Puzzles from Joseph Raz's obituary of H.L.A. Hart

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Abstract. Joseph Raz's obituary of H.L.A. Hart for *Utilitas* raises certain puzzles, especially for readers coming from the research area analytic political philosophy. I present three puzzles.

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Joseph Raz is renowned as a legal and also a political philosopher, in the sense of a philosopher of what the government should do. Legend has it that he was discovered by H.L.A. Hart and brought back to Oxford. These days there are surely philosophers who approach the senior figure of Hart through Raz, especially ones who focus more on political philosophy. They begin by reading Raz and then they find that Raz refers to Hart and then they start reading Hart, almost as if investigating a gravitational influence.

Raz himself does not seem much of a textbook writer or maker of introductions, despite what he once declared in the second sentence of his most famous book (1986: 1), the second sentence leaving aside the preface. However, his obituary to H.L.A. Hart for the journal *Utilitas*, which includes summaries of Hart's contributions, does indicate some potential in this direction – the idea of a Razian textbook forms in my mind, and the image of one, if that be distinct. But the obituary leaves puzzles.

1. Definitions. Raz presents the young Hart as encountering, within legal philosophy, a tradition of definition. The word "law" was taken to refer to an instance

of something more general: referring to a subtype within a type, a species of a genus metaphorically speaking. Likewise "right." Raz captures one of Hart's objections to this project of subtype-type definition as follows:

> One may perhaps define 'rights' in terms of entitlements and 'law' in terms of rules but 'rules' and 'entitlements' are just as puzzling, and puzzling in the same way as 'law' and 'rights'. (1993: 145)

So Hart's argument, or the argument of Raz's Hart, is that definition should reduce puzzlement and a definition of a law as a type of rule, or a legal system as a subtype within the more general type rule system, does not reduce puzzlement.

Raz portrays Hart as interested in law as a social institution more than defining the word "law." But that does not mean that Hart was disinterested in how words such as "law" and "right" and associated concepts are used. He was interested in such language as essential to understanding the social institution and was inspired by more recent philosophy of language than the definitional tradition he confronted, specifically the linguistic turn of the 1940s and 50s. Here is Raz identifying one change in outlook due to the linguistic turn:

> This linguistic turn has two crucial consequences. First, the most general terms and expressions used in legal discourse ('rights', 'duties', 'rules', 'property', 'agreement' etc.) are not specifically legal. They are the common currency of much normative discourse generally. Therefore, the explanation of the normativity of law is not just a matter of explaining what, if any, moral force it has. It is an explanation of normativity generally and on that basis an exploration of the specific characteristics of morality, law, etiquette, and other special normative spheres. (1993: 147)

But does this not leave us back where we started? Here is the puzzle.

(1) The old legal philosophers tried to define legal terms as referring to subtypes of more general types.

(2) Hart objects to this species-genus approach, because it is not reducing puzzlement. The general type is puzzling in the same way as the supposed subtype.

(3) Hart's use of more recent philosophy of language leads him to treat law as a subtype of the general type normative system, other subtypes being morality and etiquette.

By the way, I cannot resist making the following observations. Is this not one of Raz's signature moves: to reject approach A and declare himself to be pursuing approach B, but leave the reader straining to distinguish between A and B, which are subtly distinct? There is a question of whether, in this obituary, Hart has been recast as an instance of the type Raz, but in this case I am not sure how best to solve the puzzle of distinguishing between (1) and (3).

2. Historical myths. Raz portrays Hart as rejecting earlier traditions of legal and also moral philosophy and incorporating techniques from the analytic philosophy of his day. Raz writes:

> During the first half of the twentieth century, English moral philosophy was rather uninspiring. The emphasis was on moral epistemology and the analysis of moral language. The results were not very impressive and by the late fifties a sense of impasse was growing. Hart's essays combining conceptual analysis with a detailed lucid argument about concrete moral issues which have clear implications for legal and social policies were an inspiring model of an alternative style… (1993:

153)

This will remind some readers of the hero myth around John Rawls, of how conceptual analysis dominated before Rawls brought back large-scale system-building political philosophy. (I do not use "myth" in a derogatory sense here, by the way.) The puzzle this leaves for us arises from the following combination:

(1) The English moral and legal philosophy of the first half of the twentieth century was uninspiring.

(2) Hart brought new life into these areas of research partly by introducing techniques from the analytic philosophy of his day.

(3) The representation of Hart as breaking with earlier uninspiring traditions of legal and moral philosophy is similar to representations of John Rawls's contribution.

(4) Rawls broke from the linguistic turn, the uninspiring analytic philosophy of Hart's day.

Rawls does not carefully examine how words such as "justice" and "fairness" are used in ordinary and specialist discourses, rather he develops a model of what would be a fair situation for agreeing on a constitution (1999: 9-10). How can it be that Hart provided a more inspiring way of contributing by taking from what, in the Rawls myth, is the uninspiring stuff, or a significant part of the uninspiring stuff?

3. No Locke? Towards the end of the obituary Raz says that Hart reconnected legal philosophy with general philosophy. Raz writes of

…the need to struggle with the richer and subtler works of Aristotle, Aquinas, Hobbes, Hume, Kant or Hegel. But jurisprudence languishes when it is studied independently of general philosophy. Hart rescued jurisprudence in English by re-establishing its lifeline to general

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philosophy. Arguably apart from his work (together with Honoré) on causation he has not contributed greatly to general philosophy. But his writings in philosophy of law join those of Hobbes and Bentham as the major contributions in English to that subject. (1993: 156)

Where is Locke in these prominent name lists? Students for generations are presented with Locke as the source of the claim that we tacitly consent to state authority and that we have a right to the unowned things which we mix with our labour, provided we leave enough for others (1690: chapter 5, 33). Locke famously defended religious toleration (1689) and is referred to as an inspiration for the American constitution. The omission is bizarre. Is it based on some strange intuition that wherever Hart's writings are destined, the omission does not matter?

References

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