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ON WHAT VALUE, MY LORD? HOW VALUES INTERVENE IN HARD LEGAL CASES

Mladen Domazet

Institute for Social Research – Zagreb, Croatia
domazet@idi.hr

Abstract:
The paper confronts the issue of single jurisprudence facing a value (-system) pluralism, the one often arising nowadays. Starting from the Raz – B. Williams debate, it outlines a proposal close to Raz's but ontologically less demanding.

Key words: value, pluralism, jurisprudence, relativism.

Judges are bound by the values that are (exist) out there.

One pertinent fact about our world is that it contains people of different and conflicting religious, moral and philosophical beliefs. J. Rawls claims (1993) that the facts of pluralism consist not merely in there being different and competing comprehensive conceptions of the good (moral beliefs regarding what is of value), but different yet *reasonable* comprehensive conceptions of the good. So we can't discard all but one of those opposing views as mad, bad or dangerous to know. Some may be such, but there will be many comprehensive conceptions which are perfectly reasonable, but which conflict with other, equally reasonable, conceptions. For Rawls this is a predictable outcome of the operations of reason under conditions of freedom.

Yet, in contemporary Western societies (but increasingly elsewhere in the world, too), all those people are expected to operate, under a single legal system of a state, or even international law. Legal positivism of the straightforward Austinian variety (Austin, 1832) offers a first step towards dealing with this predicament, by insisting on sharp separation of law and morals. Whatever the moral or other beliefs of any individual may be is irrelevant to legal practice that is governed by positive law (rather than supposed natural law[1]). Thus, though the judge's values may not coincide with the values of the accused, both will rely only on the value-free system of rules governing procedures and sanctions related to the action considered to have been a transgression of those rules.

Ideally the said system of rules will be deductively complete, comprehensive and internally coherent. Execution of legal judgements should then be, given clear-enough evidence, almost an automatic process. Thus, Kelsen and other positivist idealists (Austin in England) hope for an entirely deductively closed system of laws that all derive from the foundational axiomatic norm. But, in practice, Hart warns, the ideal of completeness is unfulfilled and judges sometimes have to make decisions that are not automatic and deductively proscribed. Rational justifications for such judgments will often draw on some moral principles, and this may be seen to be working against the recognised pluralism in society. It may on some occasion be rationally justified to use the discretion to draw conflicting conclusions by drawing on conflicting value systems.

On another hand, there is no absolute vouchsafe that the existing system of rules itself is internally coherent (incoherence is discovered when two rules contradict each other in a single case), and when issues of incoherence arise straightforward positivism (i.e. pre-dating Hart and Dworkin) does not offer guidelines how to resolve them (i.e. what independent standard is to be used in choosing preference). If we were to try to order conflicting rules according to importance (e.g. rules governing driving and rules governing individual liberties) we would need a common scale of importance against which to judge all the individual rules. This is where morality seems to make a comeback into the legal system, and Dworkin calls for reliance on extra-legal principles that help interpret the "internal" rules. He also sees this as a serious weakness of legal positiv-

[1] Moreover, the natural law (Kelsen, 1967) lacks the element of force, i.e. has to be adopted by humans into some positive law in order to be implementable, and thus instrumentally meaningful.

ism.[2] Moreover, Dworkin (1977) argues that there are extra-legal principles, which will be called values below, that must be binding for the judges when applying (supposed) discretion in hard cases. And what values are they to draw upon in cases requiring explicit respect for pluralistic character of the society today?

So the problem of different value systems coexisting under the roof a single legal system cannot be avoided by escape to legal positivism. If the conflicting value systems, as ascribed to the contemporary societies above, were to be equated with simple social relativism (the values are dictated by community proclamation) then any moral system judges may draw on in discretionary decisions will be an act of oppression of one social group against another. It is therefore desirable to respect pluralism whilst striving to secure a distance from social relativism.[3] This is the aim of Raz's (2003) lecture. Raz's proposed solution rests on a *"metaphysical thesis"* that values exist independently (modulo emergence conditions) from social groups espousing them. Thus the objective existence of values is a precondition for ordering them in a hierarchy of importance.[4] Such a hierarchy would then allow drawing upon those values in legal cases without committing a political oppression of one social group over another, as to adjudicate in such matters would be rationally justified and not arbitrarily or politically imposed. Raz claims that his social dependence theory (SDT) can account both for objectivity (allowing absolute ordering within a genre when called for) and fluidity (allowing for present state of pluralism) of values.

Existence of values is superfluous

Williams (2003) criticizes Raz mainly for unnecessarily introducing a much stronger metaphysical thesis than is needed. Williams picks forcefully at Raz's arguments for the existence of values, but admits that the thesis itself is useful for bringing to the fore the historical nature of our value systems. He, in fact, thinks that Raz can achieve the stated aim "without asking questions about the conditions under which various values exist" (Williams, 2003: 114).

Williams says that he does not understand what it means for values to exist, and that Raz's thesis does not answer this as it gives the conditions for existence but presupposes that everyone knows what such existence means. His conditions specify what it means for a value to come into existence (an *emergence* condition), namely that there should be a social practice sustaining it (and he acknowledges Raz is very detailed and explicit on how this is to be achieved), but not what it is for a value to continue existing even without the social practice sustaining it (a *continuation* condition). Without some such continuation condition, Raz's thesis merely starts off at the same place as relativism does, namely that values arise or are in the fist instance embodied by the social practices sustaining them in the right way, but then unjustifiably projects the metaphysical claim that they continue existing even when no longer practically supported by the relevant social practices. Moreover, Raz suggests that once the values come into existence through a sustaining social practice, that existence is projected across cultures and even backwards in time, to a time before the sustaining social practice arose.

Williams' criticism of Raz's thesis with respect to political values is of special interest here (political values being more closely bound with law than aesthetic ones): can we say that certain values exist even in the societies that do not know of the social practices sustaining them? If we replace "societies" with 'cultural groups within a society under a jurisdiction of a given legal system" it becomes obvious why the question is important for the issues of judicial discretion. Can such discretion be applied based on a system of values of a dominant cultural group (being the one the judge belongs to) alone? This is obviously a claim that Raz cannot support given that

[2] An important disclaimer may be called for here. From the above discussion it may seem that most, or even substantial proportion of legal cases are difficult to decide (given all the facts). This is not the case, and most cases are dull and obvious (meriting the automatic treatment the positivists may have hoped for, above). But when it comes to of principles behind the legal system, as well as the thin line between the legal system and the wider social machinations, the hard cases raise the most interesting issues for understanding of the law (Goldman, 1999: 278).

[3] Relativism, though, as all authors in the debate admit, is a murky ground with many sufficiently distinct versions present (it was once said that there are as many relativisms as there are relativists). Perhaps it is important to bear in mind, pre-empting Williams' criticism below that it is only the negative characteristics of relativism (once we have singled those out clearly) that have to be avoided, whereas the concept as a whole is more of a scarecrow than a real danger.

[4] Admittedly, Raz is not aiming to propose some absolutist picture, that merely pays lip-service to pluralism, whilst presenting a strict hierarchy of all value. He uses a genre-based picture to allow for incommensurability of some values in some situations. But, with respect to the genre (and this could be a courtroom of a pluralistic society), some comparisons can be made even of values that appear to come from the conflicting comprehensive conceptions of the good.

he wants to distance himself from relativism. Williams forces Raz's position into a knot: on one hand the values that are "brought into being" by one cultural group "bear on everything" outside that cultural group and contemporaneous with it, as well as what comes before and after it. Thus, those values "behave" as if they always existed and always will. But then it becomes an evaluative judgement against the cultural groups that don't endorse those values that they somehow fail to recognise their worth. Williams finds it easiest to illustrate this with a historical point: if we assume that most of the contemporary liberal political values came into being in the eighteenth century, but then spread across time, we must say it was a failing on behalf of ancient or medieval societies not to have endorsed values that existed, i.e. were available to them.

> … what was wrong with the pre-modern world, that it did not recognize these values? Why did the existence of these values, which had always been there, only burst on the world in the eighteenth century? (Williams, 2003: 113)

Williams thinks the problem can be solved by dropping talk of the existence of values, and plainly admitting the relativist nature of all values as simply a product of cultural practice that may or may not spread across cultures (both spatially and temporally), but can only do so if adopted as practice by other cultural groups. And this appears to be in spirit of Hart's warning that "if we have learned anything from the history of morals it is that the thing to do with moral quandary is not to hide it" (Hart, 1977: 33). The problem of specific interest here, though, is how to rationally justify judges applying discretionary powers based on the values of their cultural group over members of a pluralistic society that may be from another social group. If they were to admit that they are simply using their power to uphold values of their own cultural group, this would certainly peel away strongly from the ideals of legal positivism and rule of law ("…to the end it may be a government of laws and not of men" (Massachusetts Constitution, Part The First, art. XXX (1780))).

It is often the case in philosophy that matters can be obscured, problems only seemingly resolved by unjustifiably stepping into the realm of metaphysics, by simply postulating a metaphysical solution. There is no room here, nor ambition, to solve the issues of moral realism, though Raz and Williams admit that they differ from the outset, in their views on the topic. We can merely repeat the motivation stated above, that a realist solution would in most cases make the judiciary discretion an easier task, by allowing judges to draw on something existing, though possibly intangible. Certainly, if existing it is open to everyone to appropriate and their failure to do so may be taken as a moral (and pace positivism in hard enough cases this may coincide with legal) act on their behalf. But, Williams' criticism of Raz explication of how values come into existence and are connected to the social and historical circumstances cannot be dismissed or ignored by a sturdy belief that values exist.

Williams' relativist strategy and its problems

A mere recognition, says Williams, of the pluralism in a given society today (such as expressed in Rawls' claims we started with) is sufficient to raise awareness of the pluralistic nature of values that judges may wish to draw upon. The ordering of the conflicting values that agrees with the fundamental postulates of the society within which the recognising takes place should follow such explicit recognition. But it would not, in and of itself, simply justify raising the principles upholding pluralism above all others, for that would be turning a simple thesis about values into another political or ethical ideal (a thing to be evaluated using the thesis about values). Thus, Williams calls for explicit admittance of when reliance on some social conditions is exercised, rather than trying to fudge matters with metaphysical posturing. Let's be relativist and unashamed.

But the problem is that without the metaphysical thesis, Raz's model can be reduced to the admittance of the power struggle as the fundamental norm upon which the legal system rests. Namely, when Pippin (2003), in criticizing Raz, claims "that reason is incapable of ever resolving the dispute in favour of one side or the other (that the matter is therefore essentially a political contestation, a struggle for power)" (Pippin, 2003: 101), Raz agrees and says that political philosophy cannot solve the deep social divisions and problems. What he does not call upon, and in our context this seems of paramount importance (given that he can, which remains open, overcome Williams' arguments against the existence of value), is the importance of the supposed existence of value in assisting the judges in making discretionary decision, in drawing upon the extra-legal principles. Most notably, it seems that without further complications to the metaphysical thesis, the possibility of which is not excluded but is better avoided here, openly conflicting values cannot exist for they are negations of each other (for the sake of simplification we should ignore Raz's genre-based value conflicts). Thus, an act either bears moral value or it does not, that is what makes the judges' job much easier.

Sadly, though for the present purposes instructively, Raz all but abandons the metaphysical thesis

for the instances of values most under duress here. In his replies to criticism (Raz, 2003a) he says that the problems that Williams brings up (among which is that of 'liberal political values') were not explicitly treated in his original lectures and deal with borderline values that may require additional specification and do not straightforwardly fit the metaphysical thesis. When forced to face the music on the issue of political values, most notably how they can "bear on everything without restriction", Raz denies that they do so. He says those values are highly genre- (or kind-) specific and are only applicable in certain political contexts. He therefore agrees with Williams that it is senseless to debate liberal issues with King Arthur or medieval Roman popes (Raz, 2003a: 152). Political values have to be recognised as such, and we should be wary of a repeating human mistake to convert some of the political values into more universal moral values. Liberal political values are political, however universal their advocates may think them to be. Thus, liberal values are simply not of the kind we often take them to be (and of the kind Williams understands them to be in his criticism).[5]

In perhaps the most pressing issue for pluralism in contemporary society, that of political values, Raz and Williams effectively agree (whether they happen to use the same terminology or not): unashamed relativism is the best that philosophy can provide. Yet that presents a problem that shouldn't be dismissed too lightly, and that brings us back to the strong motivation for the (now discarded) metaphysical thesis. For if social relativism is the model (the view that Raz aims to reject in 2003), and the power struggle is the norm, then the whole point of legal conduct might be called into question. Given suitable premises (most notably those pertaining to social and historical context), other forms of power struggle may also be rationally justified (especially if an early positivistic stance of authoritative though openly immoral positive laws is accepted), though directly conflicting with respect for the legal system.

In an admittedly oversimplified, but hopefully illustrative example, why respect any ruling by the judge, be it based on legal proscription or moral justification, if it is merely a product of a successful power struggle of one social group against others?[6] On the other hand it does not straightforwardly legitimise terrorism or similar forms of power struggle, for those may present a transgression against even more universal values than were ever under discussion in a specific judicial ruling. We should be wary of using borderline cases to legitimise a jump to general conclusions. Again, there is no room here to investigate this matter further, and the main reason for bringing it up is to refresh the motivation for a metaphysical thesis.

Where does the above leave the judge? In explicit failure of simple legal positivism the judge was forced to draw on some system of values, external to the law, in passing discretionary ruling on a "borderline" case. This would be most easily achieved by drawing on a system of existing values (in some realm), fixing the failure of legal positivism by effective transferral to ethical positivism (the values are what is out there and are in no need of additional interpretation). The model most likely to respect the pluralism of contemporary society that the judge is to make her ruling in was Raz's metaphysical thesis above (or some such along the lines of social emergence of values, but application unrestricted by social context). Otherwise, the metaphysics of values collapses into relativism—which may have a metaphysical dimension, though would have to solve the problem of the concurrent existence of mutual negations) which would have problems similar to the ones stated above, or some form of naturalism (the values that exist are the ones that are natural, or decreed by a supreme being, and have always existed) which would have a hard time showing desired respect for pluralism. Yet, in the case of political values, the most likely ones to be a part of out "borderline" case,[7] Raz and Williams agree: the explicit metaphysical thesis fails. Given that it does, and given that it was the most likely one to meet the motivation and the demand for pluralism, what options are left to the judge?

Epistemology vs. metaphysics

[5] This is in line with Raz more general claim in the replies (Raz, 2003a), that everything must be first assigned a kind and then evaluated as an instance of its kind (a take on genre-specificity). It is senseless to judge how good architecture a film is. Though such a view is leaning dangerously close to Korsgaard's Aristotelianism (Korsgaard, 2003) that Williams criticizes (Williams, 2003: 115).

[6] The imperative to respect the judge's ruling may come through the use of force, which is another important ingredient of the positivist view of a legal system, but it is also yet another instance of a power struggle.

[7] Important rulings may be called for in hard cases not explicitly connected to liberal political values, such as might be those of aesthetics (what is a work of art and what is not), but when they become a matter of adjudication between interest groups within a society (and not one of straightforward expertise) they can then be subsumed under general political values case.

When choosing values against which the transgressor has "sinned," in cases where there is no positive rule straightforwardly applicable to the case at hand and universally understandable to be such, the issue before the judge is effectively one of finding values to replace it. And the transgression against values, as well as against positive laws, is one of conscious and willing disregard for behavioural prohibitions they state. With laws it is assumed that they are all known to the transgressors and at best a small mitigation in a sentence passed[8] can be provided by the fact that the transgressor simply had no inkling that his actions violate a positive law. Likewise with values, the judge in using discretion in problematic cases has to stipulate that the transgressor wilfully chose to act "badly," to go against his knowledge of what is of value. And this would most easily be achieved in that antithesis of positivism – naturalism; where the judge could claim that the value was either ingrained in the transgressor as a human being and that he or she chose to ignore its counsel, or that it was somehow naturally (even super-naturally) mandated and thus available and applicable to everyone. But, pluralism and pluralistic societies have long ago given up on such naïve naturalistic proscriptions both of law and value.

The next best step, then is to claim that though the value was not ingrained in the individual transgressor, it existed, i.e. was out there for him or her to become cognizant of it and to subsequently show respect for it. But even this is philosophically going a step too far, for as explained above the effective transgression is in knowing and ignoring. And to argue how one must come to know, might in this situation be seen as too much philosophical baggage. Not that such baggage would not solve a host of problems. But values, unlike laws, are in pluralistic societies not written in ink or stone, and thus placed before everyone. Even those that claim to respect them would be hard pressed to name them all, not to mention to show how they fit into a reasonably coherent whole. Having them existing in whatever realm seems to alleviate this burden.

Yet, we have seen it is hard to philosophically justify this assumption, and even if we could do it, our judge in passing a sentence would still have to show that not only did the value(s) he draws upon exist, but that it was cognizable to the transgressor as well. So the crux is that the transgressor could have known about a given value and its place in the society. And in a pluralistic society we might have to face a situation where the transgressor could have lived in a cultural group that did not value what the judge values, or may have even valued the opposite. In a parallel scenario with laws (cf. Hart, 1977: 32–33) the judges are advised to step out of the legal jurisdiction (competitive legal systems, one of the transgressor and the other of the judge) and explicate the moral quandary they find themselves in, explicitly drawing on a system of values external to both legal systems but somehow presumed universal. They are advised to choose the lesser of two evils, "…. with the consciousness that they are what they are" (Hart, 1977: 33).[9]

But is there a further stepping out to be done in the moral case, what quandary can we explicate in this case? The further step, the quandary made explicit, in such case is seems to be epistemological. Any member of the society, no matter what cultural group he or she belongs to, must be conscious of value pluralism inherent in contemporary society[10] and the limitations that places on his or her own value system. The judge should then draw on a system of values, genre-specific as they may be, that is upheld by the democratic and academic leadership of the society (the sort of "moral professionals") as a representation of the hierarchy of values as ordered in the self-consciously pluralist societies. These are the values, to a slightly lesser degree such is their hierarchy as well, that the transgressor either knew or could have known about, and as such a binding for him and the judge.

What is the difference here from Raz's original metaphysical thesis (Raz, 2003) and Williams' argument for unashamed relativism (Williams, 2003) above? Obviously there is no explicit talk of the values existing, and what the democratic and academic leadership upholds may be rather vague, in a sense of not being written in stone (and sometimes not even in ink) and explicated to the level of fine detail. On the other hand it does take us a step back (though, admittedly not a leap) from the explicit admittance that the value system applied is merely a temporary resolution of a power struggle in a society. The transgressor is sentenced not because the judge has the power to do so, based on the power

[8] Of course, this only applies to standard grown-up individuals of average (or above) health, and not to minors, people raised away from the society ("Robinsons" and feral children) or people with impaired cognitive powers.

[9] With foresight to the issues of contemporary pluralism Hart says that failing to openly admit this moral quandary "… will encourage the romantic optimism that all values we cherish ultimately fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another" (ibid.).

[10] Though it is a further task, and pressing one, for such societies to make their members conscious of inherent value pluralism and to uphold it openly in public actions.

that allows her chosen value system to reign supreme, but because the transgressor chose to act against a value (thus to act "badly") known to be held in high esteem in the given society.

How this is to be achieved in practice is what Raz's genre-enhanced thesis does well, minus the talk of existence of values. Once a value "emerges"[11] through a sustaining social practice it bears on everyone that could have possibly known about it (rather than "on everything without restriction"). Like everyone who is told about them can discuss the beauty of unicorns, though they needn't exist. And Raz, again, is explicit about how non-trivial claim this is, for values involve complex notions that can be combined and recombined in practice and on paper. Just as Williams advises, large sections of Raz's detailed explication can be adopted for practical positioning of values in a society, largely excluding the talk of existence or taking it to as an instance of misleading grammar. But only omniscience calls for metaphysics (Kusch, 2004: 575) and that is never what we are dealing with in these situations.

As Williams points out, though, sadly, declines to explicate fully (Williams, 2003: 118), the remaining details of Raz's thesis are more than helpful in drawing out the rationality of judicial discretion such that respects the pluralism in society. Thus many of the values drawn upon are genre-specific and only apply to the instances of the respective genre, which must be evident in the given case. Moreover, new values arise as a generalisation of more specific ones and may subsequently take order of precedence above a whole range of (culture-) specific ones. Contradictions between culture-specific values in pluralist societies needn't arise if the practice of judging something as good is performed in the following stages:

> First, we identify a kind to which [the thing or the act] belongs, a kind that by its nature or construction is governed by a particular value (that is, by standards of excellence for being of that kind); and, second, we judge the item under consideration good (or bad) to the extent that it is good (or bad) of its kind. This allows us to recognize the existence of values with apparently contradictory criteria (Raz, 2003a: 138).

Yet this does not call into question the whole point of legal conduct, as is suggested might be the case with straightforward social relativism above, as judges' reasoning needn't be seen as incapable of ever resolving the dispute between conflicting value systems, thus admitting openly that the matter is essentially a political contestation, a struggle for power. All that remains now is to clearly delineate, for the purposes of fair sentencing, what the judge should know about the transgressor's value system, as well as what every potential transgressor should know about the judge's.

[11] Raz himself admits that the grammar of his thesis can be misleading, and that in some instances he talks of the existence of value even when there is no clear metaphysical theory for all that is subsumed under the term value. Williams then picks at the specific problematic instances of it and shows where such grammar may be exceptionally misleading, but Raz still believes that does not detract from the whole enterprise. Likewise, for brevity here it is convenient to talk of the emergence of value as if something existing in its own realm, despite the overall argument being pitched against such thesis.

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