

Chapter 3

Law as interpretation

The foundations of legal philosophy were shaken in the 1970s by the ideas of the American jurist, Ronald Dworkin (b. 1931) who in 1969 succeeded H. L. A. Hart as Professor of Jurisprudence at Oxford. The dominance of legal positivism, especially in Britain, was over the next three decades subjected to a comprehensive onslaught in the form of a complex theory of law that is both controversial and highly influential. His concept of law continues to exert considerable authority, especially in the United States, whenever contentious moral and political issues are debated. It is unthinkable that any serious analysis of, say, the role of the United States Supreme Court, the issue of abortion, or general questions of liberty and equality could be conducted without a consideration of the views of Ronald Dworkin. His constructive vision of law is both a profound analysis of the concept of law and a compelling entreaty in support of its enrichment.

Among the numerous elements of his sophisticated philosophy is the contention that the law contains a solution to almost every problem. This is at variance with the traditional – positivist – perception that, when a judge is faced with a difficult case to which no statute or previous decision applies, he exercises a discretion and decides the case on the basis of what seems to him to be the correct answer. Dworkin contests this position, and shows how a judge does not make law, but rather *interprets* what is already part of the legal



8. Ronald Dworkin regards law as an interpretive process under which individual rights are paramount.

materials. Through his interpretation of these materials, he gives voice to the values to which the legal system is committed.

To understand Dworkin's key proposition that law is a 'gapless' system, consider the following two situations:

An impatient beneficiary under a will murders the testator. Should he be permitted to inherit?

A chess grand master distracts his opponent by continually smiling at him. The opponent objects. Is smiling in breach of the rules of chess?

Hard cases

These are both 'hard cases' for in neither case is there a determinable rule to resolve it. This gives legal positivists a headache, for, as discussed in the last chapter, positivism generally claims that law consists of rules determined by social facts. Where, as in these examples, rules run out, the problem can be resolved only by the exercise of a subjective, and hence potentially arbitrary, discretion: a lawyer's nightmare.

If, however, there is more to law than rules, as Dworkin claims, then an answer may be found in the law itself. Hard cases such as these may, in other words, be decided by reference to the legal materials; there is no need to reach outside the law and so to allow subjective judgements to enter.

The first puzzle mentioned above is drawn from the New York decision of *Riggs v. Palmer* in 1899. The will in question was validly executed and was in the murderer's favour. But whether a murderer could inherit was uncertain: the rules of testamentary succession provided no applicable exception. The murderer should therefore have a right to his inheritance. The New York court held, however, that the application of the rules was subject to the principle that 'no person should profit from his own wrong'. Hence a murderer could not inherit from his victim. This decision reveals, Dworkin argues, that, in addition to rules, the law includes *principles*.

In the second dilemma, Dworkin argues, the referee is called upon to determine whether smiling is in breach of the rules of chess. The rules are silent. He must therefore consider the nature of chess as a game of intellectual skill; does this include the use of psychological

intimidation? He must, in other words, find the answer that best 'fits' and explains the practice of chess. To this question there will be a right answer. And this is equally true of the judge deciding a hard case.

Legal systems characteristically generate controversial or hard cases such as these in which a judge may need to consider whether to look beyond the strict letter of what the law is to determine what it ought to be. He engages, in other words, in a process of interpretation in which arguments that resemble moral claims feature. This interpretive dimension of law is a fundamental component of Dworkin's theory. His assault on legal positivism is premised on the impossibility of the separation between law and morals that it proposes.

Thus for Dworkin, law consists not merely of rules, as Hart contends, but includes what Dworkin calls non-rule standards. When a court has to decide a hard case it will draw on these (moral or political) standards – principles and policies – in order to reach a decision. No rule of recognition – as described by Hart and discussed in the last chapter – exists to distinguish between legal and moral principles. Deciding what the law is depends inescapably on moral-political considerations.

There are two phases in Dworkin's conception of legal reasoning. First he contended in the 1970s that legal positivism is unable to explain the significance of legal principles in determining what the law is. In the 1980s Dworkin advanced a more radical thesis that law was essentially an interpretive phenomenon. This view rests on two main premises. The first maintains that determining what the law requires in a particular case necessarily involves a form of interpretative reasoning. Thus, for example, to claim that the law protects my right of privacy against the *Daily Rumour* constitutes a conclusion of a certain interpretation. The second premise is that interpretation always entails evaluation. If correct, this would all but sound the death knell for legal positivists' separation thesis.

In a hard case the judge therefore draws on principles, including his own conception of the best interpretation of the system of political institutions and decisions of his community. 'Could my decision', he must ask, 'form part of the best moral theory justifying the whole legal and political system?' There can only be one right answer to every legal problem; the judge has a duty to find it. His answer is 'right' in the sense that it fits best with the institutional and constitutional history of his society and is morally justified. Legal argument and analysis are therefore 'interpretive' because they attempt to make the best moral sense of legal practices.

Dworkin's attack on legal positivism is crucially founded on his concern that the law ought to 'take rights seriously'. Rights trump other considerations such as community welfare. Individual rights are seriously compromised if, as Hart claims, the result of a hard case depends on the judge's personal opinion, intuition, or the exercise of his strong discretion. My rights may then simply be subordinated to the interests of the community. Instead, Dworkin contends, my rights should be recognized as *part of the law*. His theory thus provides more muscle to the defence of individual rights and liberty than legal positivism can deliver.

In his best-known and most comprehensive work, *Law's Empire*, Dworkin launches a wholesale attack on both 'conventionalism' and pragmatism. The former argues that law is a function of social convention which it then designates as legal convention. In other words, it claims that law consists in no more than following certain conventions (e.g. that decisions of higher courts are binding on lower ones). Conventionalism also regards law as incomplete: the law contains 'gaps' which judges fill with their own preferences. Judges, in other words, exercise a 'strong discretion'.

Conventionalist accounts of law, Dworkin argues, fail to provide either a convincing account of the process of lawmaking or an adequately robust defence of individual rights. In Dworkin's vision of 'law as integrity' (see below), a judge must think of himself not, as

the conventionalist would claim, as giving voice to his own moral or political convictions, or even to those convictions which he thinks the legislature or the majority of the electorate would approve, but as an author in a chain of the common law. As Dworkin says,

He knows that other judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be.

Pragmatists, according to Dworkin, adopt a sceptical attitude towards the view that past political decisions justify state coercion. Instead, they find such justification in the justice or efficiency or other virtue of the exercise of such coercion by a judge. This approach fails to take rights seriously because it treats rights instrumentally – they have no independent existence: rights are simply a means by which to make life better. Pragmatism rests on the claim that judges do – and should – make whatever decisions seem to them best for the community’s future, rejecting consistency with the past as valuable for its own sake.

It is only what Dworkin calls ‘law as integrity’ (see below) that provides an acceptable justification for the state’s use of force. Law’s empire, he tells us, ‘is defined by attitude, not territory or power or process’. Law, in other words, is an interpretive concept addressed to politics in its widest sense. It adopts a constructive approach in that it seeks to improve our lives and our community.

Principles and policies

Dworkin’s account of the judicial function requires the judge to treat the law as if it were a seamless web. There is no law beyond the law. Nor, contrary to the positivist thesis, are there any gaps in the law. Law and morals are inextricably intertwined. There cannot therefore be a rule of recognition, as described in the last chapter, by

which to identify the law. Nor does Hart's view of law as a union of primary and secondary rules provide an accurate model, for it omits or at least neglects the importance of principles and policies.

Dworkin claims that, while rules 'are applicable in an all-or-nothing fashion', principles and policies have 'the dimension of weight or importance'. In other words, if a rule applies, and it is a valid rule, a case must be decided in a way dictated by the rule. A principle, on the other hand, provides a reason for deciding the case in a particular way, but it is not a conclusive reason: it will have to be weighed against other principles in the system.

Principles differ from policies in that the former is 'a standard to be observed, not because it will advance or secure an economic, political, or social situation, but because it is a requirement of justice or fairness or some other dimension of morality'. A 'policy', however, is 'that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community'.

Principles describe rights; policies describe goals. But rights are trumps. They have a 'threshold weight' against community goals. They should not be squashed by a competing community goal. Every civil case, he argues, raises the question, 'Does the plaintiff have a right to win?' The community's interests should not come into play. Thus civil cases are, and should be, decided by principles. Even where a judge appears to be advancing an argument of policy, we should interpret him as referring to principle because he is, in fact, determining the individual rights of members of the community. Thus, should a judge appeal, say, to public safety, to justify some abstract right, this should be read as an appeal to the competing rights of those whose security will be forfeited if the abstract right is made concrete.

In a 'hard case' – like the homicidal beneficiary in *Riggs v. Palmer* (above) – no rule is immediately applicable. Thus the judge must

apply standards other than rules. The ideal judge – whom Dworkin calls Hercules – must ‘construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory principles as well’. Where the legal materials permit more than one consistent interpretation, Hercules will decide on the theory of law and justice which best coheres with the ‘institutional history’ of his community.

What if Hercules discovers a previous decision that does not ‘fit’ his own interpretation of the law? Suppose it is a precedent decided by a higher court which Hercules lacks the power to overrule? He may, says Dworkin, treat it as an ‘embedded mistake’, and confine it to having only ‘enactment force’. This means its effect would be limited in future cases to its precise wording. Where, however, a previous judgment is neither overruled nor is regarded as an embedded mistake, it will generate what Dworkin calls ‘gravitational force’, that is, it will exert an influence that extends beyond its actual wording: it will appeal to the fairness of treating like cases alike.

Dworkin contends that conventionalism (or legal positivism) is gravely impaired by arguments concerning the criteria of legal validity. As we saw in the last chapter, legal positivists are generally content with the fact that the rule of recognition stipulates that X is law. The pedigree of a rule is thus conclusive of its validity. But the basis of legal validity, Dworkin argues, cannot be determined solely by the standards contained in the rule of recognition. This constitutes what he calls the ‘semantic sting’ of legal positivism: positivist arguments about the law are really semantic disagreements concerning the meaning of the word ‘law’.

But Dworkin argues that the concept of legal validity is more than mere promulgation in accordance with the rule of recognition. Semantic theories contest the claim that there are universal standards that exhaust the conditions for the proper application of

the concept of law. Such theories, Dworkin argues, erroneously suppose that significant disagreement is impossible unless there are criteria for determining when our claims are sound, even if we cannot accurately specify what these criteria are.

Liberalism

His rights thesis is based on a form of liberalism that derives from the view that 'government must treat people as equals'. It may not impose any sacrifice or constraint on any citizen that the citizen could not accept without abandoning his sense of equal worth. His analysis of political morality has three ingredients: 'justice', 'fairness', and 'procedural due process'. 'Justice' incorporates both individual rights and collective goals which would be recognized by the ideal legislator dedicated to treating citizens with equal concern and respect. 'Fairness' refers to those procedures that give all citizens roughly equal influence in decisions that affect them. 'Procedural due process' relates to the correct procedures for determining whether a citizen has violated the law.

Upon this foundation of political liberalism, Dworkin has launched numerous forays against, for example, the enforcement by the criminal law of private morality, the idea of wealth as a value, and the alleged injustice of positive discrimination.

His purpose is to 'define and defend a liberal theory of law'. And this is the mainspring of his assault on positivism, conventionalism, and pragmatism. None of these theories of law provides an adequate defence of individual rights. It is only 'law as integrity' (see below) which affords a suitable defence against the advance by instrumentalism upon individual rights and general liberty.

A key – controversial – component of Dworkinian legal theory is its claimed affinity to literary interpretation. When we attempt to interpret a work of art, Dworkin argues, we seek to understand it in

a particular way. We try to portray the book, movie, poem, or picture accurately. We want to establish, as far as we are able, the intentions of the author in a *constructive* manner. Why did Henry James choose to write about these particular characters? What was his purpose? In answering these sorts of questions, we characteristically attempt to give the best account of the novel we can.

Law, claims Dworkin, like a novel or a play, requires interpretation. Judges are like interpreters of a developing story. They acknowledge their duty to preserve rather than reject their judicial tradition. They therefore develop, in response to their own beliefs and instincts, theories of the most constructive interpretation of their obligations within that tradition. We should therefore think of judges as authors engaged in a chain novel, each one of whom is required to write a new chapter which is added to what the next co-novelist receives. Each novelist attempts to make a single novel out of the previous chapters; he endeavours to write his chapter so that the ultimate result will be coherent. To accomplish this, he requires a vision of the story as it proceeds: its characters, plot, theme, genre, and general purpose. He will try to find the meaning in the evolving creation, and an interpretation that best justifies it.

Law as Interpretation

Law as integrity

As a constructive interpreter of the preceding chapters of the law, Hercules, the superhuman judge, will espouse the best account of the concept of law. And, in Dworkin's view, that consists in what he calls 'law as integrity'. This obliges Hercules to enquire whether his interpretation of the law could form part of a coherent theory justifying the whole legal system. What is 'integrity'? Dworkin offers the following description of its important elements:

[L]aw as integrity accepts law and legal rights wholeheartedly . . . It supposes that law's constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental

way, but *by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does.* . . . It argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification.

The collective application of coercion is defensible only when a society accepts integrity as a political virtue. This enables it to justify its moral authority to exercise a monopoly of force. Integrity is also a safeguard against partiality, deceit, and corruption. It ensures that the law is conceived as a matter of principle – addressing all members of the community as equals. It is, in short, an amalgam of values which form the essence of the liberal society and the rule of law, or, as Dworkin, has now called it, ‘legality’.

Philosophy of Law

Why do we value the law? Why do we respect those societies that adhere to the law and, more importantly, celebrate their observance of those political virtues that characterize states ‘under law’? We do so, Dworkin suggests in his more recent work, because, while an efficient government is laudable, there is a greater value that is served by legality. A concern with the moral legitimacy of the law is a primary element of Dworkin’s legal philosophy. It is based, in large part, on the rather imprecise concept of ‘community’ or ‘fraternity’.

A political society that accepts integrity becomes a special form of community because it asserts its moral authority to use coercion. Integrity entails a kind of reciprocity between citizens, and an acknowledgement of the significance of their ‘associative obligation’. A community’s social practices spawn genuine obligations when it is a true, not merely a ‘bare’, community. This occurs when its members consider their obligations as special (i.e. applying specifically to the group), personal (i.e. flowing between

members), and based on the equal concern for the welfare of all. Where these four conditions are satisfied, members of a bare community acquire the obligations of a true one.

Dworkin constructs his idea of political legitimacy upon this notion of a true community. Political obligation, he argues, is an illustration of associative obligation. To generate political obligations, a community must be a true community. It is only a community that supports the ideal of integrity that can be a genuine, morally legitimate, associative community – because its choices relate to obligation rather than naked force.

Comparing the judicial function to the process of literary criticism accentuates the positive portrayal of law and the fundamental role of judges within it. And Dworkin's conception of a political community as an association of principle is a powerfully attractive one. It is a condition which few societies will achieve, but to which, one hopes, many aspire.