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Putting the Sources Thesis in Its Place*

I will begin with a remark made by Timothy Endicott in a recent and very stimulating paper:

“Raz’s explanation of the nature of law is not undermined by the fact that evaluative judgments are necessary in order to identify the content of the law, as long as it is still possible for legal directives to have the exclusionary force that, in his theory of authority, they claim”.¹ (p. 10)

What Endicott claims is that when determining the content of the law, you need to make evaluative judgments. These judgments are unavoidable due to the fact that the interpretation of the language of the law “sometimes calls for an explanation of the value of the law”. The problem, if any, is that this claim *seems* to contradict the sources thesis, which Joseph Raz states in the following way:

“All law is sourced based. A law is sourced-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument”.²

Endicott claims that his argument does not contradict the sources thesis. My aim in this paper is to fully understand Endicott’s argument, so in section I), I will try to clarify the way evaluative arguments figure in the determination of the content of law according to Endicott; in section II), I will then sketch out the well known Razian argument regarding authorities, legal directives and their exclusionary force, in section III) I will argue that Endicott’s argument needs to comply with two conditions in order to save the authoritative aspect of legal directives; and section IV) tries to center the debate on the practical difference the-

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¹ T. Endicott, “The One True Interpretation”, Contribution to this issue of *Analisi e diritto*.

² J. Raz, *Ethics in the Public Domain*, Oxford, Clarendon Press 1994, p. 211. [Hereinafter *EPD*]

sis, a point at which further argument is needed in order for Endicott's argument to have some plausibility.

First let me start with a caveat: I do not intend to put in doubt Endicott's version of the sources thesis, he finally says that the thesis should be restated in the following way:

"All law is source-based. A law is sourced-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument, except of course any evaluative argument that is necessary to identify the social facts". (p.10)

What I intend to demonstrate is that one of his premises for the argument (opening remark that claims the possibility of exclusionary force) might get him into trouble and that it needs a more robust form, i.e., he finally needs further argument to conclude that this modified version of the sources thesis is compatible with the authoritative aspect of the law, hence sections III and IV of this paper.

1. *Evaluative Arguments and the Content of Law*

Drawing on two disputes brought to the courts, Endicott explains how the language of the law makes room for disputes that revolve around questions of the content of the law and the values of the law. The first dispute is a case of incompleteness in a legal standard, the Geneva Convention, which according to Endicott and Article 1A "defines a refugee as a person who has 'a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'", the question is whether people being persecuted by non-state agents find a protection in this legal standard. Two of the countries that have signed the Convention, Germany and France, according to their interpretation decided that the standard has to be understood as protecting persons from persecution by state authority. Britain – after different argument in the courts – holds that the standard protects people from persecution of non-state agents. Its main reason is stated by Endicott: "If for whatever reason the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete".

The second dispute is one concerning a vague legal standard, the British Copyright Designs and Patents Act of 1988. As in many countries, this Act protects the original work of an artist with a copyright which is violated if another person copies the whole work or a substantial part of it (Endicott and section 16 of the Act). Again the House of Lords analyzed a dispute regarding a textile pattern that was produced with remarkable similarity with its original; the question was what should be understood as copying a "substantial part" of an original work. After several arguments in the lower courts, the House of Lords' main ar-

gument was that the issue of copying a substantial part of the original work is a “question of impression” which is better decided by the courts of first instance, who I should say in passing decided that indeed the textile pattern was a breach of copyright.

These two disputes are used by Endicott to clarify the way that evaluative arguments figure in the determination of laws content. We should also note that Endicott mentions the idea of having “one true interpretation”. As he understands this notion, we have one true interpretation “only if there is one interpretation that is good in such a way that it would be wrong to adopt any other interpretation” (p.7). In this rendering, a true interpretation is the same thing as a good interpretation.

But we are concerned with the question of the way evaluative judgments play a role in determining law’s content. In the refugee case, for example, Endicott claims that there is one true interpretation to the problem of what must be understood by the standard regarding the problem of protection from state or non-state agents, and this is so because interpreting the Convention according to its purpose does not leave a “legitimate range of different views on the point”. We can finally reach this conclusion if we pay attention to the origins and why the Convention was drafted, coming to the conclusion that it has the goal of “protecting people from atrocities of the kind perpetrated by the Nazi regime” for example. Another argument expressed by Endicott is one that relies on analogy in the interpretation of the Convention, where we could understand that the cases brought to the courts were analogous to victims of state terrorism, and that “imposes the same obligation on states that have signed the Convention”.

What about the copyright case? Here too, according to Endicott we have to make use of evaluative judgments in order to determine the content of the law. Endicott argues that certain principles of the law of copyright should help us out in this task, principles that explain the goals that the standard sets out to achieve, such as protecting original work to give an incentive to the original artist through a limited form of property protection, but at the same time these principles have the purpose of not canceling other work that might find an inspiration in other peoples creations. These principles should be used to determine the content of the law and more specifically the problem of specifying what counts as a substantial part of the original work for the purpose of the copyright case.

2. Authority, Legal Directives and Their Exclusionary Force

Now we know, according to Endicott, how evaluative judgments figure in the determination of law’s content. My aim in this section is to briefly sketch out the Razian argument from authority. A couple of issues that I have to clarify: The main reason for bringing Raz’s thesis into play is that Endicott claims that rendering and affirming that evaluative judgments are necessary in order to deter-

mine the content of the law *does not* undermine Raz's explanation of the nature of law, "as long as it is still possible for legal directives to have exclusionary force that, in his theory of authority, they claim". This is why we need to elaborate on Raz's theory of authority, i.e., in order to judge whether Endicott's claim is viable. I should note that I will not muster arguments in favor of the Razian view. We can discuss many things about it, but due to the fact that Endicott endorses it, my aim is to work within it.

First of all what does Raz's authority thesis entail and how does it relate to the sources thesis? Speaking in terms of legal authority and its directives, the authority thesis tells us that once we talk about legitimate authorities, its directives generate Exclusionary Reasons for action which are Content Independent and finally claim to make a practical difference in our deliberations. Let me unpack all this: Exclusionary Reasons are meant to be pre-emptive reasons not to act for certain reasons. These Exclusionary Reasons are not to be added to the dependent reasons that the rule is based upon. We cannot count both, i.e., the dependent reasons and the Exclusionary Reasons. In the case of legal directives, we count these Exclusionary Reasons. In Raz's terms the excluded reasons are the dependent reasons. The weight we have to consider - if we are talking of legitimate authorities - is that of the Exclusionary Reasons given by the directives. The justification behind these directives is the role authorities play, i.e., a Service Conception of Authority that consists in considering the dependence thesis and the normal justification thesis. The first establishes that the authorities' directives should be based on reasons that apply already to its subjects, and the normal justification thesis claims that "the normal and primary way to establish that a person should be acknowledged to have 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 directive of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly"³.

Then, to fully explain this aspect of content independence we consider this role authorities have mediating between subjects and the right reasons that they are supposed to correctly follow. This is due to the fact that authorities in their mediating role play an important part in coordinating activities in society. They allow, as Raz says, a degree of agreement in the face of disagreement, this just to mention one of their purposes.

The third thesis that explains Raz's conception of authority is the pre-emption thesis. This thesis argues that a directive with its protected and exclusionary reasons that are content independent pre-empt the weight the dependent reasons hold. The authority, if we consider the other two theses and are clear that we are talking of legitimate authorities, solves the ongoing task of its subject regarding

³ J. Raz, *EPD* (n. 2 *supra*), p. 214.

which reasons they are supposed to follow. We pass this decision - as we do many other decisions in several aspects of our lives - to the authority and once it establishes a directive, we follow those reasons and not the dependent ones. It would be odd to say that an authority makes us consider again the dependent reasons to know what exactly we are supposed to do. This in fact is what authorities are called up to do, and *via* this activity, for example, solve coordination problems and allow agreement in face of pluralism in today's societies.

This account of the nature of authority gives good reasons to prefer another of positivism's tenets, the sources thesis: According to Raz, and as we already mentioned, a law is sourced based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument. One preliminary reason that we could mention at this moment to adopt the sources thesis according to the nature of authority is that a directive - to be capable of fulfilling its role as an authority - has to be identified - its existence and content - through a way that does not direct us to the underlying reasons it is supposed to adjudicate about⁴. This way of identifying the directives is by social facts alone, not moral arguments. Again, it would be odd to say that the issue the authority is called on to adjudicate makes us consider those same underlying reasons. That would make an authority useless. An authority and a directive Exclusionary Reason purport to decide for us what right reason requires, but to say that it creates a better compliance through a directive that asks its subject to consider those same underlying reasons makes no sense. Directives are there to be able to guide conduct. This is possible through directives whose content and existence can be established without recourse to moral argument, and the sources thesis provides this.

3. Putting the Sources Thesis in Its Place

If we remember the passage from "The One True Interpretation" quoted at the beginning of this paper, we are confronted with the following question: *Is it possible for legal directives to have the exclusionary force they claim – according to Raz's theory of authority – considering that evaluative judgments are necessary in order to identify the content of the law?* Unfortunately the answer is not a straightforward "yes".

In this section I will try to explain why this question has to be readdressed by Endicott. Two important features have to be stated to fully understand what we are talking about regarding authorities, directives and their exclusionary force:

a) a directive has to be or presented as someone's view of how a subject ought to behave, and

⁴ J. Raz, *EPD* (n. 2 *supra*), p. 219.

b) it must be possible to identify the directive as being issued by the alleged authority without relying on dependent reasons or considerations on which the directive purports to adjudicate.⁵

So, we can approach Endicott's argument from these two perspectives. If these two conditions are satisfied, then we can say that the modified version of the sources thesis is compatible with the authority of law.

In this section I will mostly deal with the first condition. First, I would like to suggest another possibility, that determining what the law says in the way stated by Endicott does not need to take us to the terrain of evaluative considerations. Let us remember the "evaluative" arguments used in order to determine the content of the law in the refugee case: here Endicott says that in order to determine the content of the law we have to appeal to a correct understanding of the origins of the Convention and why it was drafted, and if we reason by analogy we can understand that the cases brought to the courts were analogous to victims of state terrorism, and that "imposes the same obligation on states that have signed the Convention".

Do we really need evaluative considerations in order to determine this? I do not think that this is necessarily so. We can simply say that the view of the framers of the Convention in fact is *x*. The conclusion Endicott comes to is that according to the purpose of the Convention, victims of non-state persecution should be protected, that if we take into account why the Convention was drafted, it follows that these sorts of cases are covered by the directive. Indeed, what the "one true interpretation" states is that the framers of the Convention have a determined view of what should count as a refugee, but I can simply come to this conclusion taking into account just factual considerations, such as reading other parts of the Convention that lead us in this direction, or taking into account what was discussed in the process of drafting the Convention. These are still questions of social facts. I can come to the conclusion that *x* is the view held by the framers on this moral issue.

This is important, due to the fact that we may think that we need evaluative considerations in order to determine this, but a plain analysis of social facts can lead us to the same result. We could attribute an intention to the authority and comply with the first condition mentioned above regarding the authority thesis. Let us think of another example: A person I consider an authority tells me that we have good reasons to think *x* on this moral issue at hand. I can simply say just with plain social facts that *x* is the authority's point of view regarding that moral issue, for example by citing several of his works where he expresses that point of view. I do not have to make any evaluative considerations in this task. I do not have to consider the very same reasons that led the authority to determine *x*. So

⁵ J. Raz, *EPD* (n. 2 *supra*), p. 218.

maybe the use of evaluative considerations in determining law's content in the way Endicott intends, can still be done with plain social facts.

But this is not Endicott's way of placing the role of evaluative consideration. He explicitly states that in the two cases – refugee and copyright case – we are engaging in evaluative reasoning, we have to make an evaluative argument regarding the *value* of the Geneva Convention and how much of a work *should* be permissible to copy in order to qualify as “substantial part” of a work of art. So we are practically left with the same question, but it must be restated as follows: If we make use of evaluative considerations to determine the content of the law, can authorities still have a mediating role to play, i.e., can we still say that this directive – one that we determine using evaluative considerations – is presented as someone's view on how a subject ought to behave? Suppose for the sake of argument that we can still say that in these cases a directive is presented as a view on how someone ought to behave, we are still left with the second condition mentioned above, i.e., *It must be possible to identify the directive as being issued by the alleged authority without relying on dependent reasons or considerations on which the directive purports to adjudicate.*

4. Practical Difference or Sources Thesis?

If the possibility that a legal directive could have an exclusionary force is met, then Endicott's arguments comply with another important thesis in securing compliance with the authoritative nature of the law, i.e., the practical difference thesis noted above in passing when we mentioned Raz's view on this point. What the practical difference thesis states is that a directive issued by an authority changes the subject's reasons. He takes his cue on what has to be done from the directive, not by considering the same reasons the directive purports to adjudicate about.

What happens if evaluative judgments are necessary in order to identify that directive? The directive loses its authoritative appeal. Unfortunately this is exactly what happens in the two cases mentioned by Endicott. The judge can only determine what the law says by considering dependent reasons.

In the refugee example, we had to consider the value of the Convention, i.e., we had to consider again what would be good in terms of protection of refugees. The directive alone was of little use to determine that persecution of non-state victims is protected by the directive. In this regard, the directive did not change my reasons for action. It was not at all clear what I had to do considering the directive alone. In the case of judges, they have to rely on dependent reasons to determine the content of the directive. The Convention has as one of its purposes to settle moral issues concerning the treatment that refugees should receive. The question on how they are to be treated is supposedly settled by the Convention. The judge who determines the content of the Convention has to raise that very

same question to answer whether people persecuted by non-state agents should be protected. The answer given by Endicott uses this very same line of reasoning to determine the content of the law, therefore the directive does not make a practical difference for the judge, i.e., he finally takes his cue on what has to be done not because of the reasons of the Convention, but on a balance of what has to be done in terms of morality.

Endicott's argument relies on the "one true interpretation" of the Convention, but this interpretation still considers dependent reasons to determine the content of the law. I do not think that *via* an interpretation that makes us consider evaluative considerations we can make a practical difference. It is hard to imagine a Convention – or many legal systems – that allow for just one way or standard for the interpretation of directives. We can easily find several more, such as appeal to the words of the directive, the lawmakers intentions when they drafted that directive, or a systematic way of interpreting the law, where several laws that bear on the issue come into play to establish what the law says or does not say. Further argument has to be mustered in order to prove that an interpretation based on moral considerations can make a practical difference.

Let's think of a possibly reply considering Endicott's arguments: He can say that I am missing the whole point of the "one true interpretation" claim, and that what this claim is saying is that even if you have to consider evaluative judgments, these evaluative or moral considerations *do not necessarily* lead to a judge having discretion. Some cases will yield a clear result regarding those judgments, e.g., some cases will be clearly and undeniably "fair", "reasonable", i.e., we will have cases in which there is a clear case of the "right application of moral considerations".⁶ But even if this is so, the law – an authoritative directive – is still not making a practical difference in the way a rule supposedly does. My action is not affected by the rule. It's the right application of the moral considerations that guides my conduct, not the rule itself. For example: A father tells one of his sons that the pizza they just ordered has to be fairly shared with his brothers. That instruction given by the parent does not make a practical difference as a rule. The motivation the son has to fairly divide the pizza is given by morality, not the directive. When time comes for the son to divide the pizza it is morality that makes a difference. My main point here is that the son already has, *prima facie*, a moral duty to act with fairness. The directive given by the parent is leaving things practically the same and is adding nothing in terms of a practical difference.

If we concentrate on the practical difference thesis and contemplate not just what happens with judges, but with citizens, the scenario is worse. Citizens do

⁶ See T. Endicott, "Raz on Gaps-the Surprising Part", in L. Meyer et. al. (ed.), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*, Oxford, Oxford University Press, 2003, p. 114.

not have the resources to come to “one true interpretation” of the Convention. They are not trained in the standards for interpretation that a judge must use in order to settle a dispute. In this example, again the directive does not make a practical difference in the reasons the citizens have. They will have a directive that makes a practical difference only after a decision reached by the courts. In this scenario a citizen does not know the content of the directive without considerations of dependent reasons. He has to appeal to these reasons – what is fair in the treatment of refugees – in order to determine that persecution by non-state agents should be protected.

What I am finally suggesting is that Endicott’s arguments might need a modified version of the practical difference thesis, not the sources thesis. We need to have good reasons to think that a directive that asks its subjects to consider the dependent reasons can still make a practical difference in their reasoning, and this is important due to the fact that the practical difference thesis is entailed by the authoritative nature of law and its capacity to offer guidance.

What these arguments have tried to establish is that Endicott’s argument regarding the role evaluative considerations play in determining the law’s content may need some adjustments for them to be compatible – as he intends – with the authoritative nature of the law. More arguments have to be presented in order to prove the passage quoted at the beginning of this paper where Endicott asserts the possibility of exclusionary force, due to the fact that we have to take into consideration another thesis, the practical difference law’s directives purport to accomplish. Therefore, this paper does not establish that the modified version of the sources thesis is not correct or that evaluative considerations in determining law’s content do not have a place within accounts of the nature of law.