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The Invisible Origins of Legal Positivism

A Re-Reading of a Tradition

Kluwer Academic Publishers

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A Re-Reading of a Tradition

by

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KLUWER ACADEMIC PUBLISHERS
DORDRECHT / BOSTON / LONDON

A C.I.P. Catalogue record for this book is available from the Library of Congress.

ISBN 0-7923-7101-1

Published by Kluwer Academic Publishers,
P.O. Box 17, 3300 AA Dordrecht, The Netherlands.

Sold and distributed in North, Central and South America
by Kluwer Academic Publishers,
101 Philip Drive, Norwell, MA 02061, U.S.A.

In all other countries, sold and distributed
by Kluwer Academic Publishers,
P.O. Box 322, 3300 AH Dordrecht, The Netherlands.

Printed on acid-free paper

Printed in the Netherlands.

Law and Philosophy Library

VOLUME 52

The titles published in this series are listed at the end of this volume.

Acknowledgements

This book has been long in the making. Millie Bakan saw what I was doing at a very early stage during the late 1980s and my concerns would not have taken the form of a manuscript without her encouragement and piercing questions. When the book seemed complete during the mid-1990s, I delivered various sections and chapters at conferences on the Continent and in the U.K. and in philosophy or law faculty workshops at Edinburgh's Law and Society Centre, Birkbeck College, Queen Mary College, Liverpool University, and University College London. I am grateful to the participants who took the time and effort to comment on my presentations. William Christian, Walter Skakoon, Bert van Roermund, Ernie Weinrib, Jonathan Lavery, Mark Thornton, Louis Wolcher, Janet Ritch, Kent Enns, Robin Jackson, Wally McLeod, and Sabine Grebe read particular chapters and this invariably initiated conversations that helped me to clarify my claims and arguments. I am grateful for the time and effort they took in offering me feed-back. The referees also made me conscious of shortcomings. I am especially grateful to Henry Pietersma and Sol Nigosian, who, throughout the years when I was writing the manuscript, joined me in wide-ranging conversations about its themes and, by so doing, encouraged me to continue the long project. John King copy-edited the final draft, offering invaluable comments relating to content and style. Without his help as copy-editor, this book would not have seen the light.

The manuscript simply would not have been completed, however, except for the opportunity to spend my summers and long weekends in the civilized environment and library facilities of Victoria College at the University of Toronto. I am especially grateful to Jean O'Grady and Margaret Burgess of the Northrop Frye Centre at the College for their support over the years and to Brian Merrilees and Roseann Runte for allowing me to work at the Centre.

I am grateful to my mother, who, over the years, frequently read my manuscripts. It is to her spirit that I dedicate this book.

William E. Conklin
10 February 2001

About the Author

William E. Conklin has authored *In Defence of Fundamental Rights* (1979), *Images of a Constitution* (1989) and *The Phenomenology of Modern Legal Discourse* (1998). Having co-edited four volumes in the fields of third-world jurisprudence and access to justice, he has also written extensively in different fields of the humanities and of law. He received his doctorate in Social and Political Thought from York University in 1992 after having received graduate degrees in Law from Columbia University and in International Relations from the London School of Economics.

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Introduction

Since the Renaissance, societies have been organized with the sovereign state as the centre. Internally, the authority of the sovereign state is plenary. In the exercise of this authority, the state may define who is a legal person, assign rights and duties to the person, create or terminate legal relationships between the persons, and prescribe social behaviour in terms of legal norms. The legal norms enclose social behaviour inside conceptual boundaries. The enclosure is potentially total. Ultimately, the institutions of the state may coerce one to comply with the normative prescriptions. And, in the coercive act of a state institution, much good may be accomplished as well as much evil. Concerning the latter, persons may be incarcerated, tortured, cleansed of their citizenship, expelled from their territory, and executed; their property may be confiscated and their means of a livelihood terminated. Publicists and teachers redefine social events from the viewpoint of the state, and the new political leaders and legal officials displace the old Founding Fathers with new Founding Fathers whose intent legitimizes all acts of government officials. The laws of the state are said to bind all persons who live within the territorial boundaries of the state. The substantive content of a law remains authoritative despite the apparent injustice of the content. No institution – neither a religious institution nor political party nor a corporation – possesses the authority to posit and enforce binding laws unless the state's legal institutions have authorized such authority. The state alone possesses a monopoly of force: no social organization may impose force without the authority of a state institution.

The sovereign state also possesses an external aspect. A state is immune from scrutiny from other sovereign states. A state is autonomous (*auto*, meaning 'self' and *nomos*, meaning 'law-making'). No one state may exercise authority in a manner that interferes with the sovereignty of another state.

The big question is 'why are the laws and regulations in such sovereign states authorized when the acts of petty and organized criminals are not?' This issue does not necessarily go to the justice of the acts of state. Nor does it go to the factors that officials may authoritatively incorporate into their deliberations about the actions of the state. Rather, this critical question addresses the nature of legal authority itself. Why is a rule or norm of a state's officials binding upon the social

behaviour of residents within the territory of the state: that is the question of the day. If one could only resolve that question, one might begin to understand the apparent inhumanity of state institutions that authoritatively expel long-standing residents, torture others, authorize the disappearance of many others, and execute many more, all in the name of the authority of the state. If one could understand why a human law is binding, one might finally appreciate why the state possesses a monopoly of coercive authority.

Jurists have generally offered two perspectives from which to respond to this issue. The one, the natural law tradition, has claimed that officials must evaluate the substantive content of a rule in order for the rule to be authoritative. In this act of evaluation, the law would be binding if its content were consistent with universal principles that transcended the particular law. Such universal principles are considered unwritten. They are so considered because they have not been authored by the institutions of the state. Instead, natural law theorists have claimed that the source of the transcendental principles is one's "heart" or conscience. Perhaps it would be best to consider the universal standards as intuitive. The universal standards seem natural – so much so that they have been called 'natural laws.' The mere posit of a rule by a civil institution does not render the rule authoritative and binding. The content of the rule must be measured against the natural universal laws. It is not surprising that, given the Judaeo-Christian influence in western culture, especially since the Renaissance, natural laws have been associated with a still further transcendent and self-starting source, independent of the content of the natural laws: namely, a divine Author. The Author has been considered invisible. As I shall argue in Chapter Two, this invisibility has been considered synonymous with a sense of the divine.

The second approach, the tradition of legal positivism, dominated the thought of the sophists of the fifth-century *polis* as well as the legal thought of the newly formed sovereign city-state of the Renaissance. The assumptions of legal positivism have so permeated legal thought even to this day that I eventually describe this dominant strain of thought as 'the Tradition.' The tradition of legal positivism has insisted that the authority of a rule is not determined by reference to the substantive content of the rule. This is not to say that morality and anthropology and politics and psychology do not enter into deliberations about the substantive content of a binding rule. But the legal positivist tradition has insisted that the substantive content of a rule is separate from its authority. What makes a rule authoritative is its source or grounding or *arche*. I shall argue in Chapter Three that such an impersonal trace of the authority of a rule to its distant *arche* has dominated European legal thought since the Roman times, perhaps even since the later Greek. At times, this impressive tradition has associated the *arche* with a founding author of the civil institutions; at other times, with an *a priori* concept untouched by

human passion; and at still other times, with the felt experience of bonding that officials share towards the civil institutions.

Contemporary commentators have reinforced the demarcation of binding laws into natural law theory and legal positivism for too long. The deliberative stage of the legislative and adjudicative incorporate factors that even in the recent past would have been considered morality or non-law. Statutes, constitutional texts, and international treaties have incorporated prescriptive moral norms. Human rights statutes, constitutional bills of rights, and international conventions exemplify such a phenomenon. Even commercial law codes and common law doctrines in the fields of private and administrative law have required officials to articulate moral standards of fairness and justice in day-to-day decisions. Evidence rules have been widened and, in aboriginal cases, for example, what courts have considered legal evidence has become less formal. Higher courts in the common law countries now expect competent counsel to be familiar with the anthropological researches concerning the pre-European tribal legal cultures. Both jurists and judges are increasingly sensitive to the possibility that laws have hitherto represented the voices of men, especially privileged men, and that the legal voice should be more inclusive of women. So too, the highest courts in the land have ordered that public institutions include personnel with diverse ethnic-religious backgrounds. And officials have deferred to alternative modes of decision-making that aspire to avoid the legalism and formalism of adjudication so that the parties may address the substantive content of their disputes. The broadening of the factors incorporated into deliberative content of law, even so short as a decade ago, would have been rejected in many common law countries as moral, as political, as improper for the judicial function, and as inappropriate for pedagogy in a professional law school. The separation of law from non-law has been undermined in the deliberative stage of the adjudicative process.

When one turns to the question 'why are laws binding?' or 'why is a decision authoritative or valid?' one also faces a striking similarity in theories of law that are self-described as legal positivism and natural law, for both approaches to law share a common inquiry into the authorizing origins or *arche* of the authority of humanly posited laws. For natural law theory, the *arche* has been considered, until relatively recently (with the writings of Lon Fuller and possibly Ronald Dworkin, for example) to be the invisible Author or Nature.[1] For legal positivism, the *arche*, I argue in Chapters Three to Nine, is also invisible. By 'invisible,' I mean that the *arche* is inaccessible through the humanly constructed language of officials such

1 In *The Structuralism of Analytical Jurisprudence* (forthcoming), I argue that Dworkin's works do presuppose an invisible author and an invisible juridical paradise.

as judges, lawyers and legislators.[2] Both the tradition of natural law and the tradition of legal positivism search for an *arche* of the grounding for their human laws.

I take up the latter line of inquiry in this book. As I explain in Chapter Three, I put to the side the character of moral factors that officials incorporate into their deliberative process.[3] I address a different question. Instead of asking 'what factors (political, social, ethical, psychological, or statistical) are members of a legal structure?' I examine what lies at the authorizing origin of binding laws. With the possible exception of Joseph Raz, whose work I examine in Chapter Nine, the concern of recent legal philosophers has been the identity of law. Here, the identity of the factors that constitute membership within the phenomena of "law" has entered into the deliberations of legislatures and courts. Here, officials have asked whether statutes, regulations, precedents, jurists' treatises, or unwritten customs, for example, constitute laws. The nature of a binding law, however, is a different issue. Here, the issue is 'why is a law binding, whatever factors enter into the deliberation about the substantive content of a binding law?' The central claim of the tradition of legal positivism, again, is that the latter issue of the authority of law is separate from the issue of the identity of the factors that enter into the deliberation about a binding law.

My method of analysis is to read the canons of legal positivism seriously. I shall retrieve what each important thinker has understood as the ultimate authorizing origin of binding rules and norms. I shall retrieve the thinkers' resolution of the latter issue, though, by re-visiting how the canons understand the nature of legal language. In particular, what do the canons define as legal language? And does such a view of legal language provide insight into the question, 'what is the authorizing origin of a binding law?' Is the origin outside language?

The issue of language is not new to the discourses of the humanities and of law. It is especially an issue that permeates Hegel's phenomenology during the nineteenth century, the recently translated and highly original works of the Russian thinker Mikhail Bakhtin (1895-1975), the German and French elaboration of the phenomenology of language (especially the writings of Edmund Husserl and Maurice Merleau-Ponty), the social and literary criticism of French and German writers during the 1960s and 1970s (especially Michel Foucault, François Lyotard, and Jacques Derrida), English literary criticism since the 1970s, and unsystematic

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2 I draw from Emmanuel Levinas, *Totality and Infinity*, trans. Alphonso Lingis (Pittsburgh: Duquesne University Press, 1961, 1969) and Maurice Merleau-Ponty, *Visible and Invisible*, ed. Claude Lefort, trans. Alphonso Lingis (Evanston: Northwestern University Press, 1964, 1968).

3 This is the subject of my book, *The Structuralism of Analytical Jurisprudence* (forthcoming).

writings by legal theorists during the 1980s and 1990s.[4] In short, there is a deep and rigorous context from which I retrieve the importance of language in the tradition of legal positivism.

Indeed, in Chapters Four to Eight, I retrieve how language is indispensable for an appreciation of how each of Thomas Hobbes, Jean-Jacques Rousseau, John Austin, Hans Kelsen, and H.L.A. Hart grounded the authorizing origins of humanly posited binding laws. The tradition of legal positivism can only grow richer if one connects these thinkers' insights about legal language with their understanding of why is a posited norm or rule binding.

In particular, the canons in the tradition of legal positivism have generally understood language in a very special manner. For one thing, the canons have assumed, I shall argue, that legal language is primarily written. What is meant by 'written' is not just that humanly posited laws are written on a page. After all, the writings of poets and novelists are also written on a page. What is important for the thinkers of legal positivism is that a script is authored by an appropriate official or institution in civil society. The institution is related with other institutions, and together they form an interdependent hierarchical structure modelled on a pyramid. For some centuries, the legislature was understood as the important institutional author. Much of the common law is unwritten, one might say, in that legislatures have not authored many common law rules. But the 'unwritten' common law rules and principles are expressed in texts that courts and quasi-judicial tribunals have authored. Since the influence of American realism in the 1920s and of Jeremy Bentham in the nineteenth century, judges have been considered the authors of the 'unwritten' common law principles.

Accordingly, the authoritative writing of legal officials has been associated with very special authors. The authors, as contemplated by Thomas Hobbes (as I argue in Chapter Four), originate an institutional structure whose rules, in turn, bind all the populace within the state's territory. The authors, in the case of Jean-Jacques Rousseau or John Austin (as I argue in Chapters Five and Six), may be 'the People' whose will transcends the rules of the civil institutions. Or, as in the case of Joseph Raz (as I argue in Chapter Nine), the authors may be the institutions themselves. The above philosophers postulate that authors begin legal language.

No matter how one understands the identity of the authorial source of written laws (whether a transcendent General Will, 'People,' or civil institution), such an author is considered self-starting, autonomous, originary, or a creator of written expression. The author's expression represents the author's concepts. Jurists and

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4 I provide an annotated bibliography of these contributions in Conklin, "Alternatives to the Study of Law: An Annotated Bibliography of Legal Phenomenology and Legal Semiotics," *Current Legal Theory* **16**: 3-61. Bakhtin also wrote under the name of V. N. Volosinov.

officials call the concepts legal doctrines or legal rules. One may be familiar with some such doctrines from daily life: criminal intent, consideration, fee simple, freedom of speech, and the like. The author may authorize institutions to posit such concepts. A distinct and assignable author, placed on the institutional hierarchy, legislates the doctrines. It is even a common practice in common law countries to cite the date and place of the author's creation of the expression at the end of a statute or the start of the judicial decision.

If there were a time and place when an author of the legal doctrines could not be identified, as suggested most forcefully by Hobbes, Kelsen, and Hart, then the unwritten would characterize such a condition. Since law is written by distinct and assignable authors, a non-law would characterize a condition of the unwritten. Officials reject the unwritten pre-language world as a pre-history, pre-morality, and pre-legality. Officials cannot recognize the social or moral norms of such a world as binding because they exceed the expression authored by civil institutions. By interpreting the classics of modern legal positivism, we shall discover that legal existence is associated with a special authored or written language that officials on the institutional hierarchy recognize as authoritative.

What cannot be authored in this sense of an autonomous, self-creating author, I shall show, is excluded as non-law, as outside 'the Law,' as morality, as anthropology, as subjective. Hobbes and Locke describe such an unrecognizable, languageless world as "barbaric" and "savage." Kelsen and Hart describe such an unwritten world as "primitive" and "pre-legal." It seems that without self-conscious authors to will legal doctrines, there cannot be authoritative, binding laws. The exclusionary character of legal language addresses the subject-matter of 'what is law?', the evidence admissible in court, the factors that a particular official may incorporate into her/his deliberations, and the nature of the official's decision itself.

What the great thinkers of legal positivism consider legal language – an authored written expression and a special sense of an author at that – makes both inclusions and exclusions.

Traditionally, legal positivism claims that a legal language represents or stands for categorical objects. Hobbes calls such representations "signs." Today and put simply, we call the object of a sign a referent: the sign refers to an object. The referent may be a physical object of nature. Or, as in the case of legal discourse, the referent may be a concept which, again, is called a doctrine or a rule. Hobbes' understanding of posited laws, as I argue in Chapter Four, privileges the legal sign. Officials can only recognize an object – a physical tree or a concept – if they possess words or phrases to represent the object. Again put simply, the words and phrases are signs of objects. The words and phrases signify the objects. The objects are, in a sense, absent from the signs. Legal officials signify the object by