



LAW AND PRACTICAL REASON

LAW AND AUTHORITY UNDER THE GUISE OF THE GOOD

VERONICA RODRIGUEZ-BLANCO

B L O O M S B U R Y

Law and Authority under the Guise of the Good

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The received view on the nature of legal authority contains the idea that a sound account of legitimate authority will explain how a legal authority has a right to command and the addressee a duty to obey. The received view fails to explain, however, how legal authority truly operates upon human beings as rational creatures with specific psychological make-ups. This book takes a bottom-up approach, beginning at the microscopic level of agency and practical reason and leading to the justificatory framework of authority. The book argues that an understanding of the nature of legal normativity involves an understanding of the nature and structure of practical reason in the context of the law, and advances the idea that legal authority and normativity are intertwined. This point can be summarised thus: if we are able to understand both how the agent exercises his or her practical reason under legal directives and commands and how the agent engages his or her practical reason by following legal rules grounded on reasons for actions as good-making characteristics, then we can fully grasp the nature of legal authority and legal normativity. Using the philosophies of action enshrined in the works of Elisabeth Anscombe, Aristotle and Thomas Aquinas, the study explains practical reason as diachronic future-directed intention in action and argues that this conception illuminates the structure of practical reason of the legal rules' addressees. The account is comprehensive and enables us to distinguish authoritative and normative legal rules in just and good legal systems from 'apparent' authoritative and normative legal rules of evil legal systems. At the heart of the book is the methodological view of a 'practical turn' to elucidate the nature of legal normativity and authority.

Volume 6 in the series Law and Practical Reason

Law and Practical Reason

The intention of this series is that it should encompass monographs and collections of essays that address the fundamental issues in legal philosophy. The foci are conceptual and normative in character, not empirical. Studies addressing the idea of law as a species of practical reason are especially welcome. Recognising that there is no occasion sharply to distinguish analytic and systematic work in the field from historico-critical research, the editors also welcome studies in the history of legal philosophy. Contributions to the series, inevitably crossing disciplinary lines, will be of interest to students and professionals in moral, political, and legal philosophy.

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Acknowledgments

This book started when my daughter, who is now 13, was only two years old. During these years, she has learned, among many other things, to walk, talk, whistle, ride bikes and horses, write, read and play the cello and the piano. It has been a privilege to be the spectator of all these amazing events. This experience has motivated me to try to understand the interconnections and intricacies between our rational capacities and other potentialities and the way we actualise them as active selves in the context of the law. I wanted to make intelligible the distinctions between ‘producing’ and ‘acting’, between contemplation and action, between outward-looking and inward-looking. This book concentrates on these notions and aims to show that these distinctions and concepts shed light on the core idea that law is ‘actuality’ of our practical reasoning powers. The book defends a robust conception of practical reason and argues that practical reason illuminates two key features of law, authority and normativity.

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Introduction

Contemporary views on the nature of knowledge reaffirm and insist on the priority of theoretical knowledge over practical knowledge. This view is not new, however. It has roots that stretch back through time and an ancient pedigree in Platonist philosophers, for whom it did not make sense to comply with God's intentions without trying to understand them.¹ Platonist philosophers considered that before acting and performing in accordance to the good, it was necessary to understand what the good is. In the same vein, Aristotle – the champion of practical knowledge – believed that a contemplative life is the highest flourishing point for human beings.

One reason for the proclaimed supremacy of theoretical over practical knowledge is that practical knowledge and practical reason are elusive and a full and deep understanding of them raises difficult questions. For example, to understand practical knowledge do we need to reduce them to theoretical knowledge? If practical knowledge is not about true propositions but about 'doing', how do we perceive the 'doing' within time? The complexity of change and time add to the inscrutable character of practical reason and practical knowledge. And what about its metaphysical status? The ontological status of practical knowledge escalates its puzzling nature and even some philosophers, such as Kant, prefer to expel practical reason from the realm of the experiential. Thus, Kant advanced the idea that practical reason *must* belong to the 'non-knowable by experience' and therefore he located it beyond our empirical possibilities.

Modern scientific achievements seem to confirm the primacy of theoretical perspectives over practical perspectives. Technological developments, for instance, have been possible because of our sustained and continuous engagement with science and mathematics. Contrast this with the disasters of two world wars; armed conflict in numerous regions of the world; famine in certain parts of the world in contrast to the abundance of food in other parts; the growth in fear of, and violence towards, a constantly redefined other; and the destruction of our natural environment and resources. It is difficult to believe that the answers to our practical problems reside in something that is about 'practical knowledge' and reasons in acting. It is even harder to believe that there is a 'robust conception of practical reason' that can compete with a

¹ A Dihle, *A Theory of the Will in the Classical Antiquity* (Berkeley, CA, University of California Press, 1982).

'robust conception of theoretical reason'. If it is 'knowledge', the practical reason sceptic argues, it is a type of knowledge that is subservient to theoretical knowledge. Practical knowledge is the Cinderella of all types of knowledge, including technical knowledge. If the measure of truth and knowledge is success, then practical knowledge is bankrupt.

However, might it be that our current understanding of practical knowledge cannot help us to alleviate the deepest problems and dilemmas of human action because this understanding is wrong or insufficiently deep? Might it be that we have an understanding of practical reason that is extremely theoretical because, for example, deep understandings of practical reason have been replaced by 'decision-making' theories, game theory and other more 'scientific' or theoretical understandings of practical knowledge. Not surprisingly, the field of economics has thrived. Its success above other disciplines that study human beings, societies and institutions resides in its theoretical understanding of human action and in discarding any robust conception of practical knowledge.

The final triumph of theoretical reasoning comes from within moral and normative philosophy where contemporary philosophical reflections on 'reasons for action' tend to bifurcate reasons for action into motivational and normative reasons for action,² leaving the puzzle of how practical reason truly operates intact. They extrapolate the understanding of reasons from the sovereignty of theoretical reflection. Consequently, normative reasons are conceived as being proximate to *right* theoretical reasons, by contrast to motivational reasons, which are conceived as merely psychological states of the agent. Normative reasons theorists have been seen to have the upper hand in this debate because, among many other factors, the Humean account of reasons for actions as merely psychological or desire-based, even in its most sophisticated and refined version, seems implausible and leaves unexplained key features of human agency. In this debate between normative and motivational reason for actions, the nature and understanding of what robust practical reason is, is both simplified and reduced. In the normativist account, a reflection on reasons for action in isolation from the agent is privileged. In other words, reasons for actions are understood in isolation from the agent whose whole parts, according to the classical tradition, act in unity and produce *something* in the world. In the normativist account the question of how agents produce states of affairs and things in the world, which is the bread and water of practical reason and practical knowledge, becomes utterly unintelligible.

² Candace Vogler calls this 'bifurcationalist psychology'. See C. Vogler, *Reasonably Vicious* (Cambridge, MA, Harvard University Press, 2002). In some ways, contemporary philosophy has been trapped by Hume's formulation of the problem, emphasising a division between beliefs and desires.

Human institutions such as law, probably because of a lack of sufficient reflection on robust practical reason among legal philosophers, have also been the subject of reflection from a predominantly theoretical or conceptual perspective. The most important work in twentieth century legal philosophy is called *The Concept of Law*. As the title suggests, it engages with the core features of the concept 'law' and theorises 'law'. Even the main critical accounts of this work, for example Dworkin's theory of legal interpretation,³ give a theoretical account of law as interpretation. Interpretivist theory provides only a weak portrayal of the full power or faculty of human agency and practical reason.

In this book I will argue that there is a field of study to which we should return to complete our understanding of, and find answers to questions on, the nature of human institutions such as law. In contemporary philosophy this field is called 'moral psychology' and 'philosophy of action', but in the classical tradition it is connected to how things become, and consequently it is linked to action, movement and changes produced by agency. I invite the reader to re-visit a place that has been mainly occupied by Aristotle, Aquinas and Anscombe. I will argue that deep engagement with practical reason and practical knowledge provides the framework to understand two key features of law, ie normativity and authority.

The core argument of the book is that law is a specific 'actuality'⁴ of our practical reasoning powers. Practical reason is conceived as a *form* that is displayed in our intentional action, which also has a *form* that involves a *diachronic structure*. To show that law is an 'actuality' of our practical reasoning powers, the book begins by dispelling the mistaken view that practical reason is theoretical reason *plus* something extra, ie volition, will or desire. The study advocates the view that intentional action is the midwife of practical reason. The study then tackles various misunderstandings surrounding intentional action and criticises the view that reduces intentional actions to mental states. The tendency has been either to reduce or to not take sufficiently seriously the idea that intentional action is a *form* which entails a *diachronic structure*. The illusion has been that we can grasp the diachronic structure of intentional action, and therefore of practical reason, if we regard it as constituted by separate components, or as constituted by 'slices' of actions which are caused by mental states. The result is muddled and confused theories that hopelessly attempt to connect mental states and results of actions in a directed and intelligible unity, after having severely chopped and disconnected their parts.

I have said that Aristotle, Aquinas and Anscombe provide the framework for a robust conception of practical reason and for explaining two key features of law: authority and normativity. Nonetheless, the first chapter of the book

³ Dworkin hardly ever uses the term 'practical reason'.

⁴ I use the term 'actuality' as coined by LA Kosman in his article 'Aristotle's Definition of Motion' (1969) *Phronesis* 40. See Chapter 4 for a full discussion of the notion of 'actuality'.

begins with a modern and familiar framework which is the antagonism between anarchist and Kantian notions of autonomy. In the first chapter the supposed conflict between authority and autonomy is analysed and it is shown that there is a possible Kantian interpretation of autonomy which makes compatible autonomy and the idea of the authority of the state. The chapter finishes with a promissory note on harmonising the conceptions of practical reason in the classical tradition and Kantian practical reason. This project is, of course, beyond the scope of this book.⁵ The contemporary reader is more familiar with the Kantian notion of practical reason than with the idea of practical reason as advocated by Aristotle, Aquinas or Anscombe and therefore this first chapter provides the reader with familiar territory from where reflection on practical reason can begin. Since this is a book on legal authority and normativity, it begins with the anarchist challenge on authority, and because the anarchist challenge is connected to the Kantian notion of autonomy, I have searched for a tentative Kantian answer. The underlying intuition is that the Kantian answer is not far from the answer provided by Aristotle, Aquinas and Anscombe. One of the aims of this chapter is to provide the reader with reasoning that will allow her to go from what is familiar, ie practical reason in Kant, to something less familiar, ie practical reason according to the classical tradition. The first chapter establishes the tasks, ie examining the antagonism between authority and autonomy and possible ways of reinterpreting both authority and autonomy that ameliorate the antagonism between them. The notion of legal normativity, ie how the law is reason-giving, plays a key role in reinterpreting authority and autonomy. Thereafter the book focuses on legal normativity until we return to the question of legal authority in Chapter 8.

In Chapter 2 I explain how law can be reason-giving. The chapter aims to give an account of what legal normativity is in terms of *how* it works and operates in the agent. It is shown how intentional actions of legal rule-following or rule-compliance⁶ are explained by the description of the agent who takes the deliberative point of view. It is argued that the agent performs the action *because* of the grounding reasons of legal rules that are understood in the best light by the deliberator or agent himself. In other words, the deliberator follows the legal rule because he can describe his own actions in terms of reasons as good-making characteristics. Traditional wisdom states that intentional actions can be rationalised and that intentions are mental states (such as acceptance, desires, beliefs, and so on). Therefore, following this line of argu-

⁵ For an attempt to do this see C Korsgaard, 'Aristotle and Kant on the Source of Value' in *Creating the Kingdom of Ends* (Cambridge, Cambridge University Press, 1996) 225 and S Engstrom, *The Form of Practical Knowledge* (Cambridge, MA, Harvard University Press, 2009).

⁶ I will use the terms 'rule following' and 'rule compliance' interchangeably for reasons that will become apparent in Chapter 8.

mentation, an intentional action aimed at following legal rules can be explained in terms of ‘acceptance’ of the rule or other related mental states. I argue that this conception presupposes what I call the ‘two-component model’ of intentional action. The two-component model sits well with a description of rule-following actions from the third-person perspective. The model assumes that there is symmetry between an explanation of ‘following a legal rule’ from the third-person point of view and an explanation from the first-person point of view.⁷ This assumption of symmetry, however, is mistaken and in Chapters 5 and 6 I defend the parasitic thesis. It is argued in these chapters that an explanation of rule-following from the deliberative point of view in terms of the grounding reasons as good-making characteristics (‘guise of the good’ model of legal rules) is *primary* to the explanation given by the two-component model in terms of mental states. Chapter 5 shows that Hart’s notion of ‘acceptance’ of the rule of recognition presupposed the two-component model; consequently, it is argued, Hart’s notion of ‘acceptance’ is parasitic upon the ‘guise of the good’ model of legal rules. Chapter 6 argues that Kelsen’s notion of legal normativity relied on a narrow notion of intentional action which is close to the two-component model. A parasitic relationship also seems necessary to make intelligible and much more *complete* the notion of legal normativity.

Chapters 3 and 4 scrutinise the robust conception of practical reason, ie the ‘guise of the good’ model. In these chapters I directly engage with, and unpack, the key features of this model whilst in Chapter 2 the ‘guise of the good’ model is applied to the phenomenon of legal rule-following or rule-compliance. Chapter 3 elucidates the relationship between reasons for actions, good-making characteristics and intentional action and defends the guise of the good model against some its critics. Chapter 4 engages with understanding *how* the form or structure of intentional action is able to reveal the form and structure of practical reason. I argue that we need to go deeper into Aristotelian metaphysics to scrutinise what practical reason is and *how* practical reason and intentional action are intertwined. The Aristotelian metaphysical view is that we are creatures of a certain nature and that we possess powers and capacities, amongst which the power of practical reasoning is the

⁷ Examples of the symmetric view of intentional action can be found in S Perry, ‘Political Authority and Political Obligation’ in L Green and B Leiter (eds), *Oxford Studies in Philosophy of Law* (Oxford, Oxford University Press, 2012) vol II. Perry points out: ‘What should we say about the situation where the lawmaker goes through the motions, as it were, of legislating but does not have the appropriate intention? It seems to me that the right thing to say is analogous to the private law solution to such problems, which is that we attribute intentions based on objective manifestations of behavior: So the lawmaker has in fact made law, despite not possessing the appropriate intention’ (34). However, Perry argues that the paradigmatic case is when the ‘intention is present’. Perry’s test to determine whether ‘intention is present’ is Enoch’s defence of a Gricean theory of intention. For a rejection of Enoch’s and Grice’s explanation of reason-giving and intention see section 10.3.

most important. Capacities or powers can only be grasped when we are active. But then what does it mean to say that these capacities are 'active' or *actual*? The core argument is that the Aristotelian distinction between actuality and potentiality provides the general framework for understanding the idea of capacity change that underlies the view of practical reason as a capacity or power that changes and manifests itself in different ways.¹⁸ We require, therefore, an understanding of the actuality/potentiality distinction to grasp *how* practical reason as a capacity is able to work, operate, manifest itself and provide the form of our intentional actions. In section 4.2 I explain the actuality/potentiality distinction and how it illuminates the notion of practical reasoning (capacity) and capacity change. In section 4.3 I analyse the implications of this view for the central inquiry of the book which is an explanation of the legal-rule compliance phenomenon.

Chapter 7 aims to establish the idea that the claims of legal authorities of legitimate authority and moral correctness should be understood as expressions of intentions about *how* legal actions will be performed. It is shown how the claims of legal authorities construed as expressions of intentions shape the law and our attitudes towards legal rules.

The picture of legal rules that starts to emerge is a complex one where expressions of intentions, intentional actions, successful and failed performances, and hypothetical and objective good-making characteristics are all intertwined.

Chapter 8 joins the idea of authorities' claims as expressions of intentions with compliance with the eight desiderata of the Rule of Law to show that together they create a presumption of the goodness of legal authority and, consequently, a presumption of legitimacy. The view that the notion of legal normativity defended in this book and legal authority are incompatible is subsequently discussed. Raz, for example, offers an explanation of the reason-giving character of law that is compatible with legal authority. He adumbrates the view that legal rules provide exclusionary reasons which can explain the service that law gives us and the practical difference in our lives that characterises the authoritative nature of law. The 'guise of the good' model seems unsatisfactory because it cannot explain the 'practical difference' that law makes to our actions and in our lives. However, I adumbrate arguments to show that legal rules as conceived by the 'guise of the good' model can compete with the idea of legal rules as exclusionary reasons. An independent criticism of Raz's notion of authority is also offered. The notion of exclusionary

¹⁸ This interpretation is advanced by M Frede, 'Aristotle's Notion of Potentiality in *Metaphysics Q*' in T Scaltsas, D Charles and M Gill (eds), *Unity, Identity and Explanation in Aristotle's Metaphysics* (Oxford, Clarendon Press, 1994) and Makin's commentaries on Aristotle in *Aristotle, Metaphysics Book Q*, Clarendon Aristotle Series (Oxford, Clarendon Press, 2006) 133. Cf WD Ross, *Aristotle's Physics: A Revised Text with Introduction and Commentary* (Oxford, Oxford University Press, 1995).