to engage in civil disobedience to protest against them.

Thus we are forced to conclude that although he takes an attitude that basically in a liberal state there should be no excuse for civil disobedience, he nevertheless retains a certain ambivalence over this question. We therefore have to ask the question - If it is right in certain circumstances to indulge in civil disobedience is it right to punish that indulgence? Raz takes the attitude that there could be no claim that the authorities shall not take action to prevent the disobedience, or punish it. This is explainable if we think of Raz's 'right' to civil disobedience in terms of a Hohfeldian liberty as opposed to a claim-right, which latter would involve a correlative duty to let it occur.

Thus presumably Raz would argue that the right to civil disobedience is not a prima facie right but rather it has to overcome protected reasons against it. Therefore it is still a punishable offence. So his case would be that his theory of punishment is not weakened. In the next chapter we shall see whether if one takes his theory alone and does not make the political assumptions, we can reach the same position.

6. Conscientious Objection.

Here Raz immediately makes the distinction that

while civil disobedience is a public act, Conscientious objection is a private one. Moreover in the case of conscientious objection we must, he says, assume that the law is morally valid (and he cites the case of conscription); further, that the person's views, though deeply held, are wrong. In these circumstances Raz has no difficulty in finding that the person should be punished. He can see no way to providing a right to conscientious objection and confirms that one cannot give priority to a morally wrong view on the grounds that this conviction, though wrong, was strongly held.

His solution for avoiding too many difficulties of this nature is, as we have seen before, to draft the laws in such a way as not to conflict with minority views wherever possible. He admits that this is not an ideal solution, though there are, as has been pointed out, positive arguments in its favour in any attempt to establish laws for a multicultural society. The problem which remains, as Raz sees it, is that any right not to have one's views coerced is a primary one.[17] In view of this Raz feels that the punishment should be pecuniary rather than imprisonment. In any event it should be lighter presumably because enforcement of the law would involve coercion of an undesirable nature. There are again arguments against this because Raz has posited that the law is deemed to be morally correct. That being so should it be less punishable to break

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[17] There are of course alternative solutions, for example in the case of a society where there is freedom to leave, a person with convictions that were deeply offended by the laws could do this. That too, is by no means a perfect solution and it may well be that this is one of those insoluble social problems of a free society.

a morally correct law because of a deeply held but wrong conviction, than it is to break a law in support of a deeply held, and possibly morally correct conviction in the case where Raz would permit civil disobedience?

On the other hand is it reasonable that it should be less punishable to break a law because of a deeply held, but wrong, moral conviction, than out of sheer moral turpitude? The answer to the latter is clearly yes because it is a matter of intentionality. This is a subject which has a great bearing on the practice of punishment and indeed on the philosophy relating to quantum. However it is a subject on which Raz is understandably silent as he has not had need to consider it - except so far as will be posited in part IV.

Certainly it would not affect the issue of whether or not an offence of conscientious objection is punishable, but as is clear from his comments that he takes the view that the honestly deeply held (but wrong) moral view is a mitigating circumstance.[18]

II. DETAILED APPROACH TO PUNISHMENT.

a) Definition

Having started from Kelsen's imperative theory of norms the third basic idea of which is that such norms are supported by standard reasons for compliance in the form of some evil ensuing upon disobedience, Raz would have little difficulty with Hart's definition, subject to his

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[18] A view that I am not sure that I would share. Take for example the case of the destruction of the aircraft by four women convinced that it might, in their view, be used for morally outrageous purposes.

requirement that punishment should not be wrongfully coercive (we have already noted his concern with the morality of the law and the validity of the authority as prerequisites).

b) Necessity

As we saw earlier Raz has no difficulty with the concept that "coercion is the ultimate foundation of the law..." and his whole concept entails the use of S-laws. He thus has no quarrel with the establishment or necessity for punishments. However we must remember the importance he attaches to critical reactions. He maintains that it is a characteristic of the law that violations of legal duties are met with such critical reactions. The sanctions to a large extent replace the critical reactions as the characteristic fact giving rise to the duties, but he argues they do not replace them altogether.[19] In fact he points out that violations of legal duties can be met with critical reactions, even from people who regard the law as bad. However we know that he believes there is no duty as such to obey the law and this, though not affecting necessity as such, is bound to have an effect on the application of his theory.

c) Deterrence, Retribution and correction.

i) Deterrence and Retribution.

He distinguishes between the restoration of the status quo of civil actions and punishment as 'retribution, prevention, deterrent, correction etc'. Unfortunately he does not go into these in detail and extrapolation here is

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19 C. of L.S. p.151.

difficult because they are part of the objects of punishment. The primary object is to ensure conformity with the rules in the most efficient way possible. That object, as was pointed out, is affected by such issues as policing, arrest rates, success of prosecutions etc. To distinguish them I referred to the objects of deterrence, retribution, and correction as purposes of punishment, though I appreciate that they may equally be referred to as objects. Without doubt in many respects Raz relates punishment primarily to deterrence. Certainly where punishment is not necessarily morally condemned, as for example in the case of simple speeding not involving danger to others or an accident, then it does appear that the punishment is exacted on utilitarian grounds as a deterrent. Though such a view cannot really be extrapolated from Raz it would appear consistent with his thinking, even though he does not leap to embrace utilitarianism.

Certainly his main view of punishment relates to its deterrent uses. Although it is often argued that there is an element of retribution in any punishment Raz is not a retributionist as a fundamental or necessary part of the justification of punishment. His justification is on the ground of providing reasons for obedience rather than establishing a retributive basis. It is quite possible that he might see the necessity for a retributional element in punishment. Were he to do so he would have to justify it separately from the philosophical justification which he has already provided. This in fact, I submit, he could do. He could do it in two ways,

1) from the approach which we know he endorses of the critical reaction of society, and

2) from the approach of having regard to the well being of the victim.

Of the two, in my submission 1) is the weaker from the point of justifying a retributive element to punishment though in a sense it may be a moral representation of 2). Certainly we have to admit that the desire to see an offender, particularly one who has offended against us personally, get their deserts is to a large extent universal. There are, it is true, certain magnificent souls who seem capable of forgiving the most terrible crimes against themselves. However the type of case where the victim, who might otherwise have got over their tragedy, has their life ruined by the fact that the perpetrator has not been found, or if found has been insufficiently punished, seem to be far more numerous. Thus I can see grounds within Raz's philosophy for arguing for a retributive factor to punishment. The question is a complex one which is still completely unresolved but it is as I say possible, though not necessary, under Raz's philosophy to argue the case cogently. As to the degree of retribution there could be some considerable variation and this would depend on the degree of importance the particular Razian philosopher attached to the autonomy and well being of the individual. We know that a balance would have to be struck because of Raz's views on the necessity for avoiding wrongful coercion. Thus, as we shall see when considering proportionality, Raz would not favour say an increase in the punishment which

would render it wrongful (perhaps the removal of fingers for theft), even on the utilitarian grounds that it could be proved to be effective.

ii) Correction: Raz does not comment on the Laing/Wooton approach and as we have seen his principal references relate to the deterrent value of S-laws. Nevertheless all punishment theories have the inherent ancillary object of reducing recidivism so that any effective corrective measures which could be incorporated would obviously be seen as advantageous. Even so, for a Razian philosopher one must remember that Autonomy and Well-being are high priorities and thus correction in the form of, say, aversion therapy would not be acceptable. The utilitarian approach that the effectiveness (if indeed such there were) justified the means would be subject to very heavy adjudication in relation to the effect on the person's well-being and their autonomy, which could well result in a punishment being classified as wrongful.

We know that Raz has referred on a number of occasions to 'wrongful coercion'. Thus we can assume that punishments which are unduly harsh or corrective means that are unduly invasive would be rejected. Raz has not set out the parameters leading to a means of classification and thus there would be room for argument. The factors involved would be the person's interests, their well-being, and their autonomy. Autonomy is already invaded by any form of punishment and is therefore the weakest argument. Raz admits that there is no such thing as complete autonomy, but in his philosophy the requirements of autonomy are largely

satisfied by the right to political participation.

'Interests' as used by Raz have to be such as to warrant the creation of a duty in others, which is his means of limiting the term - in one example he gave he pointed out that although personal safety is in our interest others are not duty bound actively to prevent us from getting hurt. On the other hand freedom from molestation is also in our interest but here there is a duty not to interfere with others. In the case of punishment it is in the person's interest that they should be an accepted part of the society but again this interest is not an overriding excuse for retributive punishment or curative punishment, although it is for deterrent punishment. In my view therefore the strongest case for both retributive punishment, and particularly for curative punishment, is made by a consideration of the person's ultimate well-being.

Thus I would conclude that Raz's philosophy encourages a theory of punishment in which the punishment is primarily deterrent. There is also, within his philosophy, a strong case which may be argued for a retributive factor stemming from the replacement (at least in part) of the society's critical reaction by the sanction. And there is also a case which may be made for a curative element in that this is reconcilable with considerations of the person's ultimate well-being. These latter, and indeed even the deterrence element, would be subject to the limitations relating to the 'interests', 'well-being' and 'autonomy' of the individual. Finally there is an overall limitation that no coercion should be 'wrongful'.

Such a theory of punishment provides us with answers to all the points considered in part I. It fits with the legal system and its position is explained. Raz has provided us, unlike some philosophers, with that most valuable basis, a philosophical justification. It passes the more difficult hurdles of Definition, necessity and purpose set out in chapter 2 of part I, for we can provide a Razian approach to all of these. It has some exciting features because of his approach to a multicultural society which could result in a review of certain acts which might be considered criminal at present. Also the law could be re-drafted in a fashion that would allow for some differences in moral or religious approach. This would not result necessarily in removing the offence but in redefining it. Thus to pick up an example given before, the offence would no longer be bigamy as currently defined, but the marriage to more than one wife when that is not in accordance with the religious views of both parties or the understanding agreed by the parties to the first marriage. As a second example the problems experienced by Sikhs using motorcycles would be solved by a Razian by merely requiring riders to wear a head protection deemed sufficient by the road safety authorities. Obviously this is not the place to attempt to re-draft laws but I hope I have indicated that this would be possible within Raz's philosophy which would require the draughtsmen of legislation to be aware of the possible problems involved, and to overcome them within the legislation.

III. FURTHER ASPECTS.

There are however other more general aspects relating to punishment besides those considered above. We now turn to these:-

1. Proportionality.

This is often thought of primarily in terms of retribution by equating the punishment to the moral culpability of the action. As we have seen above there is a case under Razian philosophy for arguing for a retributive factor. Indeed Raz goes so far as to say that the sanction laws replace, to an extent, the critical reactions of society. Thus we can go further than we did above and say that insofar as these critical reactions sponsor a retributive factor in the sanctions then any Razian system of punishment would require a fairly high degree of proportionality. This provides us with a moral philosophical background to proportionality as opposed to a merely practical or utilitarian approach. For example there has always been a scale of punishments even from the days of the Wereg.ild when everything was reduced to fines. In those days interestingly while killing a peasant did not incur any fine, killing a sheep did - of one shilling. Now that would be difficult to explain under a Razian theory of proportionality, but presumably in its day it was purely pragmatic in that one could at least eat a sheep.

The Razian principle of proportionality based on a critical reaction is in complete conformity with his belief in the need for reconciliation of natural law and

positivism. Thus his philosophy of punishment would rate severity of punishment with moral guilt. However this would only be within limits for two reasons. First, he recognizes that certain laws are regulatory and as such do not contain any moral factor. The example he gives is that of regulating which side of the road traffic should use. Such laws still have to be enforced and while it could be argued that there is a moral culpability in not obeying the law, this argument is not available to Raz, as it will be recalled that some what surprisingly, he made a strong case for there being "no obligation to obey the law".[20]

Nevertheless such laws have to be obeyed and his justification here relies on the arguments of practical reasoning. While his theory leaves a gap here in that it provides no moral guidance for proportionality in these cases, it could be argued that they relate mainly to minor offenses (which indeed they do) and that because of their lack of culpability the punishment is not required to contain a retributive element and the punishment is purely deterrent. Thus may Raz counter our attack, and a Razian would be satisfied that they too are maintained in their place by his theories.

I suspect also that a Razian might maintain that, in considering proportionality, rather more consideration should be given to critical reactions than is done at present. This could prove to be a double edged sword and

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[20] I would argue that he could have made a good case for a moral obligation to obey, but I suspect this is one of the places in his philosophy when the desire to reach a specific end result (namely that one should have no duty to obey a morally repugnant law) overreached the alternative reasoning. While he came to the conclusion he wanted it provides a major weakness in his philosophy.

leads us to one or two weaknesses which will be considered when I take the part of the Devil's advocate in part IV.[See Ref.A]

2. Law, Punishment and Justice.

Raz takes a different approach to that set out in part I. While his relationship between law and Punishment is in conformity with that which I described, he is not concerned with an approach via justice as I posited in Fig. 1. In fact he hardly mentions the word. In five major volumes the indexes never list the word once. Hart gives at least nineteen page references in his *The Concept of Law* and eleven in *Punishment and Responsibility.*[21] Raz covers this area, which would be necessarily central to any concept I were to evolve, in an entirely different manner. He looks at Authority and examines this concept in detail.

3. Authority.

Again he does not take a Hohfeldian approach which would be to separate the different uses of authority, but takes a consistently Razian approach, i.e. he looks at "Having Authority" and "Being an Authority". Because he goes on to incorporate aspects derived from both and compares giving an order and giving advice he is forced as a feedback to impose a limitation on authority, requiring it to be

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[21] Certainly for me it would be a fundamental building block for a major segment of any work on law or moral theory. In this omission lies, in my submission, the reason he failed to effect the desired reconciliation between positivism and natural law.

'legitimate' authority.[22]

Despite any arguments against this approach it is entirely consistent with his views that coercion (the means of enforcing authority) should not be 'wrongfully coercive'. It is also entirely consistent with his view that there is no moral obligation to obey the law. Raz looks at legal authority and reconciles it with the apparent paradoxes with respect to autonomy, i.e. that obedience to authority is equivalent to a suppression of reason which could be both immoral and irrational. He rejects explanations based on the evolution of societies or social contracts as confused[23] and, as stated above relates authority to legitimate authority, so that if authority decrees that X should happen then it ought to happen. Presumably if it ought to happen it is 'just' that it should happen and thus considerations of 'justice' as such are avoided. However he does not give us the parameters defining when something 'ought' to happen.

He looks at Orders, requests and advice and takes the view that these are differentiated by the attitude of the source rather than the way they are received by the addressee. And he relates Authority to the ability to change reasons. Rules and commands are thus protected reasons (i.e. capable of overruling and supplanting opposing reasons) and presumably by virtue of the legitimacy of the authority are ipso facto 'just'.[24]

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[22] I would regard 'authority' as one concept, its legality, validity etc. being aspects of it. Being 'an authority' i.e. an 'expert' is a totally different concept. As argument for my case I would point out that 'Authority' involves a jural relationship (usually Zygnomic), being an expert does not (not even a Mesonomic one). Drawing a common factor is the equivalent of comparing sugar and petrol by virtue of the presence of carbon atoms in both.

[23] Without saying why or how they are confused.

[24] I believe this gives rise to difficulties when we come to consider conscientious objection and civil disobedience, post.

4. Autonomy as it affects Punishment.

In addition to the points made earlier we must remember that as a libertarian Raz is concerned with autonomy and any restrictions of it. Autonomy here is that which preserves and encourages the well-being of the person. He readily concedes that there is no such thing as complete autonomy and will only grant its application where it does not restrict the autonomy of others, i.e. it is that of individual freedom based on value pluralism.

He varies the harm principle by including the person themselves so that it becomes permissable to prevent the person from harming themselves. He takes the view that the government owes a duty to promote the autonomy of the people. The restriction of their freedom limits the opportunities available to a person, but as he argues the government may take action to prevent the limitation of other people's autonomy and at the same time can enforce actions which are designed to improve people's autonomy.

Now this definitely permits a Razian theory of punishment. It may however limit certain laws as indeed Raz suggests - "a Tax which cannot be justified by the argument here outlined should not be raised".[25] This would carry through to any theory of punishment, for while he agrees that the restriction of the autonomy of one person (for the sake of the greater autonomy of others, or ultimately of the person themselves) is justified - because harm interferes with autonomy - he goes on

"But it will not tolerate coercion for other reasons. The

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[25] A. of L. p.418.

> availability of repugnant options, and even their free pursuit by individuals, does not detract from their autonomy. Undesirable though these conditions are they may not be curbed by coercion".

How does this affect our theory of punishment? Certainly it will have an effect for it will or could presumably render punishment of certain offenses an "undesirable coercion". If there were an activity, e.g. let us say, the taking of drugs, which does not affect the options and autonomy of others, perhaps its free pursuit by individuals should not be stopped. Certainly I believe Raz's philosophy could provide us with a direct philosophical argument (as opposed to a pragmatic one - such as the argument that legalization would cut down dramatically most drug related crime) for the legalisation of drugs.

Of course in pursuing the example I have ignored the question of harm to the individual themselves. This one must remember could provide a perfectly valid Razian counter argument, the resolution of which would depend on the facts and the degree of neutrality pursued by the government.[26] However if it were to be found that there are those who can exist perfectly well i.e. to the same extent as those who use alcohol, the case would be much stronger. Moreover the fact that some may be harmed by the use of drugs would not necessarily be an argument for their use to remain criminal. Alcoholics are not regarded as criminal, but merely unfortunately susceptible to alcohol.

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[26] Raz it will be recalled in part Four of The Morality of Freedom argues, not for a Rawlsian neutrality, which he feels assumes too simple a connection between neutrality and personal autonomy (p.133), but rather for a policy 'to enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones'.(emphasis mine).

Again I must stress that I have used drugs merely as an example as it is easier to visualize the arguments in the case of a defined subject rather than in the abstract. Thus at least we can see that the importance attached to autonomy, albeit limited by its alliance to moral pluralism could give rise to a different approach as to what is the correct subject for punishment. One should not make too much of this point as the general effects of a Razian approach to punishment in a liberal state should not be exaggerated, even though there may be differences. As the state becomes less liberal they would be more marked.

SUMMARY AND LINK TO CHAPTER 9.

Thus we have seen that Raz's philosophy can be argued comprehensively to support a theory of punishment. It supports a largely positivist theory with some important modifications. He gives us a philosophical justification based on a variation of the harm principle. Although his is a libertarian rights-based society he cleverly limits his 'rights' in two ways. Rights are restricted to those in which the interests of the putative right holder are sufficient to establish a duty in others. His consideration of autonomy and the inclusion of the agent within the harm principal permits him to punish, both for failure to obey a morally acceptable rule, and so as to promote rules of action of positive desirability. Again, preserving his libertarian principles, although coercive laws are allowed, indeed deemed essential, they are not permitted to be unnecessarily coercive, or coercive in a morally objectionable fashion. Thus limitations as to types of punishment would also follow. Finally he preserves his concept that there is no moral obligation to obey the law, providing us in its stead with protected reasons for obedience.

In regard to the philosophical approach to deterrence and retribution his philosophy of punishment is deterrence based but allows for a retributive factor (The sanction in part replaces the critical reaction of the society) and though he does not cover the curative aspects of punishment it is quite clear that the parameters of his

philosophy would encompass such, provided always it did not directly affect the prisoner's ultimate well-being. For example the case for aversion therapy would be likely to be unsustainable.

His philosophy may result in certain crimes being redefined where possible, better to accommodate a multicultural society.

The one area where the most contention may arise stems from his statement that Civil Disobedience might in some circumstances be obligatory. However this is not a point which he dwelt on at length because he was concerned primarily with a substantially liberal society in which the right to political participation was protected by the law. In such cases he was quite adamant that there Civil Disobedience was not permissible.

His philosophy when applied to punishment more than adequately covers all the pre-requisites of this difficult and often elusive subject. It is remarkably cohesive in that it covers all areas of internal conflict. One cannot take one line of his argument and show it to be in basic conflict with another so as to be able to attack his approach with the weapon of inconsistency.

That there are lines of attack on the grounds of inconsistency in some of his basic tenets I shall attempt to prove when I take the part of devil's advocate in part V. However, given his basic philosophy plus certain assumptions which he has necessarily made to arrive at his conclusions on various aspects of his philosophy, it is possible, as I hope I have shown, to extrapolate a comprehensive and

cohesive philosophy of punishment.

Before turning to the task of testing this philosophy, and I have tried to give indications of where the weaknesses might be found, we are turning to a secondary test in the next chapter.

There it is my intention to take the methodology used by Raz with only certain very basic assumptions and see if it is possible to devise a similar philosophy of punishment. In this case we will not be extrapolating from any of his end positions but rather working on a direct philosophical basis. This means that interim assumptions used by Raz to solve problems in part II will now have to meet the methodology test before they can be utilised.

The task is in some senses simpler, and in others much more difficult than extrapolation. For one of the problems is that Raz overall gives the impression of a man philosophically inclined to liberalism, a libertarianism restrained by an authoritarian background - a presenter of the liberal face of positivism. Is such a position methodologically justified? In the next chapter I shall try to show that it is.

CHAPTER 9. METHODOLOGICALLY DERIVED RAZIAN CONCEPT OF PUNISHMENT.

In tracing Raz's methodological approach I have attempted to follow a similar pattern to that of chapter 8. While the subjects do not coincide exactly it is hoped that they may in this way be more easily correlated and reference between the chapters made easier. I have therefore arranged this chapter as follows:-

I. GENERAL

1. The application of Practical Reason to a Legal System.

2. Sanctions and the Law.

3. Reasons; Obedience; The connection with Morality

4. Respect for the law.

5. Civil Disobedience.

6. Conscientious Objection.

II. DETAILED APPROACH

a. Derivation.

b. Critical reaction.

c. Deterrence; Retribution.

III. FURTHER ASPECTS

1) Proportionality.

2) Justice.

3) Authority.

4) Autonomy.

The idea is that in this way we shall be able to follow more clearly those parts of any theory which may be methodologically deduced or developed, and those parts which stem from, or require for their development, imported philosophical reasoning. Where the latter is the case arguments have not been repeated but rather a reference to the corresponding earlier section is made.

I. GENERAL.

1. The Application of Practical Reason to a legal System.

Raz's analytical approach is set out in his *Practical Reason and Norms*. References in brackets in the text are to relevant pages. In *Practical Reason and Norms* he develops a theory of a legal system. First he considers the structure of 'reasons', developing his theory of 'exclusionary reasons'. These are a particular form of second order reason. A second order reason is a reason to act (or refrain from acting) for a reason. An exclusionary reason is a second order reason to refrain from acting for some reason. As Raz explains it, if p is a reason for X to ϕ (first order) and q is a reason for X not to act on p, then p and q are not conflicting first order reasons. i.e exclusionary reasons are not simply reasons which outweigh the normal balance of first order reasons they are in fact reasons which exclude the consideration of certain types of first order reason. (i.e the merits of p are not put into the balance at all).

Bearing this in mind he examines rules which normally state what a person ought to do, and are

themselves reasons for action. The rules with which he is primarily concerned are mandatory norms which he argues are either an exclusionary reason, or more commonly both a first order reason to perform the norm act and an exclusionary reason not to act for certain conflicting reasons.[1]

One difficulty he points out is to distinguish norms from other reasons for action. They are not distinguishable by the character of the norm acts, nor indeed by the strength of the reasons. The imperative theory of norms he dismisses in the main because it covers only certain norms. He then considers Hart's analysis of the practice theory, maintaining that it suffers from three 'fatal' defects, namely

1. It does not explain rules which are not practices.
2. It does not distinguish between social rules and widely accepted reasons.
3. It deprives rules of their normative character.

These difficulties are resolved by the treatment of Mandatory norms as exclusionary reasons and he relates the role of mandatory norms as being analogous to that of decisions in that having a rule is like an advance decision. Norms are treated as complete reasons (not ultimate reasons) i.e they still have to be justified on the basis of fundamental values, and it must be remembered that they may, on occasion, simply be first order reasons. So he argues that norms may be treated as entities. When we say one ought to ϕ, we give no reasons. When we say there

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[1] P.R & N. p. 50.

is a rule that one ought to ϕ we are giving a reason (78). Thus a norm is partially separated from its reasons, i.e while it must have reasons to justify it, we do not necessarily have to know what those reasons are.

In looking at the application of norms within institutionalized systems Raz points out that legal philosophers have been divided as to the relative importance of the norm creating institution and the norm applying institutions. Raz comes down firmly on the side of the law applying institutions in that 1) they identify whether the system is in force and 2) they identify which norms belong to the system. He is anxious to deny that legal systems are systems of a common origin arguing, inter alia, that the common law and parliamentary laws are of different sources, so that some legal systems have more than one ultimate source. He also points out that a system can be in force without all the norms being practised or obeyed. Providing the norm applying institutions regularly enforce the norms the system may be regarded as in practice. This is important to his theory because he points out that not all systems necessarily have law <u>enforcing</u> institutions.

In view of the above he regards legal philosophy as the application of practical philosophy to one particular social institution. Legal systems consist of norms setting up primary organs (norm applying organs) and also all the norms which the norm applying institutions are bound by their own norms to apply. Moreover legal systems are comprehensive, they claim authority to control any

behaviour of their society. The law he says provides the general framework of society. It guides behaviour, settles disputes and may generally regulate any matter. It also supports or restricts the creation of other norms of the society.

Before considering the question of force Raz emphasizes, as he does in *The Concept of a Legal System*, that there are two great fallacies: one is the belief that Laws are moral reasons or that they are morally justified, and second that a legal system can exist only if the bulk of its subjects believe in its moral validity. This is again important to enable him to maintain the attitude he does with regard to civil disobedience.

2. Sanctions and the law

Raz points out that many philosophers take the attitude that the normativity of the law lies in the fact that the law stipulates sanctions. However Raz argues that it would be theoretically possible to have a sanctionless system even though at the present time it does not appear 'humanly' possible. He then argues that a sanction backed norm explanation of the law gives at best only a partial or auxiliary reason (161). The complete reason he says must include the agent's desire to avoid the sanction. Now this is very important because it is one of the very few occasions where Raz refers to the Agent's attitude. It will be seen in part IV that one of my attacks is based on the fact that in considering reasons, particularly in his examples, Raz omits all reference to intentionality or Davidson's 'pro-attitude'. Here, however, he utilizes it to

show that laws (as sanction backed norms) are merely auxiliary reasons. This however leaves the problem that if that is so, how can some laws be mandatory norms (i.e exclusionary reasons as well as first order reasons)? Thus he maintains that an attempt to explain the normativity of the law as sanction backed norms fails.

He again shows that it is not a necessary truth that every law is a moral value and separates himself from the natural law theories of justification. Thus while the use of force or sanctions or moral considerations may be reasons for people to follow the law they are not capable of explaining why legal rules are norms. His explanation hinges in part on the fact that he believes that it is not necessary that the population at large follow the law or that they must believe the laws are valid reasons. What is necessary however is that the law applying agency, the courts, believe that the laws are valid reasons for action. Not only that but that they hold the laws to be exclusionary reasons and disregard all non legal reasons, except where allowed by law to act on them. Thus the courts regard ordinary citizens as required to be law abiding and judge them accordingly. Their attitude to the law is from the 'legal point of view'. They are not concerned with the morality of the law or the validity of the proposition. His example is that of going to dinner with a vegetarian and saying "You should not eat this dish. It contains meat". Not being a vegetarian, Raz does not think that the fact that the dish contains meat is any reason against eating it. Therefore he does not believe his friend has a reason

not to eat it. He is merely stating the position from a vegetarian's point of view.

His justification for regarding the laws in this manner is very persuasive. The objections to it are not fundamentally destructive though I have elsewhere brought up one (i.e. that courts can and have overruled established precedent. Raz attempts to answer this but it is one place where I find his arguments somewhat unconvincing). Although he has dealt with the manner in which we should not regard sanctions, he has not actually defined them in terms of category. However as will be seen later I have tended to regard them as ancillary first order reasons for obedience.

In order not to repeat arguments the following comments follow the same order as chapter 8, but are expanded only where necessary.

Philosophical Justification.

As we have seen this was developed from the harm principle with the inclusion of the person themselves within the concept, and an autonomy based freedom, which autonomy may be diminished so as not to restrict the autonomy of others. There is no conflict here with the legal view developed by his practical reasoning.

3. Reasons; Obedience; The connection with morality.

Here again, though in a different manner, Raz was able to develop reasons for obedience by virtue of the exclusionary and first order nature of the laws and at the same time disprove the necessity for reliance on the moral

validity approach of the natural law theorists.

Connection with Morality.

The methodological connection is not direct but it must be remembered that the critical reaction of the society itself forms part of the reasons for obedience. Morality's effect on the law is limited. Raz has rejected morality led natural law theories in favour of a modified positivism. It is necessary to see how these two trends affect a methodological development of a theory of punishment. The conflict is best shown in his treatment of Civil Disobedience where his argument against morality determining the law is complemented by his determination that ultimately there is no moral obligation to obey the law.

Now in chapter 8 we saw how he modified this by reference to the type of state, i.e. as to whether it was a liberal or an illiberal state. For the purpose of this distinction he adopted the test of political participation. Thus he maintained that as, in a liberal state the right to political participation was protected by the law, it would be unjustifiable to defy the law in order to effect a change in it. Therefore in a liberal state civil disobedience would be unjustifiable. Such would not be the case in an illiberal state. It must be admitted that this argument is not supportable in Razian methodological terms. It is a distinct philosophical import to solve a problem in the manner Raz wants it solved. There is no harm in this but it does affect a methodologically developed theory of punishment because any such system of justice would have to

omit them. Does this destroy the development of a theory of justice under Razian methodology? I would argue that it certainly does not. There is of course no requirement that every facet of a theory be methodologically supported. Indeed it could be argued that to do so would reduce the resultant philosophy to the equivalent of an exercise in mathematics. Nevertheless the exercise is interesting just because it reveals areas that are not methodologically pure.

Without the above modification we would be left with a much weaker case against civil disobedience or disobedience generally. We are still left with the arguments against civil disobedience in that it is a breach of the law, and the laws, as we have seen, including S-laws are methodologically sound. The laws themselves may be argued to present reasons for obedience, but without any moral obligation to obey them and without the reinforcement of this additional outside based philosophical argument, just how strong would those reasons be. I think it could be argued that this extra support is vitally necessary for Raz to claim that the reasons for obedience are raised to the standard of 'protected reasons'. If the reasons are reduced to say the order of first order reasons only, then we are in a dangerous position. If disobedience is more justifiable (and it would be) punishment becomes less justifiable and the structure is weakened.

4. Conditions necessary for the law to command respect.

Interestingly in his development from practical

reason Raz found that the most important aspect was that the law applying agencies must necessarily respect the laws and treat them as exclusionary reasons. It was not necessary that the public accept all the laws as either valid or morally justified. Respect for the law is a practical respect as we saw earlier. However this is not a philosophical import as in the previous section, it is a logical consequence. Thus I would argue Raz would be entirely free to rely on these arguments in a purely methodological development of a theory of punishment. There is no reason for their exclusion. However when we come to examine the next two sections we shall see the difference caused by the exclusion of the arguments under 3 above.

5.Civil Disobedience.

Once Raz has taken his position that one has no 'moral' obligation per se to obey the law one is faced with the position that there may be laws, and Raz has pointed out that it is not necessary for everyone to have respect for each and every law, where the law may be regarded by the individual as morally iniquitous. At this point we are considering the case where the law in question is not regarded by the majority of the state as iniquitous. Some may regard it as unfortunate or even unpleasant but necessary, so the situation is not one of black and white, nor is the law regarded as totally morally justified by those who support it or at least acquiesce to its validity. What now are the forces at play? For the law, there is the argument that its existence as a law is a first order

reason that it should be obeyed, and a second order exclusionary reason that arguments for disobeying it should be ignored. But here the person ignores the second order exclusionary reason. Why? The factor that has been omitted is that any reason ultimately must relate to the agent's pro-attitude (per Davidson). The reason must include the agent's desire to avoid the sanction. But the sanction is not an exclusionary reason. It is at best a first order reason. Or is it? Let us examine a case and try applying Razian and other arguments.

Normally, to take an innocuous case, and one which for the moment omits serious moral imperatives, we have a law e.g. not to speed. There is also a punishment for speeding, a fine plus penalty points. Finally there is the state of surrounding facts. Now this is almost certainly a point Raz would omit but I shall show its importance later. First we agree with Raz that there is no moral obligation, because it is a law, to obey it. It is a first order reason, certainly; Raz says it is also a second order exclusionary reason, and on top of that there is a sanctionary norm. We now come to the situation; it is a nice day, the road is clear, there is exciting music playing on the wireless, the local police appear conspicuous by their absence, we are going to meet someone we wish to see, we have a clean driving licence, (not having been caught before), and what happens? The foot goes down and we break the speed limit. Before attempting to unravel this, let us look at two variations:-

Situation 1). We have been speeding as before and we come

to a section of road with seeing eye cameras and warning notices displayed. The effect can be quite dramatic. I have actually seen this happen on a dual carriageway section where cars normally disregarded the speed limit by a good twenty mph. Even a year after the introduction of cameras, a procession of cars may now be seen dutifully obeying (or nearly obeying) the law.

Situation 2). There are no speed cameras but we have 11 points on our licence, and one more offence means losing it. I would suggest the effect would be the same as in 1 above.

Now the first thing to note is that all three of the above situations apply to people who **may** have a respect for the law. Variations **1 & 2** apply only to people who **do** have a general respect for the law. The teenage joy rider may steal a car and drive at idiot speeds without a licence / insurance, and possibly with previous convictions. As such he does not fit with any theory of law and punishment which we are currently considering. Certainly he is relevant to the questions of efficacy of the law, deterrence, retribution and, particularly in this case, cure, but these are outside the ambit of the present exercise. What we are considering in the examples is a person who falls within Raz's requirements of having no imperative moral requirement to obey the law, but who nevertheless has a general respect for the law. On the one hand we have an allegedly exclusionary reason to obey plus a sanctionary norm; on the other we have a desire to speed. The balancing factors appear to be the apparent safety (a

clear open road, the likelihood of not being caught (no police or cameras in evidence) and a penalty which we are not going to like but which will not be totally disruptive. These are all apparently first order reasons. This leaves us with some basic questions:-

1. Is the law against speeding not an exclusionary reason? or

2. Can exclusionary reasons be over-ridden by first order reasons? or

3. Could there be another explanation?

If 1 or 2 apply then Raz is in trouble. However there is too much of value in Raz's theory to abandon it on the strength of a speeding car. I shall argue that there is another explanation. It is very simply this. Our pro-attitudes are an inherent part of every reason, and that pro attitude affects the weight of our reasons. I have pointed out before and will give further arguments in part IV that it is a basic weakness in Raz's theories that he has so often overlooked this aspect, but as I hope to show here, if it is included, it can restore the application of his methodology and overcome the objection I have raised.

My argument would run as follows:- In the example our desire to speed affects the weight which we attribute to our reasons. Thus where there is a desire to disobey the law, and perhaps where our respect for that law in those circumstances is less persuasive we treat that law as a first order reason only, and it then takes its place in the scales along with the other first order reasons. As soon as the likelihood of being caught (presence of cameras or

police car) increases, the law tends to resume the status of an exclusionary reason. Moreover it also explains the joy rider situation. Here respect for the law is weak or non-existent, the thrill is all pervasive and over-rides an already weak second order reason. The prospect of being chased by the police adds to the thrill, and possibly the lack of effectiveness of the sanction (youngsters are often merely cautioned again and again) all permit the downgrading of the importance of the second order reason.

I readily admit that the above is an amendment to Raz's reasoning, but it is not an added philosophical import. It is, like the example in 4 above, a logical consequence.

Finally in defence of my argument for the suggested amendment to Raz's arguments I would say that my suggestion provides an answer to Raz's problem with Civil Disobedience. In order that it should be indefensible, as he wants it to be, he had to import an artificial distinction between a liberal and an illiberal state. With my explanation this is no longer necessary and it could therefore actually reinforce Raz's methodology.

6. Conscientious objection.

Here the arguments pursued under Civil Disobedience do not apply in that Raz maintains that the law is morally valid. This being so there is no right to conscientious objection and the same is therefore genuinely punishable. This is consistent with his methodology, and indeed it is unaffected by my proposed amendment. The

genuineness of the morally held conviction would, Raz has argued, provide grounds for extenuation in the case of punishment. In the event of the incorporation of my amendment it would be legitimate to consider all motivational reasons. This I maintain accords more closely with the courts' actual practice.

II. DETAILED APPROACH

a. Derivation.

As we have seen in part II the structure is methodologically derived from Kelsen's Imperative theory of Norms. However his condition that coercion should not be wrongfully coercive is additional and not methodologically derived. The omission of this however would have no effect on the establishment of a concept of punishment reliant on his methodology, though it would of necessity be more purely positivist than one developed by extrapolation under Chapter 8.

This would be a trend in direct opposition to the trend previously discussed concerning civil disobedience and although even this apparent conflict is not fatal to the development of a theory of punishment it again indicates areas which will be need to be examined in part IV.

b. Critical Reactions.

It will be remembered that Raz stresses the necessity for 'critical reactions' and suggests that the sanctions in part replace those critical reactions. It is

my submission that the whole subject of critical reactions is related to the person's pro attitude to a) the law in general and b) each law with which they become concerned. This again will be discussed in part V but does not necessitate any change in basic methodology. However when it comes to developing a practical theory of punishment as opposed to the basic philosophy, Raz's methodology will carry us only so far. It will justify the existence of punishment but will be absolutely silent as to any practical progress beyond that point.

c. Deterrence, Retribution.

As indicated in chapter 8, Raz's references to punishment are primarily in relation to it as a deterrent. The methodological approach, in this instance, can get us no further than before. Punishment laws give additional reasons for obedience and are therefore consistent with his theory, and by virtue of this role they must be deemed to be primarily deterrent. It is only by considering the agent's inherent pro-attitudes in accordance with my suggested amendment to Raz's theories that we could even begin to proceed further. Moreover it is only in this manner that we shall be able to distinguish between punishment designed as deterrent, punishment as retribution (critical reaction) and punishment designed to cure. In these fields Raz's methodology is of no help to us. However having said that I maintain that it is not inconsistent with the amendment I have suggested whereafter progress could be made.

III. FURTHER ASPECTS

1) Proportionality.

In so far as the argument is that part of the punishment is relative to (or as Raz argues, represents) the critical reaction of society the arguments in chapter 8 are methodologically supportable. However in order to progress further we need some means of distinguishing between deterrent punishment and retributive punishment. As previously argued Raz's methodology does not provide us with this. We have seen that by applying his general philosophical principles it was possible to extrapolate somewhat further but even then we did not progress very far.

2) Justice.

As previously remarked Raz seems disinclined to attach a central role to justice. It is not that he has never considered the subject - indeed in 'Facing Diversity: The case for Epistemic Abstinence' he is concerned with analysing both Rawls and Nagel's concept of a just state and he rejects both their approaches and concludes that 'justified political principles may be controversial and may fail to command actual consent'. Moreover their failure leads him to suggest that the underlying idea may be unstable and incoherent. However, while I agree with his analysis (this area of analysis, like his analysis of Kelsen is quite masterly and displays Raz at his strongest) it would be my argument that the concept of a just multicultural state is quite separate from concepts of

'justice' per se or indeed what is just in any given circumstance. In my conclusions I hope to show where I feel a consideration of the subject along the lines I propose would provide a means for further progress without detracting from either Razian methodology or philosophy.

3) Authority.

Raz's views on Authority are complex. According to him authority is normative power. He accepts that authority is the right to command and the right to be obeyed.[2] However he also goes on to posit that effective authority cannot be explained except by reference to legitimate authority. This position is brought about by virtue of his methodology. For example, when considering 'authority' he considers the full range of actions which may often be referred to by the word 'authority' i.e. from 'having authority' to include 'being an authority'.[3] Thus he considers 'being ordered', 'requested', and 'advised'. He takes the attitude that there is no necessary difference between the three and argues that orders, requests, and advice are identified by the attitude of the source rather than the way they are received by the addressee.[4] His primary concern again stems from his methodology, it is

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[2] See A. of L. p.11. where he agrees with Robert Paul Wolff but goes further because "authority is a right to do other things as well".

[3] This is quite different from a Hohfeldian methodology, which would distinguish and separate each use of a word, perhaps even giving them a different terminology, e.g. being an authority would be looked at in terms of being an expert. It would then be seen that the two could be distinguished in Kocourekian terms in that Having authority implies a jural relationship with a Dominus and Servus, whereas being an expert (authority) involves no jural relationship whatsoever.

[4] Ibid. pp.19-23.

with respect to the ability of authority to change reasons, and to provide 'protected reasons'.

However the paradoxes of authority with which he is concerned relate to the incompatibility of authority with reason and autonomy. Authority requires submission even when one thinks it is wrong and is therefore irrational. Secondly autonomy requires one to act on one's own moral judgement and authority overrules this.

Raz's answer is that to have authority is to have normative power. This itself entails the idea that an order is intended to be both a first order reason and an exclusionary reason.[5] A first order reason may be accepted in the particular circumstances without allowing it to be an exclusionary reason (one that overrules and supplants contrary reasons). In this way he says an anarchist, while denying the legitimacy of an authority, may accept instructions to be first order reasons. Raz assumes that one should not abandon one's right and duty to act on one's judgement of what ought to be done "all things being considered". This is a rational principal of autonomy. However he says that this does not prevent us from accepting that there are exclusionary reasons, i.e. that may overrule what ought to be done on the balance of first order reasons. If all valid reasons are first order reasons then autonomy would entail a denial of authority.[6] However the existence of valid second order reasons is possible. There is nothing in the principle of autonomy that

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[5] A. of L. p. 26.

[6] Ibid. p.27.

necessitates the rejection of all authority. At the same time he can still maintain that we have no absolute duty to obey the law per se, and that in certain cases it might be that there is a duty to disobey.

So while he has provided us with a methodological ground for accepting and obeying the laws it does not actually give us a justification of the S-laws. That is to say if the D-laws in themselves provide a reason for obeying them, and if the laws do not outrage our moral integrity why is it necessary to have a punishment for those who do not obey? We know that his concept of law is primarily deterrent based (cf chapter 8. - based on philosophical assumptions; and the above section c - based on methodological deductions).

The introduction of valid exclusionary reasons require that authority to be a legitimate authority, i.e. it must be justified in making the utterances of those in authority exclusionary reasons. In the case of the law if people regard the authority as legitimate that authority is a de facto authority. This is a broader definition than some would accept but it stems from the fact that Raz regards authority as the ability to form exclusionary reasons, while others would start from the premise that authority is the ability to require obedience (by force if necessary) and that the validity of that authority is an entirely separate matter. However Raz's approach is consistent with his general methodological approach of encompassing terms in as broad a meaning as possible. Thus in addition to the example referred to above concerning

'authority' he takes the same approach with respect to 'rights'.

Thus the authority of law if it is effective involves that it is legitimate authority. So, he says[7] we can concentrate on the circumstances in which non-conforming behaviour is or is not a breach of the law. So first he establishes that the law claims that the existence of legal rules is a reason for conforming behaviour. This is a different approach from those who (invalidly according to Raz) claim that the law requires conformity by virtue of its validity. He seeks to prove that conformity is required in the absence of other reasons because the law itself is a reason, and not only that but an exclusionary reason. This latter seems to be a matter of practicality. Raz recognizes that there are arguments that the courts should always allow recognition of all the relevant considerations. However in many ways this would lead to an uncertainty which would itself destroy the benefits of having a law in the first place. He maintains that it is the essential exclusionary character of a rule that it resists permanent revision. It is immune from the claim that it should be re-examined on each and every occasion of its application.[8] Thus he establishes reasons for the generality of laws and their priority over autonomy.

However the question may still be raised as to whether this provides a justification for S-laws. In fact it does not provide a separate justification but Raz would

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7 Ibid. p.30.

8 Pr. R. & N. c.2 and A. of L. p.33.

be perfectly entitled to reply that they do not need a separate justification for the very simple reason that S-laws are themselves primarily directed at providing additional reasons for obedience of the law to which they relate. Indeed to many they will in fact upgrade (or at least reinforce) the category of reason for obedience. Thus it may be said that S-laws providing punishment are supportable within Razian methodology.

The arguments above requiring authority to be legitimate authority are not based on methodology but deduced separately. Thus they would not apply to the pure theory of punishment. In this case the theory would again be far more positivist and would not contain safeguards relating to an illiberal state.

This as has been shown gives rise to an inconsistency because here we have a more positivist end result which would apply to any illiberal state and it conflicts with Raz's libertarian principles. The result of this is, as we know, Razian libertarianism has amended and softened his approach to positivism. Even so this cannot be said to void any development of a theory of punishment. What it does show is that, as he admitted, his philosophy is based on that of Kelsen and Hart but amended. These amendments however, as we can now see, are not due to the necessity of methodological consistency based on a new methodological approach, but rather are due to an additional and separate application of Raz's libertarian moral philosophy to a basically positivist starting position.

4. Autonomy

Raz's arguments on autonomy are likewise developed from his general philosophy and not by direct methodology. The arguments are therefore similar to those appearing in chapter 8, section III.4, and are therefore not repeated.

SUMMARY AND LINK TO PART IV.

Whereas in chapter 8 we sought to construct the basis for a theory of punishment extrapolating from Raz's philosophy in general, in chapter 9 it was sought to check this by building a theory using only Razian methodology. In doing so we have seen that while the methodology can provide a basis for a theory, the extrapolation can take us further. Nevertheless the methodological approach was extremely valuable to check for any inconsistencies or variations which occur.

In practice there are differences caused by the importation of the occasional general philosophical assumption which then guides the lines along which the theory may be developed. Where these occur they have been pointed out. There is no difficulty in assimilating these points into the developing theory but it is useful to note them for they show that it may be possible, using the same methodology, to end up with theories with differing emphases, depending on the philosophical assumptions made.

At the same time a note has been made where there appear to be difficulties and in one instance a possible amendment to the Razian approach has been suggested (i.e. to include and place emphasis on the pro-attitude or intentionality of the Agent) and it was indicated that it was felt that this would improve and carry the theory further, without necessarily altering it. In all cases in both chapters of part III I have sought to develop theories

along Razian lines. In passing I have given indications of parts where I believe difficulties can occur, but in the extrapolation and methodology I have not followed these arguments (except on one occasion where I suggested a method of overcoming the difficulties) as our object has been to develop Razian theories.

In part IV however the time has come to turn devil's advocate and test the theories, if necessary by questioning not only the reasoning but the very basis upon which assumptions are made. The indicated problems will be explored but it is not my intention to put up rival philosophical approaches merely to show that there could be those who might feel Raz is wrong. When conducting any serious assessment one of the most effective ways is to show whether parts of a theory or philosophy are inconsistent with each other. Thus a subsidiary objective of performing a dual extrapolation / methodological approach was that it would lay bare possible areas of inconsistency. Unfortunately we are denied too much progress along such a path. Even so, the comparison between extrapolation and methodology has shown areas where Raz has had to import ideas, apparently without justification, to attain his ends. However Raz, as I have shown, is generally remarkably consistent in his approach. In fact it might be argued that the very monolithic nature of his approach may give us a clue as to a possible source of weakness.

Having been denied the undermining attack we are faced with little short of a frontal assault if we are to be thoroughly searching. We have seen that there are

various difficulties with regard to his approach to "rights", and again with respect to "reasons". Problems also arise with respect to some of his stances, for example that there is no moral obligation to obey the law. Many positivists might take the attitude that there was indeed a definite duty to obey which would far outweigh a mere moral obligation. It is to a consideration of these factors that we turn now in order to see whether and to what extent they might affect the reasoning behind a Razian concept of law and punishment.

PART IV

REVIEW OF RESULTS.

CHAPTER 10. CRITIQUE

This will be treated in five parts as follows:-

1. General
2. With respect to Law and Legal Systems.
3. With respect to "Reasons".
4. With respect to Morality.
5. With respect to "Rights".

In part II The Razian approach, I outlined those parts of Raz's philosophy of law generally; and morals and ethics, particularly those which could have a bearing on the question of developing a philosophy of punishment. Occasionally without digressing too far I attempted to indicate areas of possible contention or weakness. In this chapter we shall be exploring those potential weaknesses.

1. General.

Raz's approach is quite marked in one respect. In a number of instances he utilizes a word which has a number of distinct meanings as a generic, in that he intends the word to cover most if not all of its separately defined interpretations, which he then tries to encompass within that word. Some of Raz's definitions appear to be built up with additional clauses added in an attempt to resolve problems as they occur, rather than rethinking the original definition. Each time it leads to difficulties which require unnecessary convoluted thinking to try to square

the circle. The following are important examples:

1. In his attempt to reconcile the effect of common morality on the law he fails to separate out 'law' and 'justice' or acknowledge that the philosophical inputs to these may be different (See fig.1.). Instead he tries to encompass judge made law and the fact that it may involve moral considerations, with a sources thesis that has a definition - i.e.

> "a law has a source if its contents and existence can be determined without using arguments"..but then follows the caveat "but allowing for arguments about people's moral views and intention which are necessary for interpretation".

Now it might be argued that this caveat has had to be added in an attempt to overcome the problems of the original definition. Furthermore as an explanation it does not always work, it failed when we applied it the court's changes to fundamental approaches, changes effected in some instances by the case law rather than by statute.

2. He is determined to hold that there is no moral obligation to obey the law. This position is absolutely necessary for him to maintain his libertarian stance that one may, and possibly should, actively disobey immoral laws (without giving us any criteria for establishing what is immoral, and by whose standards). Because of this, he is forced to provide a system of 'reasons' to obey, and we run the gamut of prima facie, first order, second order, and protected reasons. Later he posits that the law can in some instances over-rule or grant dispensation from a protected reason. Logically this would seem to require a reason of a

higher order, perhaps a tertiary reason, to overcome a protected reason but he does not go into this.

3. Similarly, his reasoning involves us in D-laws, S-laws, PR-laws, M-laws, MS-laws, investitive, divestitive, and constitutive laws and norms of varying denominations. This is largely brought about by his concept that "Power can be determined ultimately in terms of duties".[1] He feels that the possibility of analysing rights in terms of powers and duties (and therefore in terms of D-laws and P-laws is of the utmost importance. He states that

> "Rights concepts are of paramount importance in simplifying the structure of laws"

but as we have already noted he states that

> "No classification or distinction between various types of rights will be attempted."

This unfortunately proves to involve us in considerable difficulties. Most of the problems arise from the failure to accept that the word 'rights' includes concepts some of which involve jural relations (e.g. rights and duties) while others, such as freedom, liberty, or privilege, do not. The failure to make these distinctions and the use by Raz of 'rights' in a compendium sense again involves us in difficult and convoluted explanations, in one of which rights are determined by interests sufficient to create duties in others. Unfortunately interests are not defined satisfactorily nor are there any parameters for determining sufficiency.

To my mind the only way to approach a subject such as this is to analyze the various aspects into their

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[1] C. of L.S. p.181.

parts. Then from the analysis of those parts one can establish commonality (if any). To assume commonality and then to try to explain away discrepancies as they occur, or worse still not to bother, is to me anathema.[2] Moreover in his attempts to encompass the general all inclusive use of various words he is forced to include clauses which include words of limitation, which themselves involve questions which remain undefined, e,g "necessary for interpretation", "sufficient to create a duty" etc.

At this point it is necessary to go into the weaknesses of approach in further detail. For ease of cross reference I have given a reference in square brackets in the earlier text and a corresponding reference in this part.

2. Raz in relation to Law and Legal Systems. [References in []s are to part II ch.4.]

[A] Raz's criticism of Austin's contention that supreme power limited by positive law is a flat contradiction in terms. I think it may be said that what was not set out by Austin or Salmond, although it was referred to by Markby, was that a sovereign or state could and would contemplate limitations on its sovereign powers. This omission may have been largely due to the time and society in which they lived (the 1890s being a time in which sovereigns were regarded as paramount) but shortly after the first world war (1922) in his *Introduction to the Philosophy of Law* Roscoe Pound points out very clearly how

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[2] It is possible that there is an irreconcilable difference of approach due to the fact that my initial disciplines were mathematics and engineering.

the political system and political philosophy has and does have a marked effect on the jurisprudence or system of law. In fact Austin is still correct insofar as the only thing which can limit the power of the state or sovereign is a greater power. Power is according to my extrapolation of Hohfeld, prior to rights or duties. Raz takes the view that powers can ultimately be defined in terms of duties.[3] This to me conflicts with his acceptance of power being prior to law, for it is in my view the law that establishes rights and duties.

However it may be possible to reconcile the position between, say, the state tax and the individual, and the debt between two individuals, as follows:- It is normal to regard both as having a duty to pay, such duty, according to Raz, stemming from the right of the other party. This is where, in my submission, the mistake has occurred. Duty is indeed the correlative of the right (Claim-right) but it does not stem from the right. The right, as Kocourek points out, extends from the Dominus to the Servus and the duty from the Servus to the Dominus but these are part of a single jural relation. Moreover, according to Kocourek, there are only two ultimate kinds of jural relations, the "Claim - Duty" relation which is frangible; and the "Power - Liability" relation which is infrangible.[4] Both are brought about by the operating facts. I would argue that performance of the duty in the case of a frangible jural relation of the tax type arises

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[3] C. of L.S. p.181

[4] A. Kocourek. *Jural Relations* Bobbs-Merrill 1928, 1973 reprint. p.341.

solely from the need/desire of the agent to remain within the law. It is the law which sets up both rights and duties. The need to obey the law in a citizen may be created by fear (eg in a dictatorship); moral duty (religious society); quasi-contract (democracy). The manner in which it is established is not directly relevant save with respect to punishment. Raz, on the other hand, propounds the concept of a right arising when the interests of others are sufficient to create a duty.

However as Pound pointed out, the laws, and political ideals governing those laws, change with time. In fact since the second world war a new ideal, namely that of the Welfare state, has grown rapidly. This ideal contemplated the idea of the state voluntarily assuming duties and liabilities. Thus the individual is increasingly in the position of being able to sue the crown (state), something that was formerly impossible, and while it may be argued that this alters the nature of the relationship such an argument is basically wrong, insofar as there is nothing whatever that could stop the state terminating its liabilities and altering its so called duties at any time. Once the new legislation altering the rights or duties was passed there is not a thing the private citizen can do about it. So basically Austin was right. Of course, it is true that if the new measures were sufficiently unpopular the government might not be re-elected, but there would be no guarantee that the next government would be under any duty to reinstate the former position.

Thus while the problem of the illimitability

theory is stated to be that Constitutional laws (ascribing rights or duties to the sovereign or limiting his capacity to have rights or duties) are not laws according to the theory, I would argue that they may be so regarded insofar as none of the limitations is any more than voluntary - they are not inviolable. Any sovereign finding himself with sufficient power could strike them down.

[B] When dealing with Duty imposing laws, Raz's D-Laws, he is concerned to show that many social duties allow for control, and that the existence of the duty imposing rule depends on patterns of behaviour. I have tried to distinguish between Duties (the correlative of a Hohfeldian claim-right) and moral obligations brought about by patterns of behaviour. In my submission these are two particularly distinct uses of the word duties which must be separated. They both involve the connotation of an obligation or requirement to do something on the part of the person having the duty, thus in general use there is no confusion. However we are concerned with the formation of duties and here the considerations are quite different. Of the connotations of "Duty" I consider the following two are particularly important and relevant and I have defined them as follows:-

1. A "**Command-Duty**" When someone who is (or at least feels) bound to obey is commanded or directed to do something. This is almost a quasi-contractual situation - I take the King's shilling, I obey his commands;

- I accept the protection of the state, I obey its laws;
- I accept the morality of this body, I obey its rules;

- I depend entirely on my parents, I accept their authority.

2. A "**Correlative Duty**" This is the correlative to Hohfeld's claim-right. This type of duty is defined by a law establishing a claim-right and is activated by operating facts.

While there are many occasions on which they can be used interchangeably, as for example when referring to the net effect on the "duty-ee", one must always be aware of the possibility of confusion, particularly when referring to their cause. As with "rights" it seems to me that Raz fails to make this distinction.

[C] Again he regards sanctions as replacing, to an extent, the critical reactions as the characteristic fact giving rise to duties. Here, as I have said, I believe there is a step missing. For example to illustrate my point:-

In a moral case we have:-

a. Accepted Group Attitude giving rise to a code of behaviour.

b. Group critical reaction if code broken.

Now why does anyone conform? It is because of a <u>desire</u> to be accepted as apart of the group. If one does not care for the group, its mores, or what they think, one breaks their code with impunity. It could be said to be the result of the acceptance of a 'command-duty' referred to above. (It is true that there are cases where the critical reaction could be so strong as to put one in fear of one's safety if in breach, but here I submit the group is

actually coming close to arrogating law making power to itself). It is the desire to be accepted by the group, which can be accomplished only by conforming, or the acceptance of a 'command-duty' that is the reason, not the critical reactions. Already the assumption of volition from Bentham seems to be downgraded.

In the case of a criminal law with a sanction we have:-

a. Group law for behaviour.

b. Sanction +/- critical reaction when law broken.

The desire to conform may be caused by

i) A desire to be part of the group as above,

ii) Fear of the sanction (but no desire to be part of the group), or

iii) A combination of the two.

iv) A sense of obligation, this is the law of the land and I am accustomed to obey. i.e. Acceptance of 'command-duty'.

v) A sense of contract. The law protects me, this protection depends on us obeying the law. Again this is a form of acceptance of a 'command-duty'. This used to be much more prevalent in the past when often the wrongdoer was not protected (The poacher caught in a man trap might be said not to have had a leg to stand on in claiming for injury!).[5]

My criticism is that facts (critical reaction/sanctions) cannot be reasons. It is the response

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[5] It is interesting to note that protection of the criminal has been extended to the point where it is beginning to conflict with the principle of 'Volenti non fit injuria'. This I would maintain is actually a principle of justice (perhaps of natural justice), not law, and it would therefore account for the public reaction against criminals succeeding in claims for damages for injuries received during the course of their nefarious activities.

attitude of the Agent to those facts which provide reasons. Also, as Raz has correctly pointed out, the law may be obeyed even when it is not approved, i.e. critical reaction to non performance is at a minimum.

A further problem with Raz's dependence on 'critical reaction' is that he has given no parameters for the acceptance or rejection of a critical reaction. No doubt, in their day, burning at the stake, or the Inquisition were both the subject of favourable critical reactions. Therefore are these critical reactions to be reactions of the majority, or of a sufficient number to regard the law as valid? What happens in the case of the multicultural society with different and irreconcilable critical reactions (Freedom of speech v the fatwa)? There is an answer but it is not a Razian one, but rather the authoritarian one of pure positivism.

One of the objections would seem to be that Razian philosophy encourages verdicts such as that in which four women broke into the property of British Aerospace and then did £1 1/2 million damage to a trainer aircraft intended for sale to Indonesia. Their defence was that suitably adapted (which it was not) the aircraft could be used against the people of East Timor and that would be a crime of oppression. There is no doubt (at least in the jury's mind) that these women genuinely believed this. Not only that, because of that they were guilt free. - The perfect Razian defence and the jury accepted it. My reaction is that, if this were to become the norm, anarchy will not be far behind.

[D] Raz tackles the question as to whether there can be legal duties not backed by sanctions and concludes that for officials "there is a legal duty imposing law, though it is not backed by any sanction stipulating law."[6]

On the contrary, in my submission, there is no need for a separate legal duty imposing law. Officials are empowered to do certain things upon certain terms and conditions. This if you like is their contract of employment and it is here that the duty arises. He states

> "That in some legal systems there are laws imposing duties on ministers and other officials not to make *ultra vires* regulations, invalid expulsion orders etc. whereas there is no similar general duty not to make invalid wills, contracts, etc., is a consequence of the critical reaction to such acts."[7]

In the first place any such law would amount to 'You are under a duty not to do something which you are not able to do' (i.e. if the act was ultra vires it is void. So Raz's DR-Laws could amount to laws attempting to establish a duty not to commit a void act). Secondly the comparison with regulatory laws such as those with respect to wills, is not on all fours. In the latter case the person affected is the person doing the act, i.e. it is the agent (who commits the operating facts e.g. makes his will out incorrectly) who does not get his property dealt with as he desired. In the case of a person making an ultra vires regulation the effect is on an innocent third party who is thereby prejudiced (or benefi ted). Equity or justice

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6 C. of L.S. p.154.

7 Ibid. p. 154.

(motivated by critical reactions stemming from the morality of the society) would suggest that such an innocent person should be compensated. Whether that is provided for by the courts making such a law or is enshrined in legislation does not seem to alter it. For example in the famous case of **Rylands v Fletcher** (1863) L.R.3 HL 330.[8] the court made a rule of law which has existed ever since. Here the two defendants constructed a reservoir on their land (as lessees) to supply water for their mill. There was in fact the shaft of an old mine, which connected with the plaintiff's mine, under the property. Through the negligence of the contractor's this was not discovered. When the reservoir was filled, water escaped causing damage to the plaintiff's mine. The court ruled that the law was one of strict liability (without wrongful intention or culpable negligence). As stated by Blackburn J.:-

> "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if he does not do so is prima facie liable for all the damage which is the natural consequence of its escape".

The 'Rule in **Rylands v Fletcher**', as it is known to this day, might just as easily have been a law passed by a far sighted government who foresaw the type of situation before it arose.

The problem is that it is often wrongly assumed that all legal relations are reducible to rights and duties. This is not so, and it leads to great difficulties

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8 See also ch. 5 p.12 ante.

if we try to assume that everything will fit into such a relationship - (not the least of which is applying Humpty Dumpty interpretations of the word 'rights' in different contexts). For example, where an official has 'power' (often referred to as the 'right') to alter the legal status quo, the jural correlative of those affected by the power is a 'liability'. As Hohfeld pointed out one must distinguish between legal relations and the facts which cause them to exist.

Jural relations may be set out in law. They may also be established in equity or justice by the courts. In the case of Agents of the state where, say, a Judge convicts and it is later quashed, it is not the Judge or officials who pay any compensation, it is the state. I suspect in Austin's day no such action would have lain. Nor can the offended party require the removal of the official, that is up to their employer, the state. The officials often proceed sublimely about their business. It is only when they constantly fail in the duty established by reference to their terms of engagement that they may finally be removed (and then only by their employers, the state).

At this point my argument is purely to warn against the idea that everything can be reduced to 'Rights' and 'Duties'. Such an approach is too simplistic and it confuses law and justice which have different philosophical inputs. The result of attempts to simplify everything to rights and duties is a complication in Raz's theories. He is forced to introduce DS Laws (S-Laws which make the

application of a sanction a duty) and MS laws (S-Laws which merely permit the application of a sanction) and A and B duties. It is important to note here that Raz's A & B duties are not the same as my 'Command' and Hohfeld's 'correlative' duties. He is referring to the scope of the duties, whereas I am referring to the initial relationships within the legal system. He also refers to A-Courts and B-courts all of which arise out of the problems he foresees.[9] He does not go into the necessary relation between the scope of D-Laws and S-Laws except to say that their scope need not necessarily be co-extensive because of immunities, periods of limitation, estoppel etc. He points out that none of these affect the scope of the D-Law and the duty it imposes. Here I would argue that it does not affect the scope of the sanction, merely its application. This more often than not is an intervention by equity (estoppel) and of course things such as statutes of limitations are brought about by the concept that there must be some degree of certainty in order to be fair. That this is a morally stimulated argument is born out by the current arguments as to whether or not there should be any limitations against the prosecution of war criminals; i.e. it is a question primarily of justice. Again as I have pointed out I believe it is imperative to maintain a distinction between normative law and justice.

3. With respect to Reasons. [References in [] are to Part II ch.5.]

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[9] Ibid. p. 154.

Raz's approach here represents one of the major areas of difficulty in formulating a theory of Punishment. Very early on in the "Authority of Law" he introduces the example used in "Practical Reasons and Norms" about carrying an umbrella. I can not accept Raz's arguments at all, for the following reasons (and see also Ref. [a] in Part IV) :

To examine the example further - He says

> "That it rains, for example, is a reason for carrying an umbrella."

No, with respect, it is not, - the reason is, one doesn't wish to get wet. The fact that is raining may - given the foregoing assumption, (which in itself may not be true for I may love getting wet but hate the sun) - be a reason for putting it up!

An equally good reason for carrying an umbrella is that I am allergic to the sun. Alternatively I may of course be the chief of a remote South American tribe, and being the only umbrella around it is my symbol of office. These are reasons, because they are the reasons for my pro attitude towards carrying an umbrella. The facts, e.g it is raining, or likely to rain, are the causal events triggering my action and they have to interact with my pro attitude to produce a result. e.g. I am at my villa on the beach, it is red hot and I am about to go swimming. A tropical storm starts and I rush out enjoying it thoroughly. My point is that while my attitude is affected by the circumstances it is my attitude to these circumstances and not the circumstances themselves that

provide the reason. Two people in the same circumstances may do the opposite thing. How therefore can the circumstances be the reason for their action.?

For example:-

1. "Why are you staring out of the window?"

Answer: "There is a thunderstorm (Circumstance) which I greatly enjoy watching (Reason)

2. "Why are you hiding under the bed?"

Answer: "There is a thunderstorm (Circumstance) which I greatly fear (Reason)

Robert Audi in his *Practical Reasoning* refers to "prima facie" reasons[10] which expression at least envisages a presumption of rebuttability.

Raz goes on to say that "It is in terms of complete reasons that the attempt to analyze authority will be made" and then adds in a footnote "One must defend in other words the belief that promises are reasons for action". Again I must emphasize that a complete reason must, as Davidson has so ably pointed out, contain a reference to the pro-attitude of the agent.[11]

[b] Thus promises need not be reasons for action, as Raz claims, unless one intends to keep them. Many social promises are made without the slightest intention of keeping them. It is true that a serious promise may invoke a feeling of moral responsibility, but even in this case I prefer Audi's 'prima facie' reason. My concern is that

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10 *Practical Reasoning* Routledge 1991. p.2.

11 *Essays on Actions and Events.* D.Davidson Oxford 1980. 1. Actions, Reasons, and Causes; and 5. Intending.

although Raz has noted a distinction he has not attributed to it its full importance, that it is not the law which provides a reason but rather the subject's attitude to that law. This is of considerable importance when it comes to theories in relation to the deterrent effects (if any) of punishment. Kocourek gets the relationship right when he says

> "the hortatory effect of legal rules which prescribe conduct may fail.."[12]

[c] While Raz's account of authority in terms of "exclusionary instructions" or "protected reasons" is explicit he says that he does not consider that Authority can be explained only in terms of reasons but that he prefers a reason based explanation in that he believes:

> "reasons provide the ultimate basis for the explanation of all practical concepts, namely, that all must be explained by showing their relevance to practical inferences"

Now this is a very imposing statement with which one might agree - provided always that one knew what was intended to be meant a) by 'practical concepts' (e.g. How to construct a coracle?), b) by 'relevance to' (e.g. causal, consequential, logical or similarity to?) and c) by 'practical inferences' (e.g. workable, logical, strictly necessary, or merely anything which is not an impractical inference). I would agree that we should look for reasons **underlying** authority rather than explanations through concepts such as rights, but these will always only amount to 'reasons for' and not an 'explanation of' authority.

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[12] A. Kocourek. *Jural relations* 2nd.Ed. 1928 Bobbs-Merrill, 1973 reprint.

[d] Next he says that, from the addressee's point of view, there is no necessary difference between being ordered, requested or advised.[13]

Now it seems to me that again he has missed the fundamental difference that in the case of a legitimate order the Servus is under a ligation. These are Kocourek's terms[14] and it seems to me that in the case of request and advice there is no ligation because there is no jural relation of Dominus and Servus. It is possible that one could argue that in the case of a legitimate order there would be a legal obligation, in that it would presumably be enforceable. In the case of a Captain of a ship ordering abandonment (Raz's example) there would be either a legal or a jural relationship (providing a very good reason to obey); In the case of a request or of an expert (authority) providing advice there is no jural relationship.

He takes the view that Authority is the ability to change reasons and that power is the ability to change protected reasons. Thus authority is basically a species of power which requires showing that rules and commands are protected reasons and that all authoritative utterances are power utterances.

[e] It is my contention that any 'proof' of the above will founder on the grounds that any "reason" for an action

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13 A. of L. p.13.

14 DOMINUS: The legal person who dominates or controls a right.
SERVUS: The legal person who bears a ligation.
LIGATION: The generic term for the servient side of a jural relation; it includes Duty, Disability, liability and inability; it excludes such terms as no duty and no-liability since they are not relational in a jural sense. (emphasis mine) A.Kocourek *Jural Relations* 2nd edn. 1928 Bobbs-Merrill, 1973 reprint.

involves intentionality. Further that this intentionality is that of the Agent or Servus. Power utterances involve the intention of the utterer or Dominus only, and can therefore never be reasons properly so called for action of the Servus or Agent. The whole effectiveness of law, rules, commands etc., hinges entirely on the jural relations between the parties and these Raz ignores. Half the time his reasons are no more than incentives. Without the remainder of the equation they just hang in limbo.

Raz has come up with a series of definitions of relative reasons which he then fits to the judicial system. He then posits this as an explanation which, with respect, it is not at all. It merely gives alternate names for various aspects and completely fails to show their necessary inter-action any more than the characters did under their original guise. He fails to show the parameters governing the interface between first order reasons, second order reasons, protected reasons etc.

[f] As has been noted Raz also regards reason as 'a valid or justified reason' and authority as 'legitimate authority'. Both these could therefore be argued to bring in a moral aspect in which case it could be argued that Raz's theories lead us into a veritable minefield from which there is no exit. It is even more fatal if we are going to examine each case to consider whether the law has authority over us and whether we should acknowledge that authority. In such a situation there could be argued to be a case for alleging there to be no grounds for justifying a theory of coercion, no punishment and no law. The whole

prospect reduces to inevitable anarchy. Yet we know this is not Raz's intention, even though I strongly suspect it would be the result. Again we can only remedy the faults by looking to jural relations, which Raz steadfastly refuses to do, because these are governed by power and not reasons. Of course Raz says:-

> "It is the essential character of a rule that it resists permanent revision. It is immune from the claim that it should be re-examined with a view to possible revision on every occasion to which it applies."[15]

"Essential character" is somewhat vague and although he refers to Practical Reasons and Norms (Ch.2 On Mandatory Norms) to justify this I am left with the conclusion that it is another case of being saved by the definition.

[g] To give a further example of the argument that rules are <u>not</u> reasons for action, consider the following. RULE:- 'All Professors at Balliol shall go swimming at 4 am on Jan 1st each year.' That is no reason for Raz to go swimming at that hour on Jan 1st. (assuming he is a sensible soul who would prefer to be under a nice warm duvet). The reasons why he might go are

a) That he does not wish to let the other Professors down (peer pressure);

b) that there is a £2000 fine for failure to do so (Punishment), <u>AND</u> that he would rather get a bit cold than pay it; or

c) that Raz considers the existence of the rule good and

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[15] A. of L. p.33.

sufficient reason to obey it (the absolute obedience syndrome).

Each of these reasons relate to his attitude. Even in the last case the existence of the rule is not the reason, the reason is his attitude of obedience to the rule. The existence of the rule is just the *sine qua non.* Here I would refer to Davidson's *Actions and Events.*[16] Just as Hohfeld pointed out the distinct variations covered by 'rights' so Davidson has illustrated the distinct components of 'reasons'.

Raz does seem to sense that something is wrong for he says in a footnote[17]

> "Strictly speaking it is not the rule but the fact that it exists, i.e. is valid, which is the reason".

Again I would say No. If there were no rule against speeding most of us would speed. If there were a rule against speeding and no fine or penalty points most of us would speed.(Note that this is not the same as the example I gave where there was no penalty against burglary because here we are dealing with his propositions about laws which are not generally respected). Interestingly, as Posner J. correctly points out ('The most punitive Nation' TLS Sept 1. 1995) if the likelihood of being caught is slight the chance of offending is greater. The reverse of this can actually be seen - the traffic on the Great West road has slowed enormously and is keeping quite close to

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16 *Actions and events.* Oxford 1980 ch.5.

17 A. of L. p. 146 footnote 2.

the limit of 40 mph now that police cameras have been installed! Even more interesting is the fact that they may very well not even be working. But this is another aspect and rather beyond the present remit.

> "Rules, but not propositions or imperatives, can be reasons for belief in or endorsement of some propositions or imperatives".[18]

Raz says this suggests that rules are facts since facts are reasons both for action and belief. Again I cannot agree. Facts are not reasons for action. Example; Joe's motorbike does 120 mph. That is no reason for Joe speeding on the motorway. Joe loves speed; That may well be a reason. However 'Joe loves speed' may well be claimed to be a fact. While it may be a true statement of the situation it is nevertheless a statement involving Joe's pro attitude or his intentionality. Again consider the following: Joe is seen speeding westward on the motorway. Joe's great aunt Betelgeuse lives to the west and is very ill (fact); That is no reason for Joe's speeding, he may loathe her. But, his girlfriend lives in the same direction (fact), AND he wants to see her as soon as possible; this quite possibly is a reason. Note that it is not until we reach the pro attitude that we get to the reason. cf Davidson *Essays on Actions & Events*.

[h] Raz believes that there is no moral obligation, even a prima facie one, to obey the law. I take the view that there is a strong case for arguing that **there is a definite obligation to obey the law**. In the sense that I

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[18] A. of L. top p. 147.

previously expressed this it may appear that I am taking a Contractarian stance (but not in the Rawlsian sense of a mutually agreed, i.e. contractual, society. This type of contractual approach is not strictly supportable in my view because as each of us cannot be assumed to have agreed to the original position it is technically not a contract). However my quasi-contract approach is that we are bound under the age old principle of "***Qui sentit commodum sentire debet et onus***". If you accept the advantages then you must be prepared to take the disadvantages and duties. Insofar as we are born and brought up in a society we have accepted the advantages but we may not have made the choice freely. However there is no obligation in a free society to go on accepting what that society has to offer. One can always leave. What one can't do is accept the *commodum* and renegue on the *debet et onus*. Again my views are based on the fact that all societies are power based. There is, short of very small communes, no society that is not controlled from the top. The moment there is a relinquishment of power of decision by upward delegation there is a loss of control. (Once you have relinquished control of something you can't continue to control what you have relinquished, and you then must enter a contractual or quasi-contractual relationship with the rulers). Thus the *prima facie* obligation to obey stems not from the laws but rather our acceptance of the benefits provided by the state.

[i] Raz points out that modern liberal writing, although it assumes an obligation to obey does not treat this as violated in the event of a strong moral reason to

the contrary. Now it seems to me that either,

1) (and this is the position I take) the obligation is a duty i.e. the State has a virtual Hohfeldian claim right that we should obey (this being the correlative of the duty) in which case when there is a breach there is always a violation. Any strong moral reason may amount to a plea in mitigation or even a defence in the sense that self-defence is a defence to the claim of assault.

2) On the other hand if the obligation is not violated (because of the strong moral reason) then **in these circumstances the obligation can never have existed** or certainly not as a duty. Therefore we have to determine what the obligation is. We know that in these circumstances it is not a duty to be obeyed, it can at best amount to a Hohfeldian **privilege** or **liberty** (being an exemption from a duty), or it might be argued that it is a Hohfeldian **immunity** (being an exemption from a liability). Now immediately libertarians try to argue either of these interpretations they are in difficulties. If strong moral views give one the privilege not to obey the law or actually constitute an immunity from the law then law, as defined by jurisprudence and as it is commonly accepted, ceases to exist. It becomes a moveable feast with springing and shifting goalposts and we are forced to ask questions such as whose moral views?; who arbitrates between conflicting moral views?; how do we assess the genuineness of the moral view? etc. and the libertarian view tends to disintegrate under the uncertainties. In short its interpretation is, to use a legal phrase, "void for

uncertainty".

[j] Now I appreciate that Raz wants to take the line that while there is no obligation to obey the law there are reasons to do so. However I question whether the removal of obligation doesn't destroy the whole edifice. The first question is Whose reasons?, Raz's or mine.

For example:- Say I earnestly believe that Raz's theories will lead to anarchy, furthermore I earnestly believe that it will lead to the destruction of our society and the only thing I can do is obtain Raz's written confession that he was wrong. As I can not get this voluntarily, I go round and obtain it under torture. However strong or correct my beliefs this should not entitle me to such an action. Yet the IRA provide a concrete example of how far this type of thinking can be extended. In this manner even murder most foul is acceptable provided it is politically (morally) motivated, and such a crime is re-cast as 'a political offence'. Terrorists may believe they have perfectly good "reasons" for not obeying the law. Thus once one starts denying an "obligation" or "duty to obey" one is, in practice, in horrendously deep water.

As I regard there to be a 'Duty to obey' I believe this will induce, in law abiding citizens, a corresponding moral obligation. The converse however is not true. A 'Moral obligation' cannot create a Hohfeldian duty because that would entail creating the corresponding claim right with its concomitant jural relation.

4. With respect to Morality. [References in [] are to Part II Ch.6.]

We have seen that Raz is committed to the view that there is no moral obligation to obey the law, though many of his "reasons" have a moral input. To justify the reasons acting as 'protected reasons' he presumes a largely just state. But even then he is loathe to relinquish the idea ofjustifiable disobedience based on moral grounds. The concept of obligatory civil disobedience[19] is countered only by the presumption of undesirable results.

He does not accept the idea that there could be a valid but grossly unjust law. Where he differs from pure positivism is that he tends to favour that morality has an input to validity. This I would argue could provide totally inconsistent results depending on the morality concerned and the veneration in which it is held. Thus the morality of eating one's dead enemy as a mark of respect is one which today is not in favour, but it has been; as indeed was the morality of burning heretics to save their souls, or of giving homosexuals electro-convulsive therapy to 'cure' them. Raz's theory of Morality-based (or at least morality-judged) laws is founded on the unspoken assumption that our current ideals are the best and only ones. I would dispute that and I would call Pound in support. Pound pointed out and illustrated very plainly that the ends of law have varied with each society and he gives examples of twelve types[20]. I would suggest that since that time there

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19 A. of L. p. 262.

20 R. Pound. *An Introduction to the Philosophy of Law* 1922, 1953 Edn. Yale. ch.2.

is a thirteenth view, one to which contractarians would subscribe, namely that end of law is to seek to promote the "interests" of its citizens. In passing I would merely comment that as no two citizens ever have the same "interests" the whole concept could be argued to be void for uncertainty, but this is beyond my present scope. We must nonetheless appreciate the presence of this view to appreciate the motivations of philosophers propounding it.

To Raz the idea that everyone has a "right" to political participation is fundamental. Then he accedes to the necessity for regulations and says, to the extent that they are reasonable, they become morally binding. As he at one point argued, in the perfectly just state where all laws were reasonable and governed by morality there would be no need for laws. Our moral sensibilities would require obedience. Similarly of course it could, equally viably, be argued that in such a just state there is absolutely no need for a right to political participation. Again we are faced with the curious modern assumption of "rights". These rights however we later find out from Raz are based on "interests" which give rise to "duties". In fact, we find in practice that what people have are 'wants' or 'desires'. These by repetition become enhanced to the status of "needs" and thence to a "right". An example of this can be seen as a result of the arrival of the latest medical techniques. Formerly if one could not have children, one was forced to accept this or possibly to adopt children. With the increasing medical ability to aid fertility, the desire to have children became a need. Frustration of the

need began to induce psychosomatic trauma and already we hear talk of "the right to have children". Fifty years ago such statements would have been met with derision. Equally, it is of course grossly unfair that my right to have a 127 foot yacht is ignored by society, even though the needs of a nautically inclined philosopher require it for tranquillity of thought and mind. But is this such a facile example as at first it might appear? Admittedly it is not what Plato had in mind for his philosopher class but he did contemplate specific requirements for specific types of people. It merely forces the rights lobby's argument to its logical conclusion.

Raz has a stated preference for a liberal state and concludes that all states ought to be liberal, AND FURTHER THAT THERE IS A RIGHT TO CIVIL DISOBEDIENCE IN AN ILLIBERAL ONE because it violates its members right to political participation. They can therefore, according to Raz, disregard offending laws and exercise their moral right as if it were the law. Now were one, for example, to be a loyal Saudi subject (and a fortiori if a Saudi ruler) these statements would be considered to be condescending, offensive and seditious. Although such a regime may not recommend itself to Raz or to many liberals it apparently does to the majority of its citizens as can be judged from the fact that while they travel abroad they also return voluntarily. So it would be quite possible for there to be a just dictatorship, a just meritocracy etc. without necessarily having political participation as a fundamental feature of its existence, and it <u>could</u> be argued to be a

far better society than Raz's might turn out to be. This therefore undermines one of Raz's fundamental assumptions on which his whole attitude to civil disobedience is built.

In fact, to play devil's advocate a little further one could say that as the American War of Independence was fought on the proposition of "No taxation without representation" (which is considered just) one could argue that its corollary was equally valid and that where the existence of the state is dependant on its ability to raise taxes, there should be no representation without taxation. Now most of our western democracies, certainly in local government base their 'democratic' decisions upon satisfying (so as to obtain their vote) the wants, (desires, needs, rights?) of people who have neither the ability or intention of paying for them. A case could be made that this is grossly unjust.

When it comes to Conscientious Objection, Raz's views are interesting. In order to permit a variation he says we must distinguish the private act from the public one. And while this is a perfectly valid distinction, he then proceeds to assume that the law, (e.g. conscription) is valid. The conscientious objector of course may well think the law is monstrous and grossly immoral. Raz does not however give us any criteria for establishing who is right in which case.

This is one of the main criticisms of Raz's philosophy. We do not necessarily lead logically to a conclusion. It is sometimes necessary along the line to make sudden assumptions so that in the end the right result

may be evolved. Most of these assumptions Raz regards as natural, but often they are ones for which today a growing number of people would require a justification, and which others are beginning to dispute. The days of liberal thought probably passed their apogee some twenty five years ago, at which time any questioner was swept aside in the orgasmic eructation of self satisfaction at doing good to others rather than the tiresome effort of improving oneself. That is not to say that Raz's conclusions are bad but the difficulty comes when we try to build on the philosophy to develop into another field. It is then that the cracks in the foundations show up.

His solution, which to be fair he agrees is not ideal, is to frame laws wherever possible to avoid conflicts with minority views. But this again leads us to unsolvable problems. Now let us try this in practice. For example, the Christian community believes that bigamy is a) legally and b) morally wrong. A Muslim does not. So does this mean that Bigamy should be removed from the list of criminal offenses? Perhaps it should. But then if we acquire a large minority (and we already have a small one) who believe in the immorality of private ownership and that the land belongs to all, are we then to remove sanctions against a) Theft and b) Trespass? The trouble is that these people could consider ours an immoral and a totally illiberal state with immoral and illiberal laws. At this point one could argue that Raz becomes hoist with his own petard.

5. With respect to Rights. [References in [] are to Part II.Ch.7.]

We have seen in chapter 4 ante the criticism of Raz's approach to the whole question of rights. It is true that in instances he has seen the distinctions between the various types of 'right' that he discusses, quite rightly distinguishing from Brandt that there are some, but not all, rights that involve a correlative duty. These latter are of course the Hohfeldian claim rights. He also distinguishes what he calls a "freedom right" at one point.

However his basic problem is that he fails to see that these rights with correlative duties are in effect creatures of the normative law. This is so because it is only under the law that they may be enforced. Moral duties, or obligations as I prefer to distinguish them, are not enforceable. They are creatures stemming from a different source namely the moral culture of a particular group.

Duties on the other hand stem from the State Laws which may not relate to the moral customs of all the parts of a multicultural society. Yet Raz appears to insist that their derivation is from a single source. In fact he is ambivalent in this respect for although he would like to reconcile the natural law approach with positivism he admits that he has not yet succeeded. So he does not go so far as to say that laws must have a moral foundation. Thus we come to the problems enumerated above with respect to civil disobedience and conscientious objection.

A far greater problem arises when he seeks to

relate rights and duties. He is reduced to introducing "interests" sufficient to create a duty in another. Is this merely a moral duty? One would suppose not for Raz has already seen that not all rights have correlative duties and the duties we are referring to here "give rise to rights". The trouble here is that he has sought to establish a causal relationship between rights and duties. No such relationship exists. The relationship is a jural one not a causal one. To understand this we must turn to the great master of jurisprudence Kocourek.[21]

Kocourek goes beyond Hohfeld in establishing a mathematical relationship of jural functions. Not only does he analyze the constituent parts of terms such as rights, defining them largely in terms similar to Hohfeld, but he proceeds to define the basic terms. Thus he defines a right properly so called as the capability to claim an act from another. This is a Hohfeldian claim-right. Power he defines as the capability to act against another. Immediately he distinguishes Power, Liberty, and Rights by saying[22] one may have the liberty to act, or the power to act but never the right to act. He points out that one may act for oneself which is freedom, and that jural relations are situations of fact by which one person may affect the freedom of another with legal consequences.

Freedom itself is non jural and is not protected as such. Protection he says comes through the armour of legal ideas and directly through claim rights. This is

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21 Kocourek. *Jural Relations* 2nd Edition, Indianapolis, Bobbs-Merrill. 1973 reprint.

22 Ibid. p.3.

another way of arriving at the conclusions I put forward earlier that the only 'right to freedoms' were those specified by virtue of the normative law (which by definition includes a constitution). He uses the same example as Hohfeld: One has the freedom to walk on one's land (Hohfeld tends to refer to this as a privilege) but one has no claim right to do so. He also correlates duty to the existence of a claim.

However he points out:

> "The claim that one has to an act from another must not be confused with the physical power of a person to act on his own account. A landowner has freedom to walk on his land. This is the landowner's act. He may have a claim not to be molested by another, but that claim is to the act of another.
>
> Freedom is not a legal relation because it is one sided. A relation always involves two elements or two sides. Freedom is protected by the law by various claims and powers, but in itself is not within the law. It is rather the end of law. Where Freedom ends the Law begins, and where the law ends Freedom begins".[23]

Rights and Duties involve a relationship between the Dominus and Servus. A relationship according to Kocourek can be seen in two ways:-

In the 'Wide sense' it is any fact that is shared between any two things e.g. A is red and B is blue. The concept of colour is a shared concept. However in the 'Narrow sense', which is where our interest lies, it is an interconnection between two things with no third point of reference.[24]

In Chapter IV he defines Jural relations as:-

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[23] *Jural Relations*. A. Kocourek. 1928, 1973 Reprint p.22.

[24] Ibid. Ch. V.

> "The conceptual fact of domination of the legal personality of one person in favour of another. The term is used interchangeably with Legal relations. The proper distinction is that a legal relation is a concrete relation while a jural relation is the legal relation considered abstractly. Courts deal with Legal relations. Jurists and theorists deal with Jural relations".

I have quoted the above rather more complex definition in detail because, although it is phrased in the way of legal personality this is merely designed to include such things as bodies corporate. Our concern is with jural relations and legal relations, primarily between people. However it is interesting to note the closeness to legal relations. In every relationship there must be two parties, a Dominus and a Servus and a single, although at times highly complex relationship. In practice Kocourek's analysis is comprehensive, and breaks jural relations into 22 different types requiring 17 pages of Glossary of new terms, but for our purposes[25] it is really only necessary to consider two; **Zygnomic** (which I prefer to call Zygonomic) and **Mesonomic** relations-

1. **Zygnomic** are those where there is a constraint on the Servus with the support of the law.

2. **Mesonomic** where it brings about a result of which the law will take notice.

To use Kocourek's example:- D makes an offer of his promise for the act of S.

This creates a power in S to accept (and the law takes notice of this) but there is no physical contract implied.

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[25] The detailed break down by Kocourek is designed to cover all the intricacies of complex legal situations.

So far the relationship is **mesonomic**.

The acceptance by S will constrain D into a **zygnomic** relation.

Now the whole point of this, as far as I am concerned, is that it shows by virtue of Kocourek's very detailed and consistent theories that the duty when it arises, arises as the result of the **zygnomic** relationship, which is, as I propounded, a creature of the law. It is not, as Raz alleges, created by someone's interest creating a duty which in turn gives rise to a right.

It is possible that Raz would argue that his proposals relate to moral duties and that the law is, at least in part analogous. I would counter by saying that moral duties are only analogous, in that while the law acts upon a **zygnomic** duty to enforce the same, a moral duty is one which may be regarded as being voluntarily self-enforceable. For example if I am a member of a religious organization which maintains it is one's moral duty to give X % of my income to the organization, I may so do. The reason that I do is because I wish to belong and be deemed a proper member of the group. Let us say that it is also regarded as one's moral duty to eat only raw root vegetables and wear jute underwear to scourge the flesh. Hell fire and immediate plague is threatened to those who disobey. Unfortunately I become allergic to raw root vegetables and my jute underwear is causing other problems. I give up both and find that rather than fire and plague I am no longer plagued with flatulence and my sores heal up. Vastly disillusioned I reject the religion, i.e. I no

longer wish to be associated with them in any way and as for having another penny out of me...

Now in both cases, that of my belonging and being bound by a duty, and that of no longer belonging and rejecting the duty, the governing factor has solely been my desire to belong or not. There may have been ancillary inducements (such as the threat of hellfire and plague) but these are indirect. Raz may argue that my desire (one way or the other) is an indication of my 'interests' but there is no way that these give rise to a duty to wear jute underwear. Even if I am the high priest and it is in my interest that my flock have sufficient faith to endure the hardships, this cannot possibly be said to give rise to a duty in others. The whole question of moral duty involves intentionality, and intentionality is one thing that Raz omits from his 'reasons'.

CHAPTER 11. CONCLUSIONS.

In part III chapters 8 and 9 I took a pro-Razian approach. In chapter 10 I have tried to take advantage of the perceived weaknesses, backed by the arguments in Annexe A to reveal the flaws in his philosophy. In the conclusion I try to make a more even assessment.

Raz's theories have provided us with one possible explanation of legal systems. Moreover it is adroit enough that we can extrapolate from it and build the outlines of a plausible theory of punishment. It is somewhat more difficult to build the theory using merely the methodology - the result tends to be more positivist. The only other drawback that might be conceded in trying to produce a theory of punishment is that it is not possible to develop firm arguments with respect to the relative role of retribution either by extrapolation or methodology. Nevertheless it can be argued that a sensible recognizable theory of punishment can be built and this is very satisfying for a Razian, and arguably supportive of the veracity of Raz's explanations.

On the other hand there are those who would contend that this supports the consistency of his approach only; that the weaknesses and flaws referred to in chapter 7 and 10 and the annexe cause considerable room for doubt. Assumptions just have to be made to bridge gaps such as the manner of creating a Duty in A from an interest of B. How can rights be derived from duties when rights and duties

are part of a jural relationship not a causal one? How can one ignore the Agent's pro-attitude or intentionality when considering reasons, and be assured of not being misled? And finally, why must the ancient, and in my submission a priori, concept of justice fail to play its full role in the system?

That a libertarian Razian philosopher could raise a theory of punishment and one which is recognizable by today's standards is in no doubt. It would be primarily a more tolerant system, designed to provide for as many minority views as possible in a multi cultural society. It would also be more lenient than a purely positivist theory. It would be limited in the extent of its application by the priorities given by Raz to Autonomy and well-being, although it could permit restrictions brought about by the application, within limits, of perfectionism. These would be deemed to be positive features preventing excesses. It would however also encompass the concept of active disobedience, though the parameters relating to this have not been described. To a libertarian it could be regarded as a further step upon the road of law with respect for the individual's rights, moral susceptibilities, autonomy, and well-being. As such it is in line with today's libertarian thinking. The drawbacks cited could easily be covered as the theory was developed in detail into practice. This however might well require making certain further philosophical, as opposed to methodological, assumptions.

The contra View.

The weaknesses that an opponent would level at it are ones which hit at the roots of Raz's philosophy and are just those where Raz leaves us in areas of ephemeral libertarian thought. The whole concept of a rights based philosophy as posited by Raz, they would claim, is insubstantial, contradictory, and ill founded. Of course, they would say, it is possible to have a rights based society, based on clear Hohfeldian claim-rights established by law (i.e. by statute or the common law incorporated by judges). This law, they would argue, effects jural relations, which are transformed by the operating facts into legal relations. One can even have within such a system rights secured by constitutional means. A positivist, rights orientated society such as this would have the advantages of clarity and certainty. But, let there be no doubt, this would be quite different from Raz's society based on a generic definition of rights as being created when a person's interests (which they would claim he has failed to define) are sufficient (again with no defined parameters of determination) to create (how?) a duty (Moral or legal and what are the determining parameters for distinguishing between the two?) in another.

They would claim, and with some justification, that there has been no attempt to define these essential features, no attempt to introduce the concept of jural/legal relations by which it is the law which creates the obligations and duties and effects them, or to provide an alternative. Most damningly they would say that when the

generalized phraseology does finally succumb to the occasional real question it has been dismissed as not appropriate for discussion. It is arguable that "rights" cannot be defined in the manner Raz has attempted, and, even if they could be, Raz has singularly failed to show how he would do so. Moreover it must be remembered that it may be argued that Raz depends on the limitation of those rights (by virtue of the 'sufficiency' of the interest of the putative right holder required to create the duty in another to bring the right into existence) in order to prevent disruption and collapse of the society.

But worse, they will claim, is still to come, for Raz in his determination not to accept a duty or a moral obligation to obey the law is forced to rely on 'reasons' for accepting the law. He works out a clever system for classifying certain reasons as second order reasons, exclusionary reasons, and protected reasons. But as we saw, this concept, ingenious though it undoubtedly is, does not always work when applied to the cases. His explanation of reasons and the examples he gives are arguably not reasons properly so called (e.g. for carrying an umbrella). They may be excuses, inducements or partial reasons but ultimately, as Davidson has pointed out, a reason must be dependent on the Agent's pro-attitude or intentionality. This is largely ignored by Raz except on one occasion which was referred to.

Thus if, in practice, Raz's rights are indefinable, and there is no obligation to obey the law, and the reasons turn out to be no more than plausible

explanations rather than true Davidsonian reasons, we are embarked in a very leaky boat. Add to this the lack of discussion of justice and its relationship within a system and we have a major indictment. Of course it may be that Raz may yet have much more to say on these subjects, but it is imperative if we are to be able to take a conclusively Razian view that attention must be devoted to the pitfalls enumerated above. Until he produces satisfactory answers to these problems there is no doubt that a free thinking liberal society could be established more easily and with far greater certainty by purely positivist means.

Raz's Rebuttal.

The point Raz would make in remise is that while such a society **could** be produced under positivism, there is no guarantee that it **would** be. His philosophy is devoted to changing the mere possibility into a certain probability. It is this that provides the great distinction between his and earlier positivist theories. He is seeking as an end that which they only might,but certainly need not, produce.

The Verdict.

There is no doubt that until the questions raised have been answered the results could be worse than the possibilities he is trying to exclude. There is no doubt that his philosophy could be varied, and as I have tentatively suggested earlier, possibly improved by, for example, the inclusion of aspects of the Agent's intentionality. It was felt that this could be done without

fundamentally altering the philosophy. Indeed the treatment of rights could be much improved by a more analytical approach and it may well be that Raz or a disciple may yet do that. However when it comes to problems such as the definition of rights, the reconciliation with jural relations, the interweaving of justice, the solutions may require such radical change that the philosophy would no longer be Razian.

PART V

ANNEXE A

ANNEXE A.

The following has been separated from the formal part of the Thesis in order to maintain the flow of argument. It constitutes the background research and extrapolation therefrom to provide the basis for one of the main weaknesses alleged in part IV. Indeed it was by extrapolating from the work of Hohfeld that I justify my statement that Power is prior to rights. It is from the work of Kocourek that I argue for the necessity to consider the jural relations involved and the necessity for distinguishing between **Mesonomic** and **Zygnomic** jural relations. In addition it propounds certain further uses of words and their manner of application in order to avoid confusion between moral and legal terminology.

HOHFELD

Many eminent lawyers and philosophers have caused a great confusion to exist in considering various jural relations. In particular they use the term "RIGHTS" to cover a multitude of disparate rights, lack of rights (Hohfeld's 'no-right', Kocourek's 'inability'), powers, privileges, duties, disabilities, liabilities, and immunities. These terms and their distinctions are vital to any discussion in jurisprudence and the philosophy of law and justice. They are too often misused and confused in current usage and we must turn to Wesley Newcomb Hohfeld for the most brilliant and perceptive separation and definition of these terms. I have used Hohfeld's terminology in trying to separate some of the issues because they seem to be the best and most logical. They have also been used, with minor variations, by Kocourek in

his minutely detailed analysis of jural relations.

However, Hohfeld himself never claimed that his definitions were the only ones possible. His analysis of the terms was brought about because of the inconsistencies of their application in law. His analysis is at first not easy to follow. Also many of his examples related to laws, often complicated trust laws, that have since been changed so that it is easy to overlook the quite vital contribution he made simply to clarity. Moreover because his work was legally orientated and relates often to trust cases I belief it fails to receive more than scant and often dismissive attention. Finally he had that quality which seems to be a lost art today - brevity. His collected papers "Fundamental Legal Conceptions as applied in judicial reasoning" run to just over one hundred pages yet therein lie more condensed incisive thinking than can be found in many a modern book in either field.

He had the brilliant idea of exploring terms by first seeking out their jural opposites, followed by their jural correlatives. In exploring the meaning of a word he would first seek out its similar applications or words *ejusdem generis* until he was able to separate the meanings into logically definable segments.

He began by emphasizing the necessity of distinguishing between legal relations and the facts that cause those relations to exist.[1] One of the examples he gives is the term "property" which is used to denote the physical object to which various rights (which as we shall

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[1] *Fundamental Legal Conceptions* 1919 Y.U.P. (1964) - p. 27.

see later includes privileges, powers etc.) attach. At the same time it may also be used to denote the legal interests themselves. For example - You may believe that you have inherited your aunt's piano but it is in truth impossible to inherit a piano. What you actually inherit is a bunch of legal rights, powers and privileges with respect to the piano. A parallel sort of mistake is made by economists who talk of increasing the world's wealth which of course can not vary. While it is all very well for the public at large to use these words in a vague manner, the distinctions and their parallels are of great importance in the fields of jurisprudence and philosophy.

Thus, for example, we must be careful to distinguish between an **obligation** and a **contract**:-

> "The obligation then is not the contract, is not in the contract, nor does it constitute any one of its terms...When the contract is made..the binding law..being the obligation on promisor to perform his undertaking, eo instanti attaches...The terms ..are made alone by the parties...The obligation is the creature of the law".[2]

Again Hohfeld stressed that it is necessary to distinguish between Operative facts and Evidential facts. In any jural transaction there may be operative or evidential facts. Operative facts are causal, they change the legal relationship under general rules. For example in a contract between A and B the operative facts are that A and B are human, of legal age, A has made an offer; B has accepted it. Also the fact that A has made no misrepresentations and B has not revoked are negative

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[2] Ibid p.31 from Aycock v Martin (1867) 37 Ga. 124, @ 128 per Harris J.

operating facts.

An evidential fact is one which affords a logical basis, not a conclusive one, for inferring another fact. All facts (operative and evidential) must be ascertained in one of four ways:-

1. By judicial admission;

2. By judicial notice or knowledge;

3. By judicial perception (what is clearly seen through the senses) and

4. By judicial inference. For example a written contract is, in fact, evidential of the contract.

He then comes to the nub of the problem in that it is generally wrongly assumed that all legal relations are reducible to "**Rights**" and "**Duties**". However he proceeds to break down various relationships by considering their opposites and correlatives. In this regard any given relationship involves two people (A Dominus and a Servus as we shall see later according to Kocourek). Thus the correlatives in Hohfeld's scheme describe the same situation (jural relation) viewed first from one point of view then the other. It will be seen how these compare with the bare opposite of a situation. He sets them out in the following manner:-

Jural Opposites	Right	Privilege	Power	Immunity
	No-right	Duty	Disability	Liability
Jural Correlatives	Right	Privilege	Power	Immunity
	Duty	No-right	Liability	Disability

In order to arrive at the above table he used the following reasoning:-

RIGHTS & DUTIES

He dealt first with the way 'right' was defined by lexicographers to show the various meanings it included. He concluded that in law, and in general practice, it was most frequently associated with a correlative '**duty**'. The nearest synonym for right was a legally well founded '**claim**' and the synonym for the correlative duty was obligation. In support he quoted inter alia Viscount Haldane L.C. in **Howley Park Coal etc. v L.& N.W.Ry.**[1913] A.C. 11.[3]

> "There is an obligation (of lateral support) on the neighbour, and in that sense there is a correlative right on the owner of the first piece of land."

Thus 'Right' in Hohfeld's sense should be thought of as a Claim-right or well founded claim. Duty is the associated correlative on the part of the other party. Where X has a right viz a viz Y, then Y has the correlative duty.

However this by no means covered the potentiality of the word rights. What about the case where a 'right' involved no correlative duty?

PRIVILEGES & NO-RIGHTS

A right can thus be distinguished, as he did next, from a 'Privilege'. This he did by pointing out that the opposite of a 'duty' is a 'privilege'. The example he gave was that, Where X has the right that Y should stay off his land, Y has the duty to do so; but X also has the

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[3] Hohfeld's primary quotes were of course from U.S. cases but such was his scholarship that there was almost invariably a leading U.K. case included in the footnotes. I have tended to refer to these where possible for convenience of reference except where the U.S. quotation is particularly apposite.

'Privilege' of going on the land i.e. he has no duty to stay off, nor does this 'privilege' give rise to any correlative duty which it would have done had it been a 'right' to go on the land as we have previously been using the word. He also pointed out that if X had, say, contracted with Y to go on the land to do something for Y, then X would have both the privilege and the duty to go on the land. This is important for the terms right and privilege are not mutually exclusive but the privilege is the exact negation of a duty having the same content. He illustrated this by considering Professor Gray's example from *The Nature and sources of Law* (1909), where Gray maintains that it is a **right** of his to eat a shrimp salad for which he has paid. Hohfeld maintained that he has the '**privilege**' of eating the salad viz a viz A,B,C, & D who have **no-right** to eat it. His rights viz a viz A,B,C & D are that they should not interfere with his eating the salad. Now, argued Hohfeld, if X who owns the salad contracts with Y not to eat it then v/v Y, X has no privilege of eating the salad. However his right that Y should not eat it is unaffected. This again is important because by virtue of confusing rights and privileges it is often erroneously assumed that the alteration of a privilege affects a right and vice versa. Such is not the case but it can erroneously appear so if both are regarded as 'rights'.

Another example is that a trader has the privilege of carrying on his business as best he sees fit. The closest synonym of Privilege is perhaps certain uses of Liberty (or legal freedom). However Hohfeld pointed out

that, while 'Liberty' is used it is not as frequent as 'Privilege' and it is in fact more likely to be used in the sense of bodily freedom (indeed Kocourek emphasises this point and points out that freedom in its proper sense is non jural - see later). He did not regard Licence as synonymous with Privilege. He pointed out that a licence merely represents a group of Operative facts required to create a privilege.

Returning to the example of X's land, - the correlative of X's privilege of going on the land is that Y has No-right to go on to it. Hohfeld coined the expression 'no-right' for the correlative of privilege (or Liberty as it was sometimes referred to) as the only term which was not already covered by a word in general usage. Nor does there appear to be a close synonym.

This actually is not as surprising as it might seem, for Rights (claims) had been used legally to cover both positive and negative claims and the opposite of a right or claim was merely its absence, a no-right. Similarly this is the correlative of A's privilege (from B's point of view) i.e. a no-right.

The next problem is that 'right' is so often used meaning power. e.g. "He has the right to do that"

POWERS AND LIABILITIES

In analysing POWER Hohfeld felt that

> "Too close an analysis might seem metaphysical rather than useful; so that what is here presented is intended only as an approximate explanation, sufficient for all practical purposes."[4]

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[4] Ibid. p.50.

It must be remembered that Hohfeld was concerned primarily with Legal conceptions and not particularly the philosophy involved. It is intended, however, later to go into this aspect of Power as an extrapolation. Thus Hohfeld defines Power by considering that a change in a legal relation may occur from some super added fact (or group of facts) which either are or are not under the volitional control of a human being (or group of human beings). Where the control is volitional then the person or persons whose control is paramount may be said to have the legal power to effect the change of legal relations that is involved in the problem.[5] He then proceeds to consider the nearest synonym which seems to be (legal) ability, the opposite of which is inability or disability. He points out that 'right' in this case is a confusing misuse as is 'capacity' (again this word merely denotes the Operative facts).

As examples he points out that X as an owner of property can extinguish his own legal interest by the operative fact of abandoning the property. He has the power to transfer his interest to Y, to create contractual obligations etc. He pointed out that the concepts are particularly useful in considering Agency cases where the Principle grants legal powers to the Agent and the creation of correlative liabilities in the Principal. Liability has a close synonym in responsibility and again it should be noted that the liability can in fact be positive or negative (because the power itself may be positive or negative - rather in the manner of claim rights).

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[5] Ibid p.50/51 My paraphrase.

Finally amongst our considerations a 'right' may often be used to describe an immunity.

IMMUNITIES & DISABILITIES

Immunity is the correlative of Disability and the opposite or negative of Liability. A Power bears the same general contrast to an Immunity that a Right (claim) does to a privilege. i.e. a Right is a claim against another and a privilege is one's freedom from the claim of another. Power is control over a legal relation over another and Immunity is freedom from that control (power). The best synonym for Immunity is exemption or Impunity.

As an example he states that X as a landowner has Power to alienate to Y. But X has Immunities against Y . Y is under a disability in that he has no power to alienate the land. If a sheriff has a writ of execution to sell X's land, the Sheriff would have the power and the correlative would be X's liability to have the land sold (the opposite of immunity).

EXTRAPOLATION.

Utilizing the same terminology I have re-arranged Hohfeld's categorization into RIGHT'S based subdivisions and POWER based subdivisions as follows:-

I. A <u>RIGHT</u> is one person's lawful claim against another.

e.g. One has a RIGHT:

- not to be assaulted
- to light
- to do those things that are not prohibited .

It is interesting to note in passing that a <u>RIGHT</u> IS SECONDARILY something created by the exercise of A <u>POWER</u>.

There is no antithesis of a RIGHT in the sense that it

can be both Positive and Negative and a further word for a negative right is therefore not required.

The Opposite of a right is a NO-RIGHT.

The exercise of a right brings about its correlative DUTY for the other party involved

e.g. one has a DUTY:

- not to assault others
- not to obstruct light
- not to do those things which are prohibited.

SECONDARILY to do whatever has been imposed as a result of the exercise of the power.

A PRIVILEGE is an EXEMPTION from a DUTY.
i.e is a freedom from a RIGHT.

II. A POWER is the ability to alter the legal status quo. POWERS are accorded under the Law

e.g. one has the POWER:

- To make a will
- To transfer property

The lack of power or its antithesis is a DISABILITY.

The exercise of a POWER brings about its correlative LIABILITY for the other party. N.B. LIABILITY as used by Hohfeld can be both positive and negative.

e.g on the other party there is the LIABILITY:

- to inherit under the will
- to receive or take up the property
- to perform the contract[6]

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[6] Here I suspect I differ slightly (though not in substance) from Hohfeld who would say that by virtue of the contract the one party acquires the right and the other the duty to perform. I agree but it is also true that contracts are created under a power of the law so that it becomes a liability to be performed. My reasoning stems from the fact that one might contract voluntarily to pay a gambling debt but as such is not recognized the duty does not become a liability. It is not significant but I wish to avoid any question of illogicality. Of course Hohfeld might well have argued that there is a general duty to perform agreements (Stemming from the right to make them) and that the exception of non performance on gambling debts was a Privilege. And such an argument would be equally forceful because there are no lines of absolute demarcation.

An IMMUNITY is an EXEMPTION from a LIABILITY
i.e is a freedom from a POWER

This may be summarized another way:-

A RIGHT is a claim v. another [+ or -]
The exercise of a RIGHT induces a DUTY (Correlative)
Lack of a RIGHT is a NO-RIGHT (Opposite)
Exemption from a DUTY is a PRIVILEGE

A POWER is the ability to alter Legal Relationships
The exercise of a POWER induces a LIABILITY[+or-] (Correlative)
Lack of a POWER is a DISABILITY
Exemption from a LIABILITY is an IMMUNITY.

It is perhaps important to note that in choosing to categorize the definitions under RIGHTS (i.e. claim-rights) and POWERS I have chosen the two capacities the exercise of which involves a Jural relation. Hohfeld is not primarily concerned with the detailed analysis of jural relations. This is the province of Kocourek.

Before amplifying on the nature of Power it is extremely useful to consider Hohfeld's subsequent analysis of Rights *in rem* and Rights *in Personam*.[7]
Again Hohfeld points out how the expressions *in personam* and *in rem* have been used in a confusing manner and he introduces the phrases '**paucital**' relations for relations in personam, and '**multital**' relations for relations in rem. I shall be adopting these superior definitions.

The first misuse that Hohfeld clarifies is that a

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[7] Extracts and quotes are from the later of Hohfeld's Articles on "Fundamental legal Conceptions as applied in Judicial Reasoning" (1917) 26 Yale Law Journal reprinted 1964.

Right ***in Rem*** is not a right "against a thing", and he quotes Holmes C.J. in Tyler v Court of Registration (1900) 175 Mass. 71,76

> "All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected."

Again the correct interpretation was set out by Austin in his *Lectures on Jurisprudence or The Philosophy of Positive Law* 1832:-

> "The distinction between Rights....is that all pervading and important distinction which has been assumed by the Roman Institutional Writers as the main groundwork of their arrangement: namely the distinction between rights in rem and rights in personam; or rights which avail against persons generally or universally, and rights which avail exclusively against certain or determinate persons."

Thus ***in rem*** indicates a general application and in personam a limited or specific application. Hohfeld uses the expression Multital right for a right in rem and Paucital right for a right in personam.[8]

He states that the Multital right or claim (Right in rem) includes:-

1. Multital rights or claims relating to a definite tangible object e.g The landowner's right to prevent entry; chattel owner's right that the object shall not be harmed.
2. Multital rights in relation to non tangible things Patents etc.

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[8] Kocourek tends to refer to polarized and unpolarized rights.

3. Multital rights with respect to his own person. (no false arrest etc.)

4. Multital rights residing in A but relating to B. Alienation of affections etc.

5. Multital rights not residing in the person or object. Right not to be libelled, not to have privacy invaded etc.

Hohfeld took the position, which I support, contrary to some other legal views that a 'right *in rem*' **does not comprise** a single right with a single correlative duty resting on all persons against whom the right avails. Instead he took the view that it comprised many separate and distinct rights, actual and potential, each one of which has a correlative duty resting upon some one person. He proved this by reverting to the example in which A owns Blackacre and X is the owner of Whiteacre. A pays B $100 in consideration of which B agrees with A never to enter on X's land Whiteacre. C & D for separate considerations also make similar agreements with A. In this case A clearly has rights in personam (paucital rights) against B,C & D. No one would assert that A had only a single right against the three. One of them could breach his duty without involving the others. Only if B, C & D agreed to be responsible to see that the others did not breach their duty could there be said to be a common or joint duty. Similarly he deduces that the same considerations apply to A's respective rights in rem (multital rights) against B,C,D and others.

He quotes Collins M.R. in **Thomas v Bradbury, Agnew, & Co.Ltd.** [1906] 2 K.B. 627 at 638

> "The right" [privilege] of fair comment, though shared by the public is the right" [privilege] "of every individual who asserts it, and is, qua him, an individual right..."

Similarly he maintains a duty *in rem*, or multital duty, is merely one of a large number of fundamentally similar duties residing in one person.(e.g. our duty not to trespass on any of the land of others) Again this is not a single duty - imagine the case you are under a duty not to strike people but if X threatens you his right is extinguished and becomes a no-right, and you acquire the privilege of self defence.

A Multital right or claim should not be confused with any co-existing privileges, or other jural relations that may co-exist with it with respect to the same subject matter. For example A is the owner of Blackacre: A has multital legal rights that others should not enter; He has privileges of entry, user etc; Power to alienate; Legal Immunities etc so in fact he has multital (*in rem*) right-duty relations; multital (*in rem*) Power-Liability relations; etc and they should <u>not</u> be confused as, for example, his privileges are totally independent of his rights etc.

Finally a Multital primary right or claim (Right *in Rem*) must always be carefully distinguished from the Paucital secondary right (Right *in Personam*) which arises from a violation of the former and which is an *obligatio ex delicto*.

Extrapolation.

From a review of the above it becomes apparent that from the point of view of Jurisprudence as opposed to a

discussion of fundamental legal conceptions POWER also can be Multital or Paucital. In jural relations between individuals powers arise under the laws of a particular society and these powers are in effect paucital. It is the Multital Power to affect the Laws (not the jural rights and relationships under the laws) that is the primary power of the society. That power may have its source in a military regime, a religious order of society or a democracy etc. These latter are merely the politico social set ups for the relevant society. They may be varied depending on the body possessed of the multital power to vary the substantive laws, as opposed to those possessed of the paucital powers and multital rights created by the laws. It does not matter whether the source of these powers is as Hart describes them or otherwise at least so far as the resulting paucital powers are concerned once they are established. It may however have a marked effect on the manner in which changes are made.

A right (claim against another) is activated by virtue of enabling facts (I trespass on your land). The potential right is created by the exercise of a power i.e. the Normative laws under which rights in rem and rights in personam may arise are the result of the exercise of a multital power by the rulers of the society. Therefore it might be argued that rights (claim rights) are power dependent and can thus never exist in their own right.

General

There are of course further uses of the word RIGHT that Hohfeld did not consider and these relate to its

use in the moral sense of right as opposed to wrong. Even here it contrives to be a slippery word and may be used in the sense of:-

1) Just, the latin *justus* (= just, equitable, honest, lawful, proper, right);

2) *Meritus* (= merited), or

3) *Aequus* (= equal, level, fair).

So for philosopher or lawyer RIGHT is a word which should only be used when its meaning is clear i.e generally as a Hohfeldian claim-right. As failure to be explicit can undermine both philosophical arguments as well as legal interpretation I would suggest that we could do a lot worse than adopt Hohfeldian definitions which are to my mind the clearest and most logical, as well as legally supportable, so far produced.

THE APPLICATION OF HOHFELDIAN PRINCIPLES TO OTHER ASPECTS.

I. CONSIDERATION OF MORAL RIGHTS, DUTIES ETC.

First restating Hohfeld we have:-

OPP	RIGHT	PRIVILEGE	POWER	IMMUNITY
	NO-RIGHT	DUTY	DISABILITY	LIABILITY
JRL CORR	RIGHT	PRIVILEGE	POWER	IMMUNITY
	DUTY	NO-RIGHT	LIABILITY	DISABILITY

SO WE MIGHT HAVE WHEN CONSIDERING **MORAL RELATIONS** :-

OPP	MORAL CLAIM	FREEDOM	AUTHORITY	DISPENSATION
	NO MRL CLM	MORAL DUTY	INABILITY	OBLIGATION

JRL CORR	MORAL CLAIM	FREEDOM	AUTHORITY	DISPENSATION
	MORAL DUTY	NO MRL CLM	OBLIGATION	INABILITY

CONSIDERING NOW MY PREVIOUS RE-ARRANGEMENT:-

I. A RIGHT is a claim v. another [+ or -]

The exercise of a **claim-RIGHT** invokes a **DUTY** (Correlative)
Lack of a **RIGHT** is a **NO-RIGHT** (Opposite)
Exemption from a **DUTY** is a **PRIVILEGE**

II. A POWER is the ability to alter Legal Relationships

The exercise of a **POWER** invokes a **LIABILITY**[+or-] (Correlative)
Lack of a **POWER** is a **DISABILITY** (opposite)
Exemption from a **LIABILITY** is an **IMMUNITY**.

WE CAN NOW APPLY IT AS FOLLOWS TO THE MORAL EQUIVALENTS:-

I. A MORAL-RIGHT is a **moral-CLAIM** against another.

The exercise of a **moral-CLAIM** invokes a **MORAL DUTY.**
Lack of a **moral-CLAIM** is a **NO MORAL CLAIM** or **NO-CLAIM.**
Exemption from a **MORAL DUTY** is a **FREEDOM.**

II. Moral Authority is the ability to influence relationships.

The exercise of **moral-AUTHORITY** invokes an **OBLIGATION.**
Lack of **moral-Authority** is an **INABILITY** (to influence)
Exemption from an **OBLIGATION** is a **DISPENSATION.**

The adoption of the above, or a similar set of distinctions would provide a useful tool in clarifying the problems, and might thus aid in their resolution.

KOCOUREK

The importance of Kocourek is that he followed Hohfeld and provided an even more profound analysis particularly of jural relations. Like Hohfeld, Kocourek starts by analysis and definitions. Thus the reader always knows what a word is intended to encompass and is not met with sudden re-definitions halfway through a theory. The first thing he points out is that legal phenomena involve three things:-

1. A system of potential rules. They await application in concrete cases.
2. Situations of fact upon which the rules operate, and
3. Jural relations - The connecting link between the law and the social activities upon which the law is to operate.[9]

> "It is not enough that there be law in the abstract, set over against a material content of social activities. It is just as necessary here that there be a connecting principle, as that the steam compressed in a steel tank be connected with a system of valves and levers..... The connecting principle between the force of the law and the material social context upon which it is to operate is the jural relationship, '*juris nexus*,' or '*juris vinculum*'. Since the law does not govern every possible situation of fact, it follows that jural relation, likewise, does not attach to every situation of fact. Jural relations come into existence, are subject to modifications during their existence, and lastly they submit to destruction. There are always large fields of social activity where jural relations do not exist. <u>These are the fields of liberty where legal regulation does not extend except in a negative sense.</u> (emphasis mine).

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[9] *Jural Relations*. A. Kocourek. 2nd Edn. 1928 Bobbs-Merrill.

He goes on to point out that there are only two ultimate jural relations - **claims** and **power**. Thus Kocourek takes up from the point I had extrapolated from Hohfeld by dividing into the two basic categories of **rights** (Hohfeldian claim-rights) and **power**. In addition I had shown that power was prior to rights which is of vital importance philosophically, though not from a jurisprudential viewpoint, where I suspect it is quite naturally assumed.

Like Hohfeld, he takes immunity to be the reciprocal of claim and privilege the reciprocal of power. However as we shall see he makes a greater distinction than Hohfeld did with respect to freedom. He maintains that the capability to claim an act from another is a right (in a strict sense). The capability to act against another being a power.

> "If the word right is given a strict meaning it is never correct to say that one has a 'right' to do this or that. One may have the 'liberty' to act or the 'power' to act. So he too maintains that the correct use of right is a claim even though in general use it encompasses other things.

One of the most important points Kocourek makes very early on is that **jural relation** may be roughly described as

> "a situation of fact by which one person presently or contingently may affect the natural physical freedom of another person with legal consequences."

Freedom however is **non jural**. One may act for himself and this is freedom. As freedom is a non jural act it is not protected as such. If freedom is exceeded it becomes a **wrong**.

According to Kocourek the central idea of law in a formal sense is power (in its technically restricted sense. This is translated to all jural relations. The example he gives is the best explanation:- A has the power to make an offer of contract to B. B has the power to accept (or refuse). A has the power to revoke his offer before acceptance. B has the power to perform the contract and the power to destroy it by non-performance. Thus even though a duty may flow from the Servus its performance is by way of power. In short power is the fundamental determining factor. Thus as I have argued, the concept of power, (and also in its unrestricted sense), is prior to claims (rights) because no jural relation can come into existence without its operation. In these circumstances I believe my assumptions are fully supportable.

Now from this one can see immediately the difficulties to which Raz's approach give rise. He refers to freedom as a type of 'right' and 'claims' as being derived from 'duties' created by 'interests' which are undefined.

To Kocourek a right, in its broadest sense, is the generic term for the dominant side of a jural relation. It may include a claim, immunity, privilege, or power. It **excludes** Liberty, Freedom, and all general negations of ligation (the servient side of a jural relation). Here Kocourek distinguishes liberty and freedom in greater detail than Hohfeld.

The important thing to note is that some of these terms involve jural relations, and others do not. It is difficult

to see how they can be discussed in the generic fashion that Raz does. Particularly see my arguments in chapter 7.

CONCLUSIONS

Thus it may be said that, given the necessity for recognizing the different uses of the word rights and given the necessity for distinguishing between jural and non jural relations, it is possible to argue that rights involving duties are not derived from interests. Jural rights are creatures of the law. As such they are politically derived and the concomitant duties have a totally different source from moral duties.

To look at why anyone should obey the law it is totally insufficient to say that the law is a reason for its obedience. Facts are never reasons. One has to look at the 'objects' of law (as opposed to its purposes - see chapter 2.(c) ante). Laws came into being with societies as a means of regulating the behaviour patterns of those societies. Originally such structures were purely and simply top down structures. Despite libertarian theories such as those of Rawls, today's societies are still essentially top down structures. Even with the most advanced democratic society once the government is elected it puts its policies into practice. It is true that there is a regulating factor in that if it goes too far it is unlikely to be re-elected. Even so, the government that is elected in its place will essentially carry out its own program and there is no guarantee that any, let alone all, of the wishes of the people will be met.

The relationship of a government with the

governed is that the object of the government (apart from remaining in power) should be to run the society in a manner which will be competitive and preferably better than those of other societies with which it has contact, i.e. so that it is just and flourishes in the Aristotelian sense. If it does not the society will fail, its people will suffer and ultimately it stands in danger of being taken over by another stronger society. In order to carry out its policies the government provides a behavioural framework for its people. This framework has to be consistent with providing them with protection and at the same time giving them as much freedom as is consistent with safety and competitiveness with respect to other societies.

From this approach it may be argued that people in a society do have a moral obligation at least, though many would argue that it is more, i.e. a duty, to obey the law. This is because that society represented by its government, offers the people protection, it offers them law and order, and in return the people who accept that offer, have a jural relation with the society, to obey its laws. So long as they are free to leave and do not, that duty *prima facie* remains extant.

This is an extremely simplified resume of one alternative argument allowing for a duty to obey the law. It is not the present purpose to develop an alternative philosophy to that of Raz. It is enough merely to show that it is possible and logical for such to exist. The important issue is that however such a duty arises it brings about a jural relation between the individual and the state. This

means that the whole system of rights as Raz is forced to describe them, as arising out of 'interests' (which are undefined) of a 'sufficient' (without a means of determining the quantum of sufficiency) nature as to create a duty (but with no parameters governing the manner of their formation), falls away. The frequent confusions between duties and moral obligations also falls away for we are now dealing with the jural relations of the law, and as both Kocourek and Harris J. (in **Aycock v Martin**) recognized it is the law which creates such duties.

Indeed as Raz acknowledges, though for different reasons, morality is not directly relevant to the law. However it is highly relevant to concepts of 'justice'. Thus if there is a *prima facie* duty to obey the law, Civil Disobedience would be illegal and it would not be necessary to have to contrive to make it illegal by suddenly introducing the concept of having a legally protected right to political participation as a form of justification. Presumably Civil Disobedience might always occur if a law were regarded as so unjust as to be morally repugnant. But in such an event the agent's reasons would include his attitude which would have to be such as to overcome a positive duty to obey. There would be no question but that such an offence would be punishable. Of course such a system would be more strictly positivist in one sense than Raz would wish, but it would still allow the courts to apply 'justice' to each situation within the law.

It is not my purpose to explain or justify an alternative to Raz's libertarian philosophy, merely to

point out that at least one such is possible, that its effects would not eliminate progress but that its construction, based on firm jural principles, would avoid the vagueness and pitfalls which Raz has displayed. Questions both of people's 'interests' (which are undefined), and of the sufficiency of such interests (even if established, judged by what criteria - utilitarian, libertarian, or egalitarian?) would fall away. Similarly the philosophical question of how can an interest in A create a duty in B would be irrelevant. The difficulty of duties being 'derived from' rights and vice versa would also disappear.

Reasons would involve the pro-attitude of the Agent because if they do not we can so easily be misled and think that we have found just cause when we have not. A parasol is not an umbrella even if they look alike. It is also quite possible that the division of laws into the numerous types referred to by Raz could be reduced and simplified. Certainly obscurities would be replaced by certainties and the role of 'justice' so largely ignored by Raz would resume its proper place. Finally a realization of the differing philosophical inputs to the various aspects of the subject as outlined in figure 1 would facilitate analysis and resolution of problems.

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