Vedlagt følger:

**Raz's kritikk av Dworkin – kort analyse**

Tre posisjoner

Raz’s eksklusive rettspositivisme – «the source thesis», se ss. 194–95.

Den posisjon Raz tillegger inklusiv rettspositivisme – «the incorporation thesis», se ss. 194–95.

Den posisjon Raz tillegger Dworkin – «the coherence thesis», s. 195.

**Raz's kritikk av Dworkin**
Raz hevder to teser som står sentralt i hans argument for eksklusiv rettspositivisme, og som begge benektes av Dworkin:

*Raz's viljesteori*: se ss. 208–210;

*Raz's argument fra autoritet*: Retten har autoritet, og «etter sin natur» avskjærer autoritet at man går tilbake til de innbyrdes motstridende hensyn som organet med autoritet tok i betraktning da det fastsatte rettsregelen, se s. 209.


**Raz's argumentasjon – nærmere analyse**
Se S. Eng, *Rettspositivismedebatt*, særlig avsnittene B 3 og B 5.1.2 (3).
Authority, Law, and Morality

H. L. A. Hart is heir and torch-bearer of a great tradition in the philosophy of law which is realist and unromantic in outlook. It regards the existence and content of the law as a matter of social fact whose connection with moral or any other values is contingent and precarious. His analysis of the concept of law is part of the enterprise of demythologizing the law, of instilling rational critical attitudes to it. Right from his inaugural lecture in Oxford1 he was anxious to dispel the philosophical mist which he found in both legal culture and legal theory. In recent years he has shown time and again how much the rejection of the moralizing myths which accumulated around the law is central to his whole outlook. His essays on ‘Bentham and the Demystification of the Law’ and on ‘The Nightmare and the Noble Dream’2 showed him to be consciously sharing the Benthamite sense of the excessive veneration in which the law is held in common-law countries, and its deleterious moral consequences. His fear that in recent years legal theory has lurched back in that direction, and his view that a major part of its role is to lay the conceptual foundation for a cool and potentially critical assessment of the law are evident.

This attitude strikes at the age-old question of the relation between morality and law. In particular it concerns the question whether it is ever the case that a rule is a rule of law because it is morally binding, and whether a rule can ever fail to be legally binding on the ground that it is morally unacceptable. As so often in philosophy, a large part of the answer to this question consists in rejecting it as simplistic and misleading, and substituting more complex questions concerning the relation between moral worth and legal validity. Let us, however, keep the simplistic question in mind; it helps to launch us on our inquiry.

Three theses with clear implications concerning the relation between law and morality have been defended in recent years. They can be briefly, if somewhat roughly, stated as follows:

The sources thesis: All law is source-based.

The incorporation thesis: All law is either source-based or entailed by source-based law.


The coherence thesis: The law consists of source-based law together with the morally soundest justification of source-based law.\(^3\)

A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument. All three theses give source-based law a special role in the identification of law. But whereas the parsimonious sources thesis holds that there is nothing more to law than source-based law, the other two allow that the law can be enriched by non-source-based laws in different ways. Indeed, the coherence thesis insists that every legal system necessarily includes such laws.

The main purpose of this essay is to defend the sources thesis against some common misunderstandings\(^4\) and to provide one reason for preferring it to the other two. The argument turns on the nature of authority, which is the subject of the first section. In the second section some of the implications of this analysis are shown to be relevant to our understanding of the law. Their relation with the three theses is then examined. The connection between law and authority is used to criticize Dworkin's support of the coherence thesis, as well as the incorporation thesis advocated by Hart and others. The rejection of these views leads to the endorsement of the sources thesis. The essay concludes with some observations concerning the relations between legal theory, law, and morality. Throughout, the argument is exploratory rather than conclusive.

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I. AUTHORITY AND JUSTIFICATION

Authority in general can be divided into legitimate and \textit{de facto} authority. The latter either claims to be legitimate or is believed to be so, and is effective in imposing its will on many over whom it claims authority, perhaps because its claim to legitimacy is recognized by many of its subjects. But it does not necessarily possess legitimacy. Legitimate authority is either practical or theoretical (or both). The directives of a person or institution with practical authority are reasons for action for their subjects, whereas the advice of a theoretical authority is a reason for belief for those regarding whom that person or institution has authority. Though the views here expressed apply to theoretical authorities as well, unless otherwise indicated

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\(^3\) These formulations of the theses aim to preserve simplicity and comparability, and pay the price of crudeness. The coherence thesis is distorted most. Its advocates may insist that only a holistically conceived soundest theory enables us to interpret accurately many, perhaps even all, of the sources of law and to identify which law is based on them. This point will be taken up below.

\(^4\) I have defended the thesis before. See \textit{The Authority of Law}, ch. 3, \textit{The Concept of a Legal System}, 2nd edn. Ch. 8 above.
may look an unholy mixture of disparate elements. But it need not be. In the hands of its best advocate, R. M. Dworkin, it embodies a powerful and intriguing conception of the law.

Dworkin's conception of the law, expressed in various articles over many years, is not easy to ascertain. Some points of detail which are nevertheless essential to its interpretation remain elusive. Many readers of his celebrated 'Hard Cases' (1975) took it to express a view of law which can be summarized in the following way:

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

The answer to the master question and all that it entails, in combination with other true premises is, according to this reading of Dworkin, the law. The master question may fail to produce an answer for two opposite reasons, and Dworkin complicates his account to deal with both. First, there may be conflicts within a legal system which stop it from conforming with any consistent political morality. To meet this point Dworkin allows the answer to be a political morality with which all but a small number of conflicting laws conform. Second, there may be more than one political morality meeting the condition of the master question (especially once the allowance made by the first complication is taken into account). In that case Dworkin instructs that the law is that political morality which is, morally, the better theory. That is, the one which approximates more closely to ideal, correct or true morality.

In his 'Reply to Seven Critics' (1977) Dworkin returns to the question of the nature of law. He gives what he calls too crude an answer, which can be encapsulated in a different master question:

To establish the content of the law of a certain country one first finds out what are the legal sources valid in that country and then one considers one master question: What is the least change one has to allow in the correct, sound political morality in order to generate a possibly less than perfect moral theory which explains much of the legal history of that country on the assumption that it is the product of one political morality?

That (possibly less than perfect) political morality is the law. Both master questions depend on an interaction of two dimensions. One is conformity with ideal morality, the other ability to explain the legal history of the country. The new master question differs from its predecessor in two important respects. First, its fit condition concerns all the legal history of the country. Acts of Parliament enacted in the thirteenth century and repealed
fifty years later are also in the picture. They also count when measuring the
degree to which a political morality fits the facts. The earlier test referred
only to law still in force. Only fitting in with them counted. Second, the new
master question gives less weight to the condition of fit. It is no longer the
case that the law consists of the political morality which fits the facts best,
with ideal morality coming in just as a tie-breaker. Fit (a certain unspecified
level of it) now provides only a sort of flexible threshold test. Among the
(presumably numerous) political moralities which pass it, the one which is
closest to correct morality is the law.

I hesitate to attribute either view to Dworkin. The articles are not clear
enough on some of the pertinent points, and his thought may have developed
in a somewhat new direction since these articles were written. Luckily,
the precise formulation of the master question does not matter to our purpose.
Enough of Dworkin's thought is clear to show that its moving ideas are two.
First, that judges' decisions, all their decisions, are based on considerations
of political morality. This is readily admitted regarding cases in which source-
based laws are indeterminate or where they conflict. Dworkin insists that
the same is true of ordinary cases involving, say, simple statutory interpre-
tation or indeed the decision to apply statute at all. This does not mean that
every time judges apply statutes they consider and re-endorse their faith
in representative democracy, or in some other doctrine of political morality
from which it follows that they ought to apply these statutes. It merely
means that they present themselves as believing that there is such a doc­
trine. Their decisions are moral decisions in expressing a moral position. A
conscientious judge actually believes in the existence of a valid doctrine, a
political morality, which supports his action.

If I interpret Dworkin's first leading idea correctly and it is as stated
above, then I fully share it. I am not so confident about his second leading
idea. It is that judges owe a duty, which he sometimes calls a duty of
professional responsibility, which requires them to respect and extend the
political morality of their country. Roughly speaking, Dworkin thinks that
morality (i.e. correct or ideal morality) requires judges to apply the source-
based legal rules of their country, and, where these conflict or are indeter-
minate, to decide cases by those standards of political morality which inform
the source-based law, those which make sense if it is an expression of a
coherent moral outlook.

Notice how far-reaching this second idea is. Many believe that the law
of their country, though not perfect, ought to be respected. It provides
reasonable constitutional means for its own development. Where reform is
called for, it should be accomplished by legal means. While the law is in
force it should be respected. For most, this belief depends to a large degree
on the content of the law. They will deny that the laws of Nazi Germany
deserved to be respected. Dworkin's obligation of professional responsibility
is different. It applies to every legal system simply because it is a legal system, regardless of its content. Furthermore, it is an obligation to obey not merely the letter of the law but its spirit as well. Judges are called upon to decide cases where source-based law is indeterminate, or includes unresolved conflicts, in accordance with the prevailing spirit behind the bulk of the law. That would require a South African judge to use his power to extend apartheid.

Problems such as these led to the weakening of the element of fit in the second formulation of the master question. But then they also weaken the duty of professional responsibility. There is an attractive simplicity in holding that morality requires any person who joins an institution to respect both its letter and its spirit. If this simple doctrine does not apply to judges in this form, if their respect for their institution, the law, is weakened from its pure form in the first master question to that of the second, then one loses the theoretical motivation for such a duty, at least if it means more than saying that one ought to respect the legal institutions of a particular country because their structure and actions merit such respect, or to the extent that they do.

These are some of the doubts that Dworkin’s second leading idea raises. My formulations of the two leading ideas (and of the doubts concerning the second) are mere sketches. They are meant to outline an approach to law which gives source-based law a special role in the account of law on grounds other than those explained in the previous section. It is easy to see that Dworkin’s conception of law contradicts the two necessary features of law argued for above. First, according to him there can be laws which do not express anyone’s judgment on what their subjects ought to do, nor are they presented as expressing such a judgment. The law includes the best justification of source-based law, to use again the brief description given in the coherence thesis of which Dworkin’s master questions are different interpretations. The best justification, or some aspects of it, may never have been thought of, let alone endorsed by anyone. Dworkin draws our attention to this fact by saying that it requires a Hercules to work out what the law is. Nor does Dworkin’s best justification of the law consist of the implied consequences of the political morality which actually motivated the activities of legal institutions. He is aware of the fact that many different and incompatible moral conceptions influenced different governments and their officials over the centuries. His best justification may well be one which was never endorsed, not even in its fundamental precepts, by anyone in government. Much of the law of any country may, according to Dworkin, be unknown. Yet it is already legally binding, waiting there to be discovered. Hence it neither is nor is presented as being anyone’s judgment on what the law’s subjects ought to do.

Second, the identification of much of the law depends, according to
Dworkin's analysis, on considerations which are the very same considerations which the law is there to settle. This aspect of his theory is enhanced by his second master question, but it makes a modest appearance in the first as well. Establishing what the law is involves judgment on what it ought to be. Imagine a tax problem on which source-based law is indeterminate. Some people say that in such a case there is no law on the issue. The court ought to ask what the law ought to be and to decide accordingly. If it is a higher court whose decision is a binding precedent, it will have thereby made a new law. Dworkin, on the other hand, says that there is already law on the matter. It consists in the best justification of the source-based law. So in order to decide what the tax liability is in law, the court has to go into the issue of what a fair tax law would be and what is the least change in it which will make source-based law conform to it. This violates the second feature of the law argued for above.

It is important to realize that the disagreement I am pursuing is not about how judges should decide cases. In commenting on Dworkin's second leading idea I expressed doubts regarding his view on that. But they are entirely irrelevant here. So let me assume that Dworkin's duty of professional responsibility is valid and his advice to judges on how to decide cases is sound. We still have a disagreement regarding what judges do when they follow his advice. We assume that they follow right morality, but do they also follow the law or do they make law? My disagreement with Dworkin here is that, in saying that they follow pre-existing law, he makes the identification of a tax law, for example, depend on settling what a morally just tax law would be, i.e. on the very considerations which a tax law is supposed to have authoritatively settled.

For similar reasons Dworkin's theory violates the conditions of the alternative argument, the argument based on nothing more than the very weak assumption that authorities ought to act for reasons and that the validity of authoritative directives depends on some degree of success in doing so. This assumption leads to the same first condition, i.e. that the law must be presented as the law-maker's view on right reasons. As we have just seen, Dworkin's argument violates this condition. He also violates the other condition established by the alternative argument, that the validity of a law cannot derive entirely from its desirability in light of the existence of other laws. Dworkin's theory claims that at least some of the rules which are desirable or right in view of the existence of source-based law are already legally binding.

Dworkin's theory, one must conclude, is inconsistent with the authoritative nature of law. That is, it does not allow for the fact that the law necessarily claims authority and that it therefore must be capable of possessing legitimate authority. To do so it must occupy, as all authority does, a mediating role between the precepts of morality and their application by people in
their behaviour. It is this mediating role of authority which is denied to the law by Dworkin's conception of it.

IV. THE INCORPORATION THESIS

The problem we detected with the coherence thesis was that, though it assigns source-based law a special role in its account of law, it fails to see the special connection between source-based law and the law's claim to authority, and is ultimately inconsistent with the latter. It severs the essential link between law and the views on right action presented to their subjects by those who claim the right to rule them. In these respects, the incorporation thesis seems to have the advantage. It regards as law source-based law and those standards recognized as binding by source-based law. The approval of those who claim a right to rule is a prerequisite for a rule being a rule of law. Thus the law's claim to authority appears to be consistent with the incorporation thesis. 9

I should hasten to add that many of the supporters of the incorporation thesis do not resort to the above argument in its defence. Nor do they interpret the centrality of source-based law to their conception of law in that way. They regard it as supported by and necessary for some version of a thesis about the separability of law and morals. Jules Coleman, for example, is anxious to deny that there is 'a necessary connection between law and morality'. 10 He mistakenly identifies this thesis with another: 'The separability thesis is the claim that there exists at least one conceivable rule of recognition and therefore one possible legal system that does not specify truth as a moral principle as a truth condition for any proposition of law.' 11 If this were a correct rendering of the separability thesis stated by Coleman in the first quotation above, the incorporation thesis entails separability. But Coleman's rendering of his own separability thesis is mistaken. A necessary connection between law and morality does not require that truth as a moral principle be a condition of legal validity. All it requires is that the social features which identify something as a legal system entail that it possess moral value. For example, assume that the maintenance of orderly social relations is itself morally valuable. Assume further that a legal system can be the law in force in a society only if it succeeds in maintaining orderly social relations. A necessary connection between law and morality


10 Coleman, 'Negative and Positive', 140.

11 Ibid. 141.