



# **EUI Working Papers**

MWP 2007/15

Authority, Arbitration and the Claims of the Law

Lars Vinx



**EUROPEAN UNIVERSITY INSTITUTE  
MAX WEBER PROGRAMME**

*Authority, Arbitration and the Claims of the Law*

LARS VINX

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

The author(s)/editor(s) should inform the Max Weber Programme of the EUI if the paper is to be published elsewhere, and should also assume responsibility for any consequent obligation(s).

ISSN 1830-7728

© 2007 Lars Vinx

Printed in Italy  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy

<http://www.eui.eu/>  
<http://cadmus.eui.eu/>

## **Abstract**

This paper argues that Raz's 'normal justification thesis' fails to explain how the law can meaningfully claim arbitral authority. Given that the law's claim to authority is usually understood to amount to (or at least to include) a claim to arbitral authority, this result suggests that the law's claim to authority will have to be justified in ways not captured by the normal justification thesis. If one rejects alternative means of justification not captured by the normal justification thesis, on the other hand, one should likewise abandon the thesis that the law necessarily claims practical authority.

## **Keywords**

Authority, Arbitration, Coordination, Disagreement, Expertise, Law, Legitimacy, Legal Positivism, Natural Law, Normal Justification Thesis, Joseph Raz



*Authority, Arbitration and the Claims of the Law*

LARS VINX

Max Weber Post-Doctoral Fellow (2006-2007)  
European University Institute, Florence, Italy

The problem of authority is one of the key issues in political philosophy. Political philosophers disagree over what might justify claims to political authority and even over whether such claims can meaningfully be raised. One of the traditional answers to the problem of authority is to argue that political authority depends on legality, i.e. that political decisions can justifiably claim to be authoritative only if they are lawful. The most influential recent account of legal authority, however, reverses the relationship between political authority and legality. Joseph Raz has argued that the law's essential feature is that it *claims* practical authority.<sup>1</sup> According to Raz, all legal norms necessarily purport to be valid exclusionary reasons for all those to whom they apply.<sup>2</sup> However, that all legal norms inevitably claim exclusionary force over all those to whom they apply does not entail that any such claim is justified. It might be the case, though this is unlikely, that no actually existing legal system is in a position rightly to

---

<sup>1</sup> See Joseph Raz, 'Authority, Law, and Morality' in Joseph Raz, *Ethics in the Public Domain. Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1995) 210-237 at 215; Joseph Raz, 'The Claims of the Law' in Joseph Raz, *The Authority of Law. Essays on Law and Morality* (Oxford: Oxford University Press, 1979) 28-33.

<sup>2</sup> A legal norm is a valid exclusionary reason for subject *s* if and only if the fact that performance of some action *x* is required of *s* by a legal norm provides a reason for *s* to perform *x* that is distinct from all other reasons for or against performing *x* that independently apply to *s* and that ought to exclude or preempt reliance, on the part of *s*, on at least some of those other reasons. See Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990) 35-48. For the application to the law see Raz, 'The Claims of the Law' (n. 2 above).

claim that any of its norms have exclusionary force over any of its subjects. The authority thesis, Raz believes, is therefore compatible with the positivist assumption that the legality of a political decision to enact some directive that purports to bind subjects never contributes anything to the justification of the claim to authority that we must, according to Raz, attribute to that directive.

Raz consequently rejects the idea that legality is a necessary condition of justified political authority. For Raz, justified legal authority is only a species of a wider genus of justified practical authority that is not essentially legal. In Raz's view, the law will have authority, for the most part, only if those who are empowered to make it and to apply it independently happen to possess personal authority over those who are subject to the law, in virtue of their superior expertise or power to coordinate.<sup>3</sup> The law's primary practical role is that of an instrument that transmits or communicates the personal authority of lawmakers. However, such authority, in principle, exists apart from the law and can be exercised in non-legal ways.<sup>4</sup> Constraints of legality, therefore, do not just fail to make much of a contribution to the justification of claims to political authority. Respect for the rule of law, even while usually desirable, cannot be regarded as a necessary ingredient of legitimate governance.<sup>5</sup> The law, far from justifying the exercise of political power, receives justification for its own alleged claim to authority from meta-legal political sources.

My aim in this paper is to provide the ground for a criticism of Raz's reversal of the relationship between legality and political authority, on the basis of a provisional acceptance of the view that the law necessarily claims practical authority.<sup>6</sup> I will argue that the authority thesis, at least in what I take to be its most interesting and intuitively plausible variant, is incompatible with the view that the relationship between the law's claim to authority and the justification of that claim is totally contingent. The most interesting and intuitively plausible variant of the authority thesis, rather, commits us to the view that a system of governance which can credibly claim to possess practical authority over its subjects must necessarily be justified, to a significant degree, in

---

<sup>3</sup> I am not the first to make this observation. See Jeremy Waldron, *Law and Disagreement* (Oxford 1999) 130-131 and Andrei Marmor, 'Authority and Authorship' in Andrei Marmor, *Positive Law and Objective Values* (Oxford 2001) 89-111.

<sup>4</sup> While admitting that the law "by its nature, is an institution with a moral task to perform" (namely to help realize moral goals that are "unlikely to be achieved without it, and whose achievement through the law is not counter-productive" Raz has consequently denied that "there are important tasks that are unique to the law, in the sense that they cannot be achieved in any other way." See Joseph Raz, 'About Morality and the Nature of Law' in *American Journal of Jurisprudence* 48 (2003) 1-15, at 11-12.

<sup>5</sup> See Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law. Essays in Law and Morality* (Oxford 1979) 210-229.

<sup>6</sup> I will not be concerned with theoretical-anarchist criticisms of Raz's authority thesis, which argue that Raz's notion of practical authority is incoherent. See for example Heidi M. Hurd, *Moral Combat* (Cambridge 1999) 62-94. Nor will I discuss the views of critics who argue that the authority thesis is descriptively false. See for example Matthew H. Kramer, 'Requirements, Reasons, and Raz: Legal Positivism and Legal Duties' in *Ethics* 109 (1999) 375-407, Kenneth Einar Himma, 'Law's Claim of Legitimate Authority', in Jules Coleman (ed.), *Hart's Postscript. Essays on the Postscript to the Concept of Law* (Oxford 2001) 271-309, and Jules Coleman, *The Practice of Principle. In Defence of a Pragmatist Approach to Legal Theory* (Oxford 2001) 120-133. I will assume for the sake of argument that Raz's position can prevail in all these disputes. My aim is to show that acceptance of the authority thesis commits us to a form of natural law theory. A different argument for a similar conclusion has been made in Jeffrey D. Goldsworthy, 'The Self-Destruction of Legal Positivism' in *Oxford Journal of Legal Studies* 10 (1990) 449-486.



making that claim.<sup>7</sup> On a political-theoretical level, this result suggests that any satisfactory account of legal authority will have to reject Raz's reversal of the relationship between lawfulness and the justification of political authority. To make adequate sense of the law's alleged claim to authority, we must assume that it is legality that provides political directives with authority, and not the wisdom or prudence of lawmakers that justifies the law.

## **Authority and Justification**

Let me try to explain my argumentative strategy in a little more detail. Raz locates himself firmly in the legal-positivist camp, but his methodological approach to legal-theoretical questions stands in marked contrast to other positivist accounts of the nature of law. Raz's authority thesis is not offered, to quote H.L.A. Hart, as part of an "exercise in descriptive sociology."<sup>8</sup> It is not to be confused with the observation, made from an external point of view, that a legal system cannot exist or be stable unless a sufficient number of subjects or officials, for good reasons or bad, believe that its directives are authoritative. To say that law necessarily claims authority is to say, rather, that the law necessarily claims that those to whom it addresses itself ought to treat its directives as exclusionary reasons. Raz argues that this change of legal-theoretical perspective to what he calls a 'normative-explanatory' account of the nature of law is necessary because any meaningful use of the concept of de facto authority presupposes that we already understand, from a practical point of view, what it would mean for some person or institution to claim and to possess justified authority.<sup>9</sup>

Raz's change of perspective forges a somewhat stronger connection between the analysis of authority and questions of justification than might appear at first glance. Raz is not just committed to the conceptual primacy of the concept of justified authority. He also needs to hold that claims to legal authority could turn out to be substantively justified. Let us assume we came to know, after a process of reflection, that the claims to authority raised by legal systems must, for reasons that invariably obtain, always be unjustified. Someone who wanted to hold on to the authority thesis in the light of such an insight would have to affirm both that the law necessarily claims authority and that such claims cannot even meaningfully be raised because they are necessarily unjustifiable. He would, in other words, be forced to conclude that the law is an inherently unreasonable and oppressive institution whose very existence, in all instances, depends on a form of false consciousness on the part of the typical subject of the law.

---

<sup>7</sup> One might suspect that I am trying to kick down an open door here. Raz has repeatedly emphasized that there are necessary relationships between law and morality and that every legal system is likely to embed at least some moral value. See for example Joseph Raz, 'About Morality and the Nature of Law' (n. 5 above). However, Raz is clearly committed to denying that there is a necessary relationship between the law's ability to meaningfully raise a claim to practical authority and the justification of that claim. In this paper, I will be concerned exclusively with this particular denial of a necessary relation between law and morality. I am not claiming to offer a general analysis of the meaning of the separation thesis or of its usefulness in classifying jurisprudential views.

<sup>8</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> edition, ed. Penelope Bulloch and Joseph Raz (Oxford: Oxford University Press, 1994) vi.

<sup>9</sup> See Joseph Raz, 'Legitimate Authority' in Raz, *The Authority of Law* (n. 2 above) 3-27 at 5-11. The same point is emphasized in Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) 63-66 and it underpins Raz's rejection of H.L.A. Hart's practice theory of norms. See Raz, *Practical Reason and Norms* (n. 3 above) 49-68.

In order to avoid ending up in this uncomfortable position, the proponent of the authority thesis does not, it seems, have to suppose that the claims of the law will always turn out to be justified. He must, however, suppose that justification for claims to legal authority is at least in principle available. Put differently, Raz's authority thesis would not necessarily be in trouble if it turned out that all actually existing legal systems as a matter of fact lack justified authority. But Raz must hold that if this is so, it must be so for contingent reasons, because all actually existing legal systems lack some quality or other they could in principle possess and that would make good on their claims, at least to some extent, and not because claims to legal authority could not possibly turn out to be justified. The law, even while it may lack justified authority, must, as Raz himself points out, at least "be capable of having it, it must be a system of a kind which is capable in principle of possessing the requisite moral properties of authority"<sup>10</sup> if the authority thesis is to make sense.

According to Raz, a claim to legal authority over some subject *s* is justified, and legal directives will be valid exclusionary reasons for that subject, if the *normal justification thesis* is satisfied, i.e. if it is true that *s* is "likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives 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."<sup>11</sup> The normal justification thesis, Raz argues, can be satisfied either on the basis of arguments from expertise or on the basis of arguments from coordination. An argument from expertise seeks to establish that those who enact authoritative directives have better insight into the reasons that independently apply to us than we have ourselves, and that we should therefore be guided by their directives instead of acting on the basis of our own views. An argument from coordination seeks to establish that some authoritative directive can rightly claim exclusionary force because it enables us to coordinate our actions. These two justificatory strategies, Raz plausibly assumes, make justified legal authority available in principle, thus allowing the law meaningfully to raise a claim to authority. However, they do so without undercutting legal positivism, since the question as to whether any actual claim to legal authority does indeed have a sufficient basis in expertise or coordination remains dependent on contingent matters of fact.

In what follows, I will argue that Raz's confidence in the assumption that arguments from expertise and coordination make legal authority available in principle is misplaced. Raz's normal justification thesis is unable, in both its interpretations, to make the specific kind of authority the law appears to claim available in principle. In order to make this point, I will rely on a view about the function of law that I take to be highly plausible but that I will not defend at length in this paper: the view that the arbitration of social conflicts is one of the essential functions of legal order.<sup>12</sup> I will assume, in other words, that a satisfactory conception of legal authority should be able to explain how the law can meaningfully claim arbitral authority. I am not begging the question against Raz in relying on this assumption. Raz himself puts great emphasis on the example of arbitration in defending his conception of legal authority. He argues, for instance, that we need to reject inclusive positivism, i.e. the view that moral standards may, but need not be, part of a legal system's standards of legality, for the

<sup>10</sup> Raz, 'Authority, Law, and Morality' (n. 2 above) 215.

<sup>11</sup> Raz, *The Morality of Freedom* (n. 10 above) 53.

<sup>12</sup> I attempt to offer a full defence of an arbitration-based understanding of law in Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, forthcoming in 2007).

reason that inclusive positivism fails to explain how the law can meaningfully claim to arbitrate amongst its subjects.<sup>13</sup>

My specific line of attack, then, will be to argue that Raz's normal justification thesis fails to account for the possibility of justified arbitral authority. Hence, it fails to show that a legal order could in principle possess (and thus meaningfully claim) arbitral authority. If a claim to arbitral authority is at the core of the law's presumed claim to authority, and if satisfaction of the normal justification thesis is the only possible justification for claims to authority, this failure will entail the general conclusion that the law cannot meaningfully claim authority.<sup>14</sup>

This result leaves us with the following options, assuming we are not content to settle for the view that the law is an inherently unreasonable and essentially oppressive institution. If we want to hold on to the view that the law's claim to authority is a claim to arbitral authority and that such a claim is meaningful, as I believe we should, we will have to adopt a different strategy for the justification of authority, one that commits us to a form of natural law theory and to a rejection of Raz's reversal of the relation between legality and political authority. Alternatively, we might interpret the law's claim to authority as not including a claim to arbitral authority. Such an interpretation, I will argue, is counterintuitive and it cannot be defended solely on the ground that it allows us to hold on to legal positivism. What is more, it leads to an unattractive picture of political authority in general, since justified arbitral authority will be generally unavailable unless it is supplied by the law.

### **Arbitral Authority and Expertise**

Let us assume I have made a promise to help you harvest your crops this summer. As the time of the harvest is approaching it turns out that I am now unwilling to come and help, for some reason that I believe excuses me from performance of my promise. Unfortunately, you have relied on my promise and have failed to secure someone else's help in time. Understandably, you insist that I must come to help or offer compensation for the damages that result from my non-performance. Let us assume we both agree, on a general level, that there are situations that would justify non-performance of a promise like mine, but we disagree over whether we are in such a situation. Let us assume, furthermore, that we agree to submit our quarrel to the judgment of an arbitrator who is to decide for us whether the circumstances that I appeal to in order to justify my claim that I should not have to perform, constitute a valid excuse.

In authorizing an arbitrator to deal with cases such as this, we expect him to decide in good faith, on the basis of his view, whether I ought to be held to performance or not, given the circumstances of the case. This, after all, is the question I would have

---

<sup>13</sup> See Raz, *The Morality of Freedom* (n. 10 above) 41-47 and Raz, 'Authority, Law, and Morality' (n. 2 above) 212-215.

<sup>14</sup> Raz argues that to show that the normal justification thesis is satisfied is the normal way, but not the only possible way, to justify claims to authority. See Raz, *The Morality of Freedom* (above, n. 10) 53-57. One might therefore argue that arbitral authority, for the Razian, could turn out to be justified on other grounds than satisfaction of the normal justification thesis. I believe that we are entitled to abstract from this complication. Raz himself makes it clear that justifications of authority not captured by the normal justification thesis are 'deviant reasons' (ibid. 56) and that they will typically be no more than secondary justifications which can strengthen, but not replace, satisfaction of the normal justification thesis. I therefore assume that Raz would agree that it must be possible to justify arbitral authority, as a central paradigm of legal authority, on the basis of the normal justification thesis.

to ask myself if I wanted to take the right action in the absence of arbitration. However, in authorizing an arbitrator, I agree that if the arbitrator judges that I must perform, I am bound to perform and can no longer claim the power to act on my own view of the matter. If the arbitrator's decision could not bind me in this way, if it could not exclude from my active consideration the reasons that bear on whether I ought to perform or not, it would hardly make sense to authorize him.

If asked for an explanation of the exclusionary force of the arbitrator's decisions, most people would presumably point to the agreement of the parties to authorize the arbitrator. Raz, however, rejects this account. He contends that "the normal justification thesis replaces the agreement between the litigants which was the basis of the arbitrator's authority." He goes on to claim that "agreement or consent to authority is binding, for the most part, only if conditions rather like those of the normal justification thesis obtain."<sup>15</sup> Raz's view, then, is the following: the arbitrator's decisions will have exclusionary force for us if and only if it is true that we will tend to comply better with what reasons there are, independently of the arbitrator's decision, for either performing or not performing our promissory obligations, by subjecting ourselves to the arbitrator's directives. If this requirement is satisfied, an explicit authorization will not be needed. If it is not, any explicit authorization will be unavailing.

If we wanted to justify the authority of our arbitrator on Razian grounds we would have to ask, therefore, what could make it the case that we will better conform to the reasons that govern whether we ought to be held to our promissory obligations by submitting to a third person's directives regarding the matter. One obvious answer is to claim that this person must possess superior insight into the moral complexities of the practice of promising. I will now argue that possession of such superior insight is not a sufficient condition for the possession of arbitral authority. The model of expertise fails to show that justification is available in principle for the arbitral authority claimed by the law.

The argument from expertise is modelled on theoretical authority. Theoretical authority conditions our reasons for belief. The fact that someone with theoretical authority on some subject matter (and on the assumption that the claim falls within his area of expertise and that I am not myself an expert) makes the claim *p* a reason for me to believe that *p*. The normal justification thesis is easily applicable to this scenario: do my beliefs better conform to the reasons that independently bear on what I ought to believe if I defer to the expert's opinions? If the answer is 'yes', he will be an authority, quite regardless of whether I recognize him as such, and the fact that he states *p* will be an exclusionary reason for me to believe that *p*. This picture of authority is easily transferable to practical questions. We only have to assume that the expert happens to be a man of exceptional character and a deeper than usual understanding of practical and moral issues. It would then be true that I ought to treat his pronouncement that, say, I ought to perform my promise as excluding my own attempts to form an opinion on the matter. Would it be right, however, to say that the expert, given these conditions, possesses the authority of an arbitrator?

Let us try to develop as strong a case as possible, on Razian grounds, for an affirmative answer to this question. Such a case would start out by emphasizing that the expert's utterance creates a new and distinct reason for me to believe I ought to perform. This new reason does not just add weight to the side of the balance favouring

---

<sup>15</sup> See Raz, 'Authority, Law, and Morality' (n. 2 above) 214 and Raz, *The Morality of Freedom* (n. 10 above) 80-94.

performance. Rather, it ought to exclude my own reasoning on the matter. If I acted against the expert's claim that I ought to perform I would, assuming the expert is right, not just act wrongly on the merits. I would also disregard an exclusionary reason for performance that ought to have pre-empted my own reasoning about the matter and this makes my non-performance more than simply wrong on the merits. We can add a further twist by making the contrary assumption that I happen to be right on the merits in believing that I am not obliged to perform. The expert, though, tells us that, as he sees things, I ought to perform. It follows, on Raz's view, that if the expert's utterance constituted an exclusionary reason for me to perform while it was true, it must still constitute an exclusionary reason for me to perform while it is mistaken. The reason for this is that satisfaction of the normal justification thesis is clearly compatible with occasional mistakes on the part of the expert. In order for it to be true that reason requires me to adopt the policy of deferring to some expert, the expert does not have to be infallible. Hence, there may occasionally be situations in which the expert makes a false claim, whilst I nevertheless still ought to defer to his opinion. My refusal to perform my contractual obligation will, in such a case, be unreasonable even though non-performance is justified on the merits.

Let us grant that all this is true. Why should we not conclude that the model of expertise gives us all that we need to understand the exclusionary force of arbitral authority? The model seems to explain why I am no longer justified in acting on my own view of the matter once an expert has announced his view and the expert's announcement will have this pre-emptive effect as long as the normal justification thesis remains satisfied, even if his opinion is mistaken. The model of expertise, in other words, shows how I can have sufficient reason to do *x* *merely* because an expert tells me to do *x*. What more could be needed to show that the model of expertise makes justified arbitral authority available?

The answer, I believe, is the following. This view still fails to account for the intuition that an authorized arbitrator is not simply someone whose utterances constitute exclusionary reasons for believing that something ought to be done, but rather someone who has a right to *decide* what we ought to do. If I fail to comply with the directives of our arbitrator, my mistake will consist not just in having acted unreasonably in virtue of having disregarded an exclusionary reason for believing I ought to perform. It will additionally include a show of disrespect for constituted authority that is rightly subject to special moral censure. It is not difficult to see why this is so. Despite the fact that I can act unreasonably specifically in not doing what the expert tells me to do, I cannot inflict a distinctive wrong *on you* (in addition to acting wrongly on the merits) by not doing what the expert tells me to do. I will, however, inflict a distinctive wrong on you by not deferring to the judgment of an arbitrator authorized by us both because I will then abuse the trust that you put in me. Such behaviour on my part, Hobbes trenchantly observed, "is as intolerable in the society of men, as it is in play after trump is turned, to use for trump on every occasion, that suite whereof [I] have most in my hand."<sup>16</sup> Once there is an arbitrator authorized by us both, I can even wrong you by doing what is right on the merits if doing what is right on the merits requires me to disregard the decisions of an authorized arbitrator who has acted in good faith. However, it is certainly not true

---

<sup>16</sup> See Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge 1996) 33.

that I would wrong you in doing what is right on the merits while disregarding the expert.<sup>17</sup>

The difference between expertise and arbitral authority can also be brought out in a second way. As we have seen, our imaginary expert can create reasons with exclusionary force even if his view is wrong on the merits. However, this takes us only so far in explaining arbitral authority. Satisfaction of the normal justification thesis cannot conclusively oblige me not to reconsider a belief, including a belief about what I ought to do, that I have acquired through deference to an expert. If I inadvertently happen to come across some piece of information that gives me good reason to think that the expert has made a mistake in a particular instance, there is nothing that could or should stop me from changing my respective beliefs. Doing so, rather, seems to be rationally required. In changing my belief for the better, I will not violate a requirement of reason (assuming there is such a requirement) to defer to the views of experts. Such a requirement, after all, could only be based on the principle that I ought to bring my beliefs into line, as far as possible, with reasons for belief that exist independently of exercises of expertise. Hence, it could not apply to a situation where I have good reason to believe that the expert is wrong. The principle may still advise me that it would be wrong for me to stop deferring to the expert in future cases. The expert's mistake, after all, may have been of a kind that does not cast general doubt on his expertise. Nevertheless, the principle cannot stop me from changing the particular belief at issue. In addition, since the beliefs we are talking about are beliefs about what one ought to do, the principle cannot be invoked to condemn me for not doing, in the particular instance at hand, what the expert tells me to do. The expert, then, can create reasons that have exclusionary force even while his view is wrong on the merits only as long as I remain unaware of the wrongness of the particular claim of his that is at issue.<sup>18</sup>

In contrast, our intuitions about the institution of arbitration clearly suggest that the decisions of an arbitrator we explicitly authorize to deal with our disputes must claim to bar us from acting on our own view, even in cases where one of us reasonably comes to believe that the arbitrator's decision is not the one that ought to have been taken in the light of what independent reasons apply.<sup>19</sup> However, such a claim to

---

<sup>17</sup> Conversely, if I follow the directives of a genuine arbitrator I am excused even in doing what is wrong on the merits. But it is at least unclear whether the same would hold true if I followed a directive of an expert's that is mistaken on the merits.

<sup>18</sup> A similar observation grounds Donald Regan's distinction between 'indicator reasons' and 'intrinsic reasons'. See Donald Regan, 'Authority and Value. Reflections on Joseph Raz's Morality of Freedom' in *Southern California Law Review* 62 (1989) 995-1095 and 'Reason, Authority, and the Meaning of "Obey"'. Further Thoughts on Raz and Obedience to the Law' in *Canadian Journal of Law and Jurisprudence* 3 (1990) 3-28. Regan rightly points out that the normal justification thesis (which he endorses) has more restrictive implications than Raz seems to want to admit. In particular, Regan argues that satisfaction of the normal justification thesis can never give rise to a duty to obey the law. While he is happy to embrace this conclusion, he does not, as far as I can see, discuss the implications of an ultra-restrictive account of legal authority for the possibility of legal arbitration.

<sup>19</sup> This is not to deny that, as Raz himself points out, the authority of an arbitrator may rightly be challenged if "the arbitrator was bribed, or was drunk while considering the case, or new evidence of great importance unexpectedly turns up" (Raz, *The Morality of Freedom*, 42). My point is that we would have to reject a claim to authority based on expertise on much weaker grounds, namely whenever we acquire a reason to believe that the expert was mistaken in assessing the relevant reasons as he did. By contrast, an arbitrator's decision cannot be rejected merely because we have good reason to believe it is substantively mistaken. Some stronger reason for rejection, like drunkenness, bribery, or information the arbitrator couldn't have known about, would seem to be required.

authority cannot possibly turn out to be justified on the basis of the model of expertise. If the claim cannot possibly turn out to be justified, it cannot meaningfully be raised.

One might object to this line of reasoning that it is unclear why an account of legitimate arbitral authority should have to explain the wrong we do to a third party in not deferring to an arbitral decision or why it must allow for arbitral decisions to be authoritative even where deference could not be expected to lead to superior conformity with reason. An autonomy-preserving conception of arbitral authority, it might seem, will have to be limited in scope, limited to what can be justified on the basis of the normal justification thesis. Raz has argued, in this vein, that general duties to respect the law, duties whose violation would presumably wrong fellow citizens, can exist only on the basis of a citizen's voluntary identification with the laws of just state, and not as a result of a wholesale justification of claims to authority. The availability of justification for claims to legal authority, Raz argues, will always depend on whether those who govern are doing a good job and on whether a particular subject is in need of the guidance that the law can provide.<sup>20</sup>

This objection, I believe, involves a mischaracterization of the nature of arbitral authority. Our example assumes that there is a set of moral reasons that bear, independently of the institution of an arbitrator, on whether I ought to keep my promise, given the situation in which we find ourselves. It is to these reasons that I will have to take resort in trying to take a conscientious decision as to how to act in the absence of an arbitrator. Likewise, it is the expert's presumed superior grasp of these reasons that grounds his authority. Finally, an arbitrator clearly ought to decide our dispute in the light of his assessment of these reasons. There is, nevertheless, a crucial difference between the arbitrator and the expert. The exclusionary force of the expert's utterances solely depends on whether we can reasonably assume that his judgments are likely to be better attuned than ours to the reasons that independently bear on whether I ought to keep my promise. To claim that the same is true of the legitimacy of an arbitrator's decisions is to misrepresent the nature of the institution of arbitration.

The *active establishment* of an arbitral authority *changes* the normative situation of subjects of authority in a more radical way than the mere existence of an authority based on expertise. We can confer the power to create directives with exclusionary force even on a person who lacks the intrinsic features that would give her expertise-based authority over us. As a result, the reasons for deferring to an arbitral authority actively established by the parties to a dispute are no longer fully explicable in terms of the expectation of superior conformity with the reasons that independently bear on the question to be arbitrated. Their agreement to authorize an arbitrator, as well as the arbitrator's willingness to act in accordance with our understanding of the role of an arbitrator, provides the parties with a reason for accepting the outcomes of arbitration other than the expectation that the arbitrator's judgment is likely to exhibit superior conformity to the reasons that independently bear on how the dispute ought to be decided.

This, to repeat, is not to deny that an arbitrator ought (and must necessarily claim) to decide on the basis of the reasons that independently bear on the dispute. However, to argue that his authority must therefore be justified through the normal justification thesis is a non-sequitur. An aim on our part to conform better to these reasons than we would if we acted on our own assessment is not the only imaginable

---

<sup>20</sup> See Raz, *The Morality of Freedom* (n. 10 above).

(nor even a very plausible) motive for installing an arbitrator. Moreover, neither is the expectation that the arbitrator's assessments will be superior to ours, the only imaginable justificatory relationship between an arbitrator's decisions and the reasons it purports to exclude. The obvious alternative, to be developed more fully in the next section of this paper, is to claim that the function of installing an arbitrator consists in the termination of reasonable disagreement about what the reasons excluded by the arbitrator's decision require of the parties to a dispute. If this is the function of arbitral authority, then its legitimacy cannot require an expectation of superior insight on the part of the arbitrator. Parties who reasonably disagree about the right solution to moral disputes of some kind will also reasonably disagree about how to identify the relevant kind of expertise. What legitimacy in arbitration does require is that the arbitrator should decide the dispute, in good faith, on the basis of his best understanding of what is required by the reasons that independently bear on whether I ought to perform, and that he do so in accordance with a number of procedural standards that are implicit in our conception of fairness in arbitration.

I conclude that the model of expertise fails to capture an essential element of arbitral authority and hence to capture an essential element of the law's claim to authority insofar as it is a claim to arbitral authority. An arbitrator's judgment, in contrast to an expert's utterance, is not just (and arguably not at all) the expression of an opinion as to what we ought to do that is likely to be better than ours. It is a *decision* as to what we ought to do that claims to *bar me* from acting on my own opinion about the merits of the case – but not, crucially, from continuing to hold it – even where I cannot be expected to believe that the arbitrator's judgment is likely to be superior to mine. The fact that it is possible for the expert intentionally to create exclusionary reasons by declaring his opinions, and to succeed in doing so even where he is mistaken on the merits, does not eliminate the fundamental importance of this distinction. The argument so far, then, strongly suggests that genuine arbitral authority, on the basis of the model of expertise, is in principle unavailable .

### **Arbitration and Reasonable Disagreement**

A Razian could point out in reply that the problem of lapses of expertise is too peripheral to pose a real challenge to the model of expertise as a ground of arbitral authority. A conception of practical authority based on expertise, after all, may well be able to account for most exercises of arbitral authority that we intuitively believe to be justified. However, it is not at all clear why we should require an otherwise attractive conception of the justification of authority to account for all exercises of arbitral authority one might intuitively believe to be justified. There are, perhaps, good normative reasons to deny justification to claims to legal authority that cannot be sustained on the basis of the model of expertise.

This is not, I believe, a point where Razians can rest their case. Situations in which the normal justification thesis will necessarily fail to show arbitral authority to be justified, because the subjects of authority are under no requirement of reason to believe that the authority's views are more likely to be correct than theirs, are too common and too central to our received understanding of the point and purpose of arbitral authority for this reply to be successful.

Let us return to our example of the promise. Typically, we will both have some more or less worked-out account of what kinds of circumstances can excuse non-performance of promissory obligations. These conceptions will overlap to some extent.



If they did not, it would not be possible for us to conceive of our dispute as a disagreement over what is required as a result of my having made a promise. However, such general overlap will often break down in particular instances of application. Moreover, these breakdowns need not always be a result of stupidity or bad faith. They may well, for all we know, betray genuine differences in our understanding of the moral point of the practice of promising. Such disagreements of understanding, it would appear, might well be reasonable disagreements.<sup>21</sup>

The possibility of reasonable disagreement must figure crucially in any plausible explanation of why we need arbitrators and of why arbitration is a useful institution. Arbitration would not be a useful institution in a society whose members are all convinced that anyone who disagrees with their own view on some moral problem must do so out of selfishness, rank stupidity, or bad faith. If an arbitrator arrived at a decision supporting someone else's view, a member of this society would immediately conclude that the arbitrator is himself incapable of arriving at an informed judgment or else he is biased and acting in bad faith. There would be no room for deference to any decision that does not support one's own view of the case. If there is no such room, then arbitration cannot possibly be a useful institution.

The belief in the possibility of reasonable disagreement, on the other hand, is needed to make full sense of the normative expectations to which we typically hold arbitrators as well as those who have submitted to a procedure of arbitration. Some of these expectations are expectations to which we also hold experts, but not all of them. We expect our arbitrator to be impartial and unbiased, not to take any bribes and not to take his decisions in a drunken stupor. We would expect the same of an expert. But unlike the expert, we also expect our arbitrator to take into account our views and the information we provide him with, to allow us to present our cases in a public and adversarial context, and to publicize as well as to explain his reasons for his decisions. Moreover, we expect him, at least if he is regularly acting as an arbitrator amongst us, to aim for a certain degree of consistency between his decisions. Such consistency might well result from expertise, but it is not as such required by, and sometimes even incompatible with, the role of being an expert. As an expert, one ought to change one's advice on a matter if one has reason to think that one's earlier view was false, without giving any weight to the fact that one gave different advice earlier on. Finally, the arbitrator's decision, in order to bind us, must be sufficiently responsive to our own understanding of the practice of promising. Hence, we do not typically expect an arbitrator to be someone who possesses esoteric moral knowledge that remains inaccessible to us ordinary mortals. It is no accident that one's peers are usually considered the best arbitrators.

However, the fact that the arbitrator is not usually considered to possess esoteric moral knowledge does not mean that we can expect perfect agreement between the arbitrator's views and our own once we move beyond relatively uncontroversial paradigms. We do not take ourselves to be entitled to conclude, once an arbitrator did not take the decision we believe would have been the right one for him to take, that his apparent attempt to live up to the procedural requirements and constraints of role just outlined could have

---

<sup>21</sup> For a classical explanation as to why we should expect reasonable disagreement in moral matters see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) 54-58. A sustained defence of the idea that the arbitration between parties who reasonably disagree is a core function of legal order has been offered by Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).

been nothing but a mask for bad faith. If I were to agree to submit to arbitration, and yet to take the view that the arbitrator's decision must have been biased and therefore cannot bind me whenever his understanding of the problem at hand turns out to differ from mine, I would be the one acting in bad faith. What I am entitled to expect, our intuitions about arbitration suggest, is that our arbitrator decide – while acting in accordance with the procedural requirements and the constraints of role just outlined – on the basis of the conception of promising he, in good faith, thinks best. If this expectation is met, I get as much as I can expect in the face of reasonable disagreement, and I am therefore required to respect the arbitrator's decision even if I believe it to be wrong on the merits.

Our normative expectations toward arbitrators and those who agree to submit their disputes to arbitration, then, support the view that the core function of arbitration is to deal with reasonable disagreement. However, if an arbitrator is to function in cases of reasonable disagreement, he must, at least be, able meaningfully to claim the legitimate power to bring about a decision between rivaling moral conceptions reasonably held by participants to a dispute like ours. If this is true, the model of expertise must fail to provide an adequate basis for claims to arbitral authority.

A claim to authority, on the basis of the model of expertise, in a case where I disagree with the authority about what should count as an excuse for non-performance of a promise can only be justified if the authority's understanding of the practice of promising is likely to be significantly better than mine. Put differently, it has to be the case that any moral disagreement I have with the authority is unlikely to be reasonable on my end. However, if the unlikelihood of reasonable disagreement with the expert is a necessary condition for his possession of authority, the expert could never have any authority wherever we would, as happens in many moral disputes, clearly expect the possibility of reasonable disagreement with the wisdom of his views. An authority he cannot possibly possess is an authority he cannot meaningfully claim.

Plainly, however, arbitral authorities at least claim to be able to provide arbitration in conflicts between parties that reasonably disagree about moral problems and we surely expect them to make this claim. Given the pervasiveness of reasonable moral disagreement in modern societies, it is hard to see how arbitral authorities could fail to make such a claim.<sup>22</sup> However, if arbitral authorities must at least raise a claim to authority within the sphere of reasonable disagreement, and if the model of expertise entails that authority cannot even meaningfully be claimed wherever we reasonably disagree, we ought to conclude that a claim to authority based on expertise cannot be the same as a claim to arbitral authority. Arbitral authority and authority based on expertise differ in kind, even though the former may partially overlap with the latter. Expertise, hence, does not just occasionally fail to justify claims to arbitral authority, due to insignificant circumstantial lapses, but it is powerless to make any contribution whatsoever to the justification of arbitral authority.

## **Arbitration and Coordination**

So far, I have argued that claims to arbitral authority cannot be justified on the basis of the model of expertise. However, we are not yet entitled to conclude that it is impossible to justify arbitral authority on the basis of the normal justification

---

<sup>22</sup> See Philip Soper, *The Ethics of Deference. Learning from Law's Morals* (Cambridge: Cambridge University Press, 2002) 43-44.

thesis. Raz argues that there is a basis other than expertise for satisfying the normal justification thesis.<sup>23</sup> Legitimate authority may arise from the fact that an authority's directives make the prescribed way of action the best course to achieve a valuable form of coordination that is unlikely to be achieved without the help of the law.<sup>24</sup>

Once arguments from coordination are brought into play, we may well arrive at the conclusion that I will be better able to conform to reason in accepting the authority of a decision-taker than by acting on my own judgment on the merits of the case, even while I reasonably believe his views on the merits to be defective. While I may not agree that our arbitrator's theory of excuses is substantively correct, I have to ask myself a different question in working out how to act. I have to question whether I have sufficient reason to accept his decision for some theory as barring me from acting on my own view of the matter, given that such acceptance establishes (or reinforces) a pattern of coordination and taking into account the incidental benefits this pattern creates. From this perspective, the reasons I have for accepting the arbitrator's decision as binding do not boil down to the reasons for believing that my acceptance will tend to enhance the conformity of my acts with the best account of when I am morally justified to default on a promise. Arguments from coordination, it would therefore seem, can establish that an arbitrator's decisions have exclusionary force even where the argument from expertise fails because we run into reasonable moral disagreement. Hence, it would appear that arguments from coordination make arbitral authority fully available on Razian grounds. In what follows, I will argue that this is not the case.

It will be helpful for us to remind ourselves of a characteristic feature of pure coordination problems, such as the question whether to drive on the left or on the right. In the case of pure coordination problems, it makes no sense to speak of the reasons that would have determined how one ought to have behaved in the absence of an established pattern of coordination. It is meaningless to say that the rule 'drive on the right' sums up or reflects independent reasons that would otherwise be able to guide me in the endeavour of trying to avoid collision with other motorists. It doesn't matter to the subjects of authority, therefore, how the authority decides or what reasons it has for deciding as it does. The constraints of role and procedure that, as we have seen, are implicit in our idea of arbitration, are irrelevant here. It would be perfectly fine to take

---

<sup>23</sup> See Raz, *The Morality of Freedom* (n. 10 above) 66-67, and Joseph Raz, 'Facing Up. A Reply' in *Southern California Law Review* 62 (1989) 1153-1235, at 1187-1194.

<sup>24</sup> For a general attack on the idea that the law's function is to solve coordination problems see Leslie Green, 'Law, Co-Ordination, and the Common Good' in *Oxford Journal of Legal Studies* 3 (1983) 299-324. My conclusions are, as far as I see, not in conflict with Green's claim that it cannot be the central function of the law to solve coordination problems. However, I do not want to rely on Green's general argument against law as coordination, since it is unclear whether Raz's view is undermined by it. All Raz has to claim in order to counter the case I am trying to make is that the law sometimes brings about coordination and that coordination would in some instances be less likely without the help of the law. He has to go on to argue that this offers a partial explanation for how the law can meaningfully claim arbitral authority. Raz is not committed to the view, however, that there are coordination problems that cannot be solved in any other way than through legal regulation, nor is he committed to the idea that the capacity to coordinate is the law's distinctive feature. Raz argues that the law's distinctive feature is its claim to authority and that its capability to help bring about coordination is one of the standard justifications for that claim. As far as I can see, Green does not deny that the law can, in some cases, help bring about coordination, and that is all, it seems, that Raz needs to claim to be able to invoke capacity to coordinate as one possible justification for claims to authority. Hence, I have to show that authority based on capacity to coordinate is not a form of arbitral authority.

decisions arbitrarily, by drawing straws or rolling a wheel of fortune. Any decision whatsoever will suit everyone's interests equally well.

However, we need to keep in mind that our example is, like all situations that call for arbitration, not a pure coordination problem. There are substantive reasons, after all, that bear on whether I ought to perform my promise or not. Both of us therefore take a legitimate interest in the question as to which solution from among a range of alternatives that would equally cater to our interest in maintaining coordination will be endorsed by the arbitrator. While any solution that allows us to continue to coordinate will create at least some benefit for all, different solutions will distribute benefits and burdens in different ways. The arbitrator's endorsement of one amongst several possible 'coordinative equilibria' is therefore a question of justice and subject to burdens of justification that cannot be met simply by pointing out that everyone reaps at least some benefit under any coordinative scheme.

Of course, that the choice of one or another solution gives rise to questions of justice need not entail that a decision will be justified only if it is a decision for the solution that is optimally just. As I have already emphasized, people will reasonably disagree over which solution is optimally just and the institution of arbitrator is a reaction to such disagreement. However, the fact that we are faced with a question of justice will create certain normative expectations concerning the way in which a solution is chosen. Most people, grudgingly perhaps, are prepared to live with a solution they do not believe to be perfectly just if it is chosen in a fair procedure that produces *legitimate* outcomes. In other words, they are prepared to live with the decision if it is taken in accordance with the constraints of procedure and role that are implicit in our understanding of arbitration.

I can now formulate why I do not believe that arguments from coordination can make justified arbitral authority available. An argument from coordination may very well show that someone's coordination-enabling decisions are valid exclusionary reasons capable of surviving reasonable normative disagreement. Nevertheless, it does not thereby establish that these decisions are legitimate or that we ought to regard them as outcomes of a genuine process of arbitration.

Let us assume I found out that our arbitrator, in choosing one of the possible coordinative equilibria, never considered my substantive position since he is biased against me or that he just tossed a coin because he could not be bothered to think about the question of justice involved. The decision taken by the arbitrator might, under these circumstances, still have exclusionary force. It may well remain true, despite the arbitrator's corruption, that any coordinative equilibrium is better than none, that I therefore benefit from the decision at least to some extent, and that I will thus reasonably prefer adherence to the decision to disobedience and non-coordination. However, I would nevertheless be justified in thinking that the arbitrator fundamentally violated the trust that I put in him, that he did not act as an arbitrator because he took his decision without any consideration of the substantive moral reasons the decision purports to exclude.

Arguments from coordination, then, may provide one with reasons to attribute exclusionary force to decisions that are not instances of arbitration, and they may do so even where expertise gives out because reasonable disagreement reigns. They are, however, in themselves powerless to justify claims to *arbitral* authority or to establish that a decision is *legitimate*. In essence, appeals to coordination simply shun the burdens of justification our intuitive understanding of arbitration clearly tries to

address. If the law's claim to authority is a claim to arbitral authority, mere arguments from coordination will be unable to explain how the law's claim to authority could ever be justified.

One might respond by arguing that coordination is a normatively richer conception than I have assumed. In response to critics, Raz has argued that governmental authorities do not just solve coordination problems in the narrow, game-theoretic sense. They are often better able than subjects to see that a common course of action is required to achieve certain objectively valuable ends (that may not be widely desired or even be recognized as such) and to make sure that the burdens of attempts to realize these ends are distributed justly.<sup>25</sup> I do not object to the idea that governors able to perform this function would be in a position to claim authority. However, it seems to me that, so understood, the argument from coordination turns out to be a variation on the argument from expertise. As such, it would be subject to the same weaknesses in justifying claims to arbitral authority that we have diagnosed in the argument from expertise.

A more threatening criticism of the view put forward here is to claim that the legitimacy-conferring procedural standards that are necessary for arbitral authority are, in any case, also necessary requirements of successful coordination. In order to solve coordination problems, and in order for us to reasonably be able to expect that it will reliably do so, an authority will at least have to possess a reliable capacity of choosing one of the coordinative equilibria over a 'solution' that fails to bring about coordination. An authority is unlikely to possess this capacity unless we can expect it to behave, in many respects, in the way we expect an arbitrator to behave. It will, for example, have to make an effort to obtain accurate information about our preferences and the situation, it will have to decide soberly, and it will have to be committed to the goal of helping us coordinate our actions instead of tyrannizing us. It would seem, therefore, that one cannot drive a very deep wedge between arbitral authorities and coordinative authorities.<sup>26</sup>

It is indeed true that a coordinative authority will have to resemble an arbitral authority in some important respects in order to be able to reliably solve coordination problems. However, it seems to me that this observation does not affect the point that the choice between different available coordinative equilibria in an impure coordination problem may rightly be perceived as an issue of justice. We would therefore expect an arbitrator to take a decision for one or another of the coordinative equilibria by addressing the reasons that we take to bear on the question of which coordinative solution is more just. We would not, by contrast, be content to hear from the arbitrator's mouth that there are several different coordinative equilibria from which he will choose by lot or by good looks. At least some of the procedural standards to which we hold an arbitrator would be superfluous if arbitrators were indeed entitled to proceed in such a way. A coordinative authority, for example, would have little reason to allow us to present our case in public if it were able to infer our preferences from our past choices or from an opinion poll. Nevertheless, we clearly believe that an arbitrator must give us the opportunity to argue our view in some public forum and to rebut opposing interpretations of the normative situation.

I conclude that neither of the two paradigms of justification introduced by Raz, expertise and coordination, can sustain the assumption that the arbitral authority

---

<sup>25</sup> See Raz, 'Facing Up' (n. 24 above) 1187-1194.

<sup>26</sup> I owe this point to Matthew Boyle and Selim Berker.

claimed by the law is in principle available. While the model of expertise demands too much in declaring that authorities can only be justified as long as we are rationally required to believe that their decisions will allow us better to conform to reasons that independently apply to us, the model of coordination demands too little in assuming that any decision whatsoever and howsoever taken will be justified as soon as it successfully maintains some scheme of coordination that benefits everyone at least to some extent or that helps realize some objectively valuable goal. As a result, both paradigms fail to show how the law can at least meaningfully claim arbitral authority. Arbitral authority, so to speak, falls through the cracks.<sup>27</sup> If Raz's normal justification thesis, in both its readings, fails to show how the law can at least meaningfully claim arbitral authority, and if arbitral authority is at the core of legal authority, it also fails to sustain the authority thesis.

### **The authority thesis and the nature of law**

Raz argues that the law necessarily makes a *general* and *unlimited* claim to authority. However, Raz also argues that any legal system's claim to authority is unlikely ever to be fully justifiable. A legal system, according to Raz, can and usually does, possess *some* authority over at least *some* of the people who are subject to it. In other words, it may well be the case that the fact that a legal norm requires x is a valid exclusionary reason for some of the subjects of the law, since one of the two standard justifications applies with respect to them, without necessarily applying to everyone else. However, Raz points out that it is highly unlikely that the normal justification thesis will ever be satisfied in general, i.e. with respect to all subjects of some legal system and with respect to all of its laws. Hence, there is no necessary relation between legality and legitimacy.<sup>28</sup> We can never hope for more than a 'piecemeal' justification of claims to authority.

Raz is untroubled by this apparent mismatch between the scope of the law's claims and the limited availability of justification for those claims. According to Raz, the authority the law claims differs from the authority it possesses only in quantity but not in quality. The authority the law generally claims to possess is of the same kind as the particular authority it usually does possess, in virtue of expertise or coordination, with respect to some of its subjects. What is more, whenever the law possesses authority with respect to some subject matter at least over some subjects, there will typically be independent reasons for those over whom it does not possess authority to act in accordance with the requirements of the law. The gap between the extent of authority claimed by the law and the extent of the authority it actually possesses therefore, need not worry us. It does not stop the law, on this view, from meaningfully raising a claim to practical authority.<sup>29</sup>

However, there is another, more troubling, interpretation of the gap between the claims of the law and the extent to which its authority can be justified on Razian grounds. One might suspect that the gap arises from the fact that the law claims arbitral authority whereas Razians are committed to the idea that the exclusionary

---

<sup>27</sup> This result might offer a general explanation for the observation that Raz's framework seems unable to give any distinctive justificatory relevance to democracy. See Thomas Christiano, 'The Authority of Democracy' in *Journal of Political Philosophy* 12 (2004) 266-290 and Scott Hershovitz, 'Legitimacy, Democracy, and Razian Authority' in *Legal Theory* 9 (2003) 201-220.

<sup>28</sup> See Raz, *The Morality of Freedom* (n.10 above) 70-80.

<sup>29</sup> See *ibid.*, 99-105.

force of legal directives is exhausted by appeals to expertise and coordination, appeals that cannot justify claims to arbitral authority. Under this interpretation, there is a difference in kind between the authority claimed by the law and the authority it can possess on Razian grounds. I believe that the foregoing analysis should lead us to embrace this second interpretation. If I am not mistaken, we will not arrive at a sufficient characterization of the law's claim to authority merely by saying that the law claims to have the capacity to *create* exclusionary reasons for those to whom it addresses itself as well as the *intention to make use* of that capacity. An expert, as we have seen, might satisfy these requirements, but the law, at least if it claims arbitral authority, claims an authority that is *qualitatively different* from any that the expert could possess. What is more, an appeal to arguments from coordination will be unable to make up for this shortcoming of the argument from expertise.

As we have seen at the beginning, Raz denies that the law's claim to authority is automatically justified wherever there is a well-developed legal order. Nevertheless, he must assume that it is at least not a foregone conclusion that the law could never possess any of the authority it claims. This much is required by the idea that we can treat a normative (as opposed to a descriptive-sociological) concept of authority as the cornerstone of a theory of the nature of law and that we can use the concept to account for the intuition that the law possesses a distinctive normativity. However, if the law's claim to authority is a claim to arbitral authority, it will have to be a foregone conclusion for a Razian that it cannot possess any of the authority it claims, even while it may sometimes have exclusionary force on other grounds. An endorsement of the idea that the law's claim to authority, as we commonly understand it, is meaningful could, then, only be a form of false consciousness.

If we hold on to the view, against this conclusion, that justification of the law's claim to arbitral authority is available in principle, we will have to affirm a necessary relation between legality and legitimacy as well as a general obligation to obey the law.<sup>30</sup> Let us assume that claims to arbitral authority are, in principle, meaningful. The features of legal order that would presumably make a claim to arbitral authority meaningful will then inevitably justify it, at least to some extent. A system of governance can meaningfully raise a claim to arbitral authority only if it is credibly committed to realizing an ideal of legality based on the normative expectations implicit in our concept of arbitration. If a properly authorized system of governance is so committed, however, its claim to arbitral authority will inevitably be more than just meaningful. The connection between the fact that a system of governance indeed honours the normative expectations that are implicit in our intuitive conception of arbitration and the legitimacy of the decisions it produces cannot be contingent because it is this fact itself that legitimizes the decisions it produces. Note that this necessary relation equally holds for all subjects of the law since its existence does not depend on the contingent question as to whether particular governors have superior expertise with respect to particular subjects. Claims to arbitral authority, in contrast to authority based on expertise, cannot have justification for some subjects of the law and lack justification for others. Insofar as claims to arbitral authority are meaningful, they must therefore give rise to a general duty to obey the law.

To be sure, the justificatory force of a legal system's commitment to an ideal of legality based on the idea of arbitration may vary from case to case. Some forms of

---

<sup>30</sup> A fuller development of the position outlined in the following paragraphs can be found in Vinx, *Hans Kelsen's Pure Theory of Law* (n. 13 above).

governance may fail to make a claim to arbitral authority that is even in the least credible. Such forms of governance, then, do not qualify as forms of legal order. There is a necessary connection, on the other hand, between legality and legitimacy in any order that we should be willing to call a legal order since it meaningfully raises a claim to arbitral authority. But the practical weight of this connection, the extent to which it can justifiably claim to pre-empt a subject's self-government, will differ, depending on how well the order approximates the ideal of perfect compliance with the expectations of role and the standards of procedural justice that are implicit in our understanding of legitimate arbitration.

The view that the law can meaningfully claim arbitral authority, therefore, does not force us to accept that the exclusionary force of arbitral decisions always ought to prevail over one's own understanding of what the excluded reasons require.<sup>31</sup> What it does imply, however, is that any legal system, by virtue of raising a claim to arbitral authority, must necessarily be committed to the ideal of legality. In other words, the law's claim to authority, if it is understood as a claim to arbitral authority, necessarily commits the law to strive above all else for a distinctive excellence, namely for the fullest possible compliance with the normative standards implicit in our understanding of arbitration, because this excellence alone is capable of giving meaning to the law's distinctive claims. A citizen, in turn, at least ought to be attentive to considerations of legality in deciding how to act, even in cases where legal authorities lack superior expertise.

A Razian can of course avoid these naturalist conclusions by admitting that justified arbitral authority is unavailable on the basis of arguments from expertise and coordination. However, he might go on to argue, this just shows that we should not interpret the law's claim to authority as a claim to arbitral authority. Perhaps we should instead reinterpret the law's claim to authority as being nothing more than a claim to exclusionary force arising from a mixture of claims to expertise and the provision of pure coordination.

Such an interpretation of the law's claim to authority would not sit well with our received intuitions about the nature of that claim, not least because it appears that the law's distinctive claims will have to play a role in any general account of political authority that is to include the idea of legitimate arbitration. Mere intuitions, to be sure, cannot function as a final standard of assessment here. But they expose the highly revisionist character of the interpretation of the law's claim to authority a Razian must embrace in order to avoid a naturalist reading of the authority thesis.

I have not shown that a revisionist interpretation of the law's claim to authority, one that does not involve the idea that the law can offer justified arbitration, cannot be defended in a satisfactory way. It seems to me that the question as to whether we should attempt to uphold our core intuitions about the law's authority or to radically revise them must turn on a debate over the moral or political attractiveness of the two different interpretations of the law's claim to authority I outlined. Let us assume it is true that the law necessarily claims that we ought to treat its directives as authoritative. This fact is open both to the interpretation that the law's claim is a claim to arbitral authority and to the interpretation that the law's claim is a claim made solely on the basis of appeals to expertise and coordination. In other words, it is open both to the view that legality

---

<sup>31</sup> For a general defense of the claim that valid exclusionary reasons need not conclusively block recourse to the excluded reasons see Frederick Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (Oxford: University Press, 1991).



plays an indispensable and distinctive role in the justification of political authority and to its reverse, which holds that, the authority of the law depends on the authority of those who make or apply it. Insofar as it merely describes the central feature of law, the authority thesis is therefore unable to help us decide between these two views. However, we clearly need a principled reason to reject the former interpretation of the relation between legality and authority since it seems to capture much better what we intuitively believe about the law.

Raz's writings on the rule of law suggest that he is critical of the view that the law is committed to an ideal of legality because he fears that such a view will lead to a fetishistic adoration of the ideal of the rule of law, that will cover-up severe substantive injustice, as well as restrict the state's sphere of discretion too severely, and thus rob us of the potential benefits of subjection to the discretionary guidance of experts who can direct us to the realization of substantively valuable ends.<sup>32</sup> This is surely a plausible way to defend a revisionist understanding of the law's claim to authority and of political authority in general. Whether the defense is ultimately convincing depends on whether a perfect or non-defective legal system that fully developed the ideal of legality implicit in our understanding of arbitration would indeed be likely to allow for substantive injustice. What is more, Raz's case also depends on whether the values that would be served by an overriding commitment to the ideal of legality would be equally well-served by a system not so committed, or at least be outweighed by other values whose realization would be impeded by a strict commitment to the ideal of legality.

All this suggests that a reading of the authority thesis that denies a necessary relation between the law's claim to authority and the claim's justification cannot be defended on purely descriptive grounds. Positivist adherents of the authority thesis must explain, on the level of normative political theory, why we ought to prefer the rule of men, men for whom the law is a mere instrument to transmit their expertise or to communicate their coordination-enabling decisions, to legitimate arbitration among peers, exercised under the legitimacy-conferring constraint of an ideal of the rule of law. If such an explanation cannot be given, the legal theorist should either adopt a naturalist interpretation of the authority thesis or else reject the view that the law's essential feature is that it necessarily claims practical authority.

---

<sup>32</sup> See Joseph Raz, 'The Rule of Law and its Virtue' in Raz, *The Authority of Law* (n. 2 above) 210-232. See also Timothy Endicott, 'The Reason of the Law' in *American Journal of Jurisprudence* 48 (2003) 83-106.