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Sheldon Leader

LEGAL THEORY AND THE VARIETY OF LEGAL CULTURES

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This essay begins with a consideration of two anxieties about courts that are common to the civil and common law traditions: a worry about illegitimate judicial law making, and a worry about judicial bias. It will then move to the contribution legal theories might make in dealing with these shared anxieties, with a focus on a position that draws on the two largest contestants: natural law and legal positivism. It will end with an indication of the further distance that theory needs to take us before these worries about the judiciary can be effectively tackled.

I. THE TWO ANXIETIES

The civil and common law systems both raise a question that is well known. How is it possible to combine the acknowledged fact that courts often make fresh law with the belief that the legislature is the site for law making with which democracies are most comfortable? Courts create new law as frequently as they deliver answers to questions which codes, statute and/or previous judicial interpretations of a body of norms leave open. How can the democratic suspicion of this law making capacity be given its proper place while acknowledging the undeniable fact of judicial

* Professor, School of Law, University of Essex, United Kingdom.

creativity that takes place every time a need to interpret the law is placed before the court?

This dilemma accompanies the other one indicated at the beginning: how can one identify and cope with judicial bias? The latter is more of a practical than a fundamental concern when we are dealing with straightforward corruption of the judicial office. But it becomes a more complex and elusive defect when we try to track down what can be called unintentional bias. Here we need to tease apart legitimate moral and political convictions that judges must bring to bear on many open questions of law from those moral and political beliefs that, if allowed to sway judgement, we condemn as an abuse. The hunt for judicial bias is, in its easier version, a hunt for bad faith: watching out for the judge who hides his or her moral and political objectives beneath a set of principles that appear to be neutral. The more troublesome situation, however, arises when judges are of good faith. The latter believe in all honesty that they are deploying a principle impartially as they reason towards a result, but an observer can spot the fact that despite good intentions the decision is deploying a principle that should not be brought to bear without, at the very least, being voted on by the people at large.[1]

II. CURES

A. Positivism

One popular way of guiding people through these dilemmas is proposed by legal positivism. This takes the view that moral and political impartiality within a legal system is achieved via relying on value free sources of law. That is, if we have a stable and shareable way of seeing what the existing law is, whatever else separates us in moral and political belief, then this terrain can serve as a benchmark for seeing when judges have overstepped their limits by being unduly creative, and we can then also see when bias–albeit unintentional–has crept into what they are doing. What the existing law says at present, says the positivist, must be rigorously separated from considerations of what the law ought to be in the future.

Given the anxieties that we are focused on here, it is useful to flag two variants of positivism that are relevant. One can be called a two-stage model. According to this, a properly functioning legal

1. Sheldon Leader, *Impartiality, Bias, and the Judiciary, in* READING DWORKIN CRITICALLY 241-268 (Alan Hunt ed. 1992).

system contains rules and principles giving guidance to judges enabling them to identify the existing law. They must attend to this guidance, without bringing to bear any view about what they want law to be in the future. That is a second stage activity, which must be rigorously separated from the first. If a judge allows his forward looking preferences about what future law should look like to color his perception of what the existing law says, then he is doing a particular sort of damage: he is allowing his preferences to be smuggled into what looks on the surface like a *description* of the present law. The losing party is then told that he has broken the law as it is, when in reality, says the positivist, he has broken the law that the judge would like to put in place–well after the action for which the defendant is brought before the court. The loser is, in short, being retroactively punished.

The work of HLA Hart tries to show us when this abuse happens.[2] A rule of recognition, he argues, exists in all legal systems worthy of the name. This rule reports the converging views of legal officials about where existing law is to be found: about how certain norms can be picked out from the forest of maxims, customs, and convictions we live by in society. That which is identified in this way can be stably recognised as existing law–a candidate for application in a fresh case. If it turns out that the candidature fails–that a new case is not clearly or satisfactorily covered by existing law–then the judge is, Hart argues, entitled to proceed to the next stage of adding to the body of law with a fresh decision.

We are not told by this variety of positivism what the proper scope for judicial creativity is at that next stage. Hart confines himself to the task of avoiding mystification: barring the judge from delivering a solution to what he pretends, or honestly but mistakenly believes, to be the existing law when he is actually shaping the law in the way he wants it to develop in the future. This positivist tries to offer a solution for the two anxieties with tools that yield clarity. Once we are clear about the stage at which the judge is applying existing law and the stage at which he is making fresh law then at least we are able to engage, says the positivist, in a useful debate about the proper dimensions of the judge's adventures at the second stage. Without this protocol in hand, the positivist insists, we will not be able to reach that debate because the judge will not be able to see, at any point in time, when she has identified existing law and when she is unconsciously drawing on her vision of the future.

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2. HERBERT LIONEL ADOLPHUS HART, CONCEPT OF LAW (2d ed. 1994).

A second variant of legal positivism goes further, and does so in a way that is relevant for present purposes. According to this species, the law enacted, particularly in the form of a code, is 'complete.' This does not mean that the code is complete in the sense that it already contains all answers to the questions that it may be used to answer: it is not a claim that the enacted law is normatively omniscient, containing already all answers to any possible questions put to it. It is instead a different thesis: that the enacted code already contains the answers to all open questions of law *appropriate for courts* to use as they apply the instrument. If the answer is not to be found, and a solution is nevertheless needed, then legislative amendment of enacted law is appropriate, not a change in the law introduced by judge.

This brand of legal positivism is therefore much more prescriptive about the role of courts than is the first. Judges must confine themselves to looking for existing law to apply to fresh cases, and if the code or statute does not contain the answers, then for judicial purposes the matter is finished. The code commands him or her to deliver a solution that reflects the fact that the plaintiff does not have the law on her side, and hence that the defendant cannot be made to suffer on the basis of a solution that the judge thinks would be the right one to offer. If full justice is not achieved in such a case, because people like the defendant should, for moral reasons, be held accountable for what they did, then we are told that the solution is to be delivered at another time and in another place: where the will of the people is registered.[3] Future defendants of this type can then be caught by fresh law, and if the people will a retroactive application of law to the defendant, making him guilty now for what he was not liable for back when he did what he did, then Hart tells us that we are at least remaining clear that this is what is happening.

B. Natural Law

Natural law proposes a quite distinct cure for the two anxieties we are focusing on. However, it is important to start by noticing that the natural lawyer's position takes as its point of departure a belief that is actually shared by positivists. That is, natural lawyers start with a conviction that we must rigorously distinguish existing law from the law to be shaped by man in the future. Natural lawyers do this, as do the positivists, in order to prevent

3. For a recent statement of this view, extending beyond codes to the interpretation of constitutions, *see* JEREMY WALDRON, LAW AND DISAGREEMENT (2001) *passim*.

people from being punished by rules that pretend to be existing law, but falsely so. Here, however, the means used to reach this objective are radically different. The existing law, says the natural lawyer, is at certain crucial points quite separate from anything human beings can enact. It is binding law, but is so because of the force of the values that all valid legal systems must embody, failing which they do not qualify as legal systems.[4]

The difference between these two orientations–as bulwarks against undue judicial creativity and against judicial bias–is that the positivist will allow the judge to rely on a moral, political, or economic principle that might be highly divisive within the polity–and to do so under the mantle of applying the existing law–only if that principle has been imported into the legal system by a past legal event: constitutional enactment, legislation, or previous judicial decision. If he cannot do that, then he will be changing the law as a judge–which the first but not the second species of positivist will allow. The natural lawyer, by contrast, waits on no such past enactment of positive law: a judge might bring to bear a moral principle that is strongly controversial within a particular polity, but if he can show this principle to flow from natural morality rather than a contingently existing positive moral code, he will not be altering but rather giving effect to existing law.

C. An Intermediate Theory

Both positivism and natural law carry their own frustrations when trying to work with them in order to respond to our two anxieties about courts. A general treatment of those shortcomings is not relevant here. It is, however, possible to draw on both of these traditions, and via this synthesis to find a different way of responding to the two concerns. The first point to notice in building an alternative strategy is that it is necessary to jettison the positivist injunction to the judge to confine herself to a source that will itself provide the appropriate values that apply in a given case. It is possible to rely on sources, but it is an illusion to think that these stand in front of the judge ready for inspection, independent of her views about what the law should be. The reason is that what *counts* as a source of law is itself the product of deploying moral values. For example, the judge might accept the injunction to 'follow precedent' in a common law system, but this injunction does not tell him whether to opt for recent developments in

4. For a secular example of this position, *see* LON FULLER, THE MORALITY OF LAW (rev. ed. 1969).

collateral areas of the law, or to give priority to the direct line of cases that deal with the subject matter at hand. Doing the latter might yield one result in a case, while doing the former might lead to the opposite result.[5] In the civil law tradition, deciding what the Code 'says' is a product of first deciding on the weight to give to e.g. the enactor's intentions, developments in later social conditions, etc.

We also need to revisit the claim that a piece of enacted law can be complete. If this means that the judge is not to draw on values lying outside of those that have already been enacted, then again this does not look adequate. It is a variant of the positivist mistake about sources. The completeness thesis claims that a divisive moral, political, or economic principle may well be part of the existing law, but only if they are first enacted into the system by an authoritative step taken by the legislature, in the form of, say, a code. That simply reproduces the view that what counts as part of the code can be identified in a value free way. If it is true that there is no way of construing a source, such as legal precedent without deciding, in the light of moral or political principle, what scope and weight to give to different branches of precedent, then the assignment of that scope and weight must come from values that lie outside of any given set of precedents. The same point applies to a code. A code cannot generate from within itself the values that will guide those interpreting it when they must decide what weight to give to each of its features. If it tries to do this–by giving a schedule of answers to all questions about its proper mode of interpretation–there must be a prior commitment of the interpreter to accept this protocol as binding: that is itself a commitment that must come from outside of the code itself.

This is not just a dry point of conceptual housekeeping. It can color judicial attitudes of deference to any given code. Why should any particular judge accept the injunction to stay within the values already announced in the code, and to rely on legislative amendment of that code if she is not happy with what she finds? Why should she not take it on herself to supply what she is convinced is missing, and would make the code better? Courts are often willing and indeed should override the letter *and* spirit of any single piece of enacted law in order to achieve a larger coherence, as well as a result that corresponds to the best normative position that the judiciary can in good faith deploy.

This last point is central to one of the better-known theorists occupying this intermediate position, Ronald Dworkin.

5. For an example, *see*, R v Lemon (1979) 1 All ER 898.

Dworkin's view is particularly worth exploring–both for its merits and its shortcomings–as helping to see what common and civil law traditions can do to cope with the two anxieties about judicial power.

III. DWORKIN'S POSITION

When a judge reaches an answer to open question of law, he or she is properly confined to 'finding' appropriate answers within the existing law, argues Dworkin. But this not same sense of 'finding' an answer as is deployed by the natural lawyer, nor by the species of positivist who believes that the enacted law is complete in the sense identified above.

Some initial definitions will help here in order to pin down what is meant by judges finding rather than creating law:

Settled law: This is a collection of valid statements of law, as in the report that a given system provides 1, protection against unwarranted use of trade secrets; 2, against publication of an author's work without his or her consent; 3, against circulation of photographic images of someone; and finally 4, that it provides a general right to privacy.[6] These examples divide into two types: explicit and implicit propositions. Imagine that the explicit propositions are 1 through 3, but not 4.

The first three statements are true because of enactment by an authoritative source: judges in previous cases, legislation, or an enacted code. The statement that there is a right to privacy within the settled law, by way of contrast, is not true because of any specific enactment. It is instead a right that has emerged over time. It stands to the explicitly enacted rights as a genus stands in relation to distinct species. The latter have enough in common to allow them to be grouped together into a generic class. The genus contains elements that enable us to understand each of the separate species more comprehensively and effectively than is possible if each species is grasped separately. Thus, Warren and Brandeis offered their famous demonstration that the right to privacy formed part of the existing law by showing that it emerged from the more narrowly defined range of explicit rights in the set made up *inter alia* of rights 1 through 3. To posit the existence of the right to privacy allowed them to understand and to justify a range of explicit rights, even if it is not formally announced by the courts or legislature or constitution.

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6. This is a well known set of examples drawn from the analysis of the right to privacy by Warren and Brandeis. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

Implicit propositions of law are built up out of earlier legal events, which enact the more narrowly defined norms in the system. These implicit elements allow us to link a range of differently grounded answers to past questions of law and also to provide a generic category or principle under which a fresh case can be subsumed.[7]

Finding and making law by judges: Judges can make law in the course of their decisions in one of two ways: they might add to the explicit elements in the system, adding, for example, an extension or a narrowing to the coverage or a given rule. This happens frequently and routinely. Or, they might add to the body of implicit propositions within the system. This is very rare, but can and does happen.

Judges can find law in two corresponding senses: they might find an existing explicit norm; or they might 'find' an implicit norm. In doing the latter a judge may conclude that while there is no explicit law governing a new situation, there *is* implicit law governing it because the generic principles that make most sense of the previous explicit norms lead coherently to this situation being covered as well. It should be noted that when a judge finds the law in this second sense he or she is constructing a rationale for previous explicit norms *post hoc*: that is, a fresh and more comprehensive principle is substituted for the one which in fact grounded the particular, more narrowly grounded norm.

A. Dworkin's Argument

A way of rendering Dworkin's position is to say that judges may add to the body of explicit law, but in doing so they should stay faithful to the body of implicit law. Within this constraint, the judge is entitled to extend the coverage of implicit law on grounds of coherence. If, for example, he or she can unify the solutions from past enacted law under the mantle of a right to privacy, then even if not expressed that way before and even if earlier law was actually grounded on different principles, the law is properly extended in this way.

How do a judge's moral convictions fit into this picture? If the building up of an implicit part of the law was simply a matter of reporting what explicit law says, and then of reporting the areas in

7. Another example, drawn from civil law, could be the emergence or liability for unjust enrichment, implicitly drawn from decisions on a provision in the French civil code requiring the restoring of money 'paid when no debt was owing.'

which distinct branches of that law overlap such that the new implicit principle is a notional lowest common denominator, then there is no room for moral judgement. It is a matter of description, however complex that description might be. But this misconstrues the demands of this approach. In constructing a plausible implicit part of the law, there are various ways in which the construction can happen. If we go back to the right to privacy, the area of overlap between the explicit parts of the law identified by Warren and Brandeis converges on the proposition that one has, as they put it, a "right to be left alone." But there is a good deal more that has to be decided about the nature of the entitlement to be left alone before it can function as an implicit part of the system. We have to know if it is a right that can be overridden relatively easily by, say, an employer who wants to tap telephones because he wants to know if personnel have critical attitudes toward management that could make a difference to corporate performance, or if he can only legitimately tap those telephones if he reasonably suspects some graver harm, such as employee frauds. In other words, decisions have to be made about the character of the right: about its relative weight against competing rights; about the character of the interests it is best suited to protect; about its availability against interference by private as well as public bodies; etc.

These characterising decisions are themselves moral and political. They are not dictated by the character of separate parts of explicit law, and cannot be extracted by seeing where those separate simply overlap. Moral values have to be brought to bear. They are choices that cannot flatly contradict the values that explicit law is grounded on, but they can fill out those values in ways that are unexpected by the authors of past legislation, constitutions, or legal decisions. They must, as Dworkin puts it, 'fit.'[8]

This intermediate position, and the form it takes in Dworkin's theory, would easily find himself in the shoes of the civilian jurist as depicted by Julio Cueto-Rua, "...every case should be considered as an example of a class; the class, species of genus; the genus as a species of another genus of a hither degree of generality; and so on until very general and basic concepts are finally defined."[9]

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8. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986) *passim*.

9. Julio C. Cueto-Rua, *The Future of the Civil Law*, 37 LA. L. REV. 646, 647 (1997).

B. Critique

How well has intermediate theoretical position responded to the two anxieties that our systems share: the concern to place limits on judicial law making, and the concern to achieve moral and political impartiality? Insofar as Civil Law holds to belief in the completeness of Codes in the form examined–a preference for legislative amendment over judicial development of the law–then this is a constraint that Dworkin would be likely to reject. So, it seems, would many civilians. But how far are they willing to go in Dworkin's direction? The ideal judge for Dworkin legitimately reaches across all elements of enacted law, all codes and all case law, to achieve harmony between them. The guardian of the keystone principles, on this approach, should be the judiciary. This seems to complement Cueto-Rua's argument that the civilian approach leads the system to keep pushing for coherence across domains of law "...until very general and basic concepts are finally defined." Such coherence is not, and cannot be, in the ultimate control of legislatures.

Such a conclusion might raise difficulties about democracy in a particular way. Concerns about the undemocratic nature of judicial power arise from two related directions. One has to do with the problem of majority rule and minority rights, asking how far it is legitimate to frustrate the former in order to protect the latter. Linked to this, however, is another less well publicised problem that is relevant to the issues dealt with in this essay: what weight is to be given to an understanding of law as an expression of will and law as an instantiation of principle?

To rely on the *will* of the people when interpreting the law is to accept that 'this is the law because they want it this way and the fact that they have expressed their preference deserves respect.' To rely on principle is to reach for results that are due respect not because the fit with the wishes of a particular body, but because good convincing reasons, independent of those wishes, can be given to show that this solution is defensible. Dworkin is inclined to allow principle to have a dominant role in the polity.

That dominant role makes sense when we are dealing with single fundamental values, and asking about their coherent extension. It is more of a problem when we have to assign priorities to–or otherwise combine–competing values, all *prima facie* fundamental and each backed with competing fundamental rights. Here, the relevant considerations unfold in more complex ways. Courts are best placed to deal with these competing rights when the exercise of one will have a very damaging effect on one

and will make a marginal impact on the other. For example, exercising ones right to free speech under an opponent's bedroom window seems intuitively to call for an adjustment of the former in order to do less damage to the latter.

However, there are some situations where both of the right holders can have their backs to the wall: one or the other must win, leaving the loser with little room for an alternative way of exercising their right. The winner takes all. The parties find themselves in this situation if, for example, a small business is in financial crisis, and has to work on Sundays: can it legitimately require its employees to work those days when their church explicitly requires Sunday attendance? Can an employee be put in this position when he or she does not have a realistic prospect of finding an alternative job? If someone's only prospect of proving her partner's violence is to adduce private correspondence in court, should the right to privacy give way to the right to bodily safety? If a doctor has to choose between killing one of two Siamese twins or letting both die, how should he proceed?

Here it may be that the clash of values is close enough that we need a decision that is respected just because it has been rendered in good faith, and not because we happen to be convinced by the strength of the principles adduced in support of it. It may be too close a call for the latter approach. Of course, these clashes may first surface in front of a court, and the court must do its best to decide given the urgency of the situation. But it would be better if the priorities between basic rights here could be guided at least by principles given to us by other law making organs: organs such as legislatures where law as an expression of will finds a greater place. *Ultimate* clashes of value, such as here, should better be proactively dealt with–wherever realistic to do so–by legislatures.

IV. CONCLUSION

The civil and common law systems share worries about judicial power and seem to entertain similar solutions to those worries. Each is legitimately frustrated by the proposals that natural law or legal positivism offer. Both can potentially make use of the intermediate theory sketched here. Civilian and common lawyers, in their daily work, put a challenge to that theory: they force it to answer the large questions about the division of powers between judiciary and legislature via the more narrow and detailed questions that arise when basic rights compete with one another in concrete cases. The common need to get these

answers right overshadows anything that might separate the two systems.