

Chapter 1

INTRODUCTION

The topic of the sources of law is a traditional one in jurisprudence. Yet, remarkably, very little attention has been paid to the topic in recent analytical jurisprudence. Much contemporary analytical legal theory does not consider the notion of a “source of law” at all. There is no entry for the term in the indices of such central contemporary texts as Alexy 1989; Beyleveld and Brownsword 1986; Dworkin 1978 and 1986; Finnis 1980; MacCormick 1978. Other theorists mention the term and pass on. Raz, for example (see Raz 1979), characterizes his theoretical position as “the sources thesis,” that every law has a social source. But he gives relatively little articulation of the concept of a source. Rather, he lays out the implications of such a thesis, leaving the term “source” intuitive and primary. Raz is defending a version of legal positivism. Others too mention the term simply as part of a defence of (Hart 1994; Waluchow 1994) or a critique of (Peczenik 1983; Soper 1984) legal positivism. There is no philosophical examination of the notion of a source of law outside of its use as a piece in the wider game of general theory of law. There is too much theory and too little description, to elucidate what it is to be a source of law.

Among legal doctrinal writers in the common law tradition, the position is reversed. The typical jurisprudence text also leaves the term “source” undefined and primitive; it focuses on classifying and describing “the sources of law” with little acknowledgment that important theoretical questions are begged. The issues are complicated. Gall 1990 reproduces four different taxonomies from four different general textbooks of English law, differences that it would be impossible to reconcile into one master taxonomy. Jolowicz 1963 and Allen 1964 give the fullest treatment, and their classifications are virtually identical. The sources of English law are said to be Custom, Precedent, Equity, Legislation, and Subordinate Legislation. But already that would not apply to Canadian law, whose sources include the Charter of Rights and Freedoms, and embody both provincial and federal jurisdiction. Nor would it apply to European Community Law (see Hartley 1994), or to the United States (see Atiyah and Summers 1987). Under the civil law, doctrinal treatises—legal dogmatics—have some role as a source as well as the code.

One response to this complexity (see Paton and Derham 1972) is to seek to classify the sources of law in a quite different way. Paton and Derham suggest abandoning the single question, What is the source of law?, and they ask instead three questions: What is the secret of the validity of law? Whence comes the material from which law is fashioned? What are the historical or causal influences, which explain why the law is now as it is seen to be? These

are indeed separate enquiries. The first, as I have noted, is part of the traditional general dispute about the nature of law. The last is a question for the social psychologists, for political and social historians (see the account given by Hubert Rottleuthner in vol. 2 of this Treatise). Paton's and Derham's own answer to the middle question consists of an analysis of the public and private interests, which the law furthers and protects: They treat the question as one about the content of law. But the issue is not obviously one about content.

We need therefore to re-focus analytical concern with the sources of law. We need to look again at why it is vital for jurisprudence to be clear about the sources of law, and about the differences between different sources of law.

Let us begin with a classic statement of the idea of a source of law: "the term 'sources' is here used to connote those agencies by which rules of conduct acquire the character of law by becoming objectively definite, uniform, and, above all, compulsory" (Allen 1964, 1). Norms, or standards of behaviour, are of many kinds—maxims of manners and etiquette, statements of moral or legal duties, principles of successful horticulture, rules of sports and games, social conventions, methods of calculation, valid rules of logical inference, and so on. Legal norms are one sub-class of the class of norms. Some groups of norms are interlocking and so form systems. The rules of bridge, for example, presuppose each other; the game only makes sense if all the rules are observed. Some groups of norms exist only as the products of an institution, that is, are institutionalized—the constitution and rules of operation for a social club, for example. These two features of forming a system and being institutionalized may be combined, so that a group of norms may be said to form an *institutionalized normative system*. The term is Joseph Raz's (1975, chap. 4). The typical legal system—the Canadian legal system, for example—is a paradigm case of an institutionalized normative system. A norm counts as *a law*, rather than any other kind of norm, because it emerges from an institution—a governing legislature, example, or a court deciding a case. Laws and legal institutions also presuppose or outrank each other, and have common origins; laws form systems. Legal norms in this way differ from moral norms, even though they may have similar content. The law of contract could be abolished tomorrow by Parliament, and with it the legal obligation to keep a contract: The duty to keep promises would remain.

An enquiry, therefore, into the sources of law is an enquiry into one essential characteristic of law, into part of what makes law what it is and not another thing. Although the connection between being a law and being a norm of an institutionalized normative system is deep, and central to jurisprudence, the thought that it is in the nature of law to be a norm with an institutionalized source is analytically too simple, for two reasons. One reason is that there is an important theoretical division between what in this Treatise are called "strictly institutionalized sources of law" and "quasi-institutionalized sources of law" (see vols. 4 and 5 of this Treatise). The second reason is this. Of the

traditional common law sources, custom and equity may seem to fall outside the scope of this enquiry, as they are in the nature of the case not institutionalized. However, we can learn much about the notion of institutionalized sources of law, and *a fortiori* about the notion of a source of law itself, by considering seemingly non-institutionalized sources. It is important to ask what it is about such sources that entitles them, if they are so entitled, to be thought of as sources of law. Let me say more now about these two reasons.

This volume focuses on “*strictly* institutionalized sources of law.” How should we capture the force of the “strictly,” assuming for the time being that the notion of “institutionalized” is well enough understood? Here is the working definition of “strictly institutionalized source of law” for the purposes of this volume:

A law, or law-like rule, has a strictly institutionalized source just in case:

- i) the existence conditions of the law, or law-like rule, are a function of the activities of a legal institution
- and
- ii) the contextually sufficient justification, or the systemic or local normative force, of the law, or law-like rule, derives entirely from the satisfaction of those existence conditions.

Clause (i) is intended to capture the idea of a “source” for a rule, and clause (ii) the force of the qualification “strictly.” Two further comments are needed on this definition. The expression “law-like rule” is added to permit the possibility that certain forms of law less close to the paradigm of institutionalized sources of law might still qualify as strictly institutionalized sources of law.¹ It might be thought controversial whether the decisions of such sources are “laws” in some strict sense. Also, the term “contextually sufficient” is taken from Aleksander Peczenik (1983, 1; 1989, 156–7). Peczenik defines a contextually sufficient justification as one “within the framework of legal reasoning, in other words, within the established legal tradition, or paradigm.” “Deep” or “fundamental” justifications, by contrast, are those from outside the framework of legal reasoning, such as justifications by moral reasoning. For Peczenik, strictly institutionalized sources would be a sub-class of contextually sufficient justifications, but not the whole class (1989, 157). I am concerned, then, in this volume with that sub-class.

Other sub-classes would include the forms of justification considered in Volumes 4 and 5 of this Treatise, as “quasi-institutionalized sources of law.” Consider, example, coherentist justifications for legal claims. It might be that, within some jurisdiction, a legal claim is regarded as justified if in fact it is the one of competing claims, which coheres best with the existing body of justi-

¹ In Chapter 5, for example, I consider labour arbitration and mediation as possible strictly institutionalized sources of law. In Chapter 8, the claims of international law are examined.

fied claims within that jurisdiction. Neil MacCormick has argued for the validity of such coherence-based arguments within common law legal reasoning (MacCormick 1984, 46–7; 1978, 152–7, 233–40). Ronald Dworkin extended the idea to include coherence with principles whose postulation would make the legal system the best it could be (Dworkin 1986, 226ff.). Similarly, in most jurisdictions there are well-understood rules for the interpretation of statutes (Cross, Bell, and Engle 1995; MacCormick and Summers 1991). A distinction can be drawn between cases decided by the statutes “directly” and cases decided after the application of rules of statutory interpretation. The statute may be said to be a “strictly institutionalized source of law” in the first case, but a “quasi-institutionalized source of law” in the latter case. Both coherence and interpretation are analyzed by Aleksander Peczenik in Volume 4 of this Treatise. Similarly, there are a variety of modes of legal reasoning and argumentation. A distinction can be drawn between cases decided by the content of a legal source “directly” and cases decided after supplementation of the content of the legal source by one or more acceptable forms of legal argumentation. The source may be said to be a “strictly institutionalized source of law” in the first case, but a “quasi-institutionalized source of law” in the latter case. The analysis of forms of legal argumentation is undertaken by Giovanni Sartor in Volume 5 of this Treatise. By implication, then, my concern here is with potentially “direct” sources of law. I do not intend either now or later independently to define what is meant by “direct.” The study of strictly institutionalized sources of law is the study of ostensibly “direct” sources of law.

This notion of “directness,” even if it is now left merely intuitive, provides a handle on the second set of issues I distinguished above, the matter of the status of the traditional legal sources of custom and equity. Their claim to be sources of law at all rests on their capacity to decide legal cases “directly,” and their claim to do so as “strictly institutionalized sources” rests on the character of their mode of functioning as sources. Custom and equity, including the special form they take in the case of international law, will turn out to be borderline examples of strictly institutionalized sources of law. But the importance of borderline cases lies in the refracted light they shed on the paradigm cases.

The decision to concentrate on contextual rather than deep justification for law limits in important ways the scope of the enquiry here into the sources of law. It is, however, consistent with, and even demanded by, the analytical approach, which I will also take. The focus of the volume will be only how sources of various kinds actually function analytically *within* legal systems. We will investigate in what way legislation, or precedent, or custom, directly generate validity for legal norms, or how it is that these sources are authoritative for legal decision-making. We are not going to investigate the ultimate sources of legal validity itself, if that is taken to be an enquiry into what moral values, or what political forces, or what historical antecedents led to a particular law being a part of the system of which it is a law.

The course of this volume will be as follows. The focus initially will be on the paradigm strictly institutionalized sources—legislation (chap. 2) and precedent (chap. 3). Then I will turn to those of the traditional sources of law, which have proved to be more controversial—custom (chap. 4) and subordinate legislation or delegation (chap. 5). In Chapter 6, the role of constitutions, especially charters and bills of rights, will be considered.

In these chapters, I will reflect my own particular legal and philosophical upbringing, as it were, in that the focus will be on the common law, and on sources of law within the common law legal tradition. The issue of the sources of law presents itself in a somewhat different guise within the civil law tradition. In the strict and formal sense of “source” that I have assumed in these chapters, not much except the enacted code counts as a source of law in the contemporary civil law. The debate over the sources of law nonetheless continues with vigour and vitality. It is important to complete the picture of strictly institutionalized sources of law by considering sources of law within the civil law. I am grateful to Dr. Antonino Rotolo for supplying a chapter (chap. 7) on this topic to this volume. The volume concludes with a chapter on the special topic of the sources of international law (chap. 8), and then a concluding chapter on the notion crucial to any analysis of legal sources of authority. It might seem strange to end, rather than begin, a discussion of strictly institutionalized sources of law with the concept of authority. However, I ask the reader to be patient, and to take Chapter 9 seriously once he or she arrives at that point.

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