The Legal Theory of Ethical Positivism

Tom D. Campbell

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To Beth,
who won't read it,
and Emily,
who just might,
with love

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Contents

Series Preface

The objective of the Dartmouth Series in Applied Legal Philosophy is to publish work which adopts a theoretical approach to the study of particular areas or aspects of law or deals with general theories of law in a way which focuses on issues of practical moral and political concern in specific legal contexts.

In recent years there has been an encouraging tendency for legal philosophers to utilise detailed knowledge of the substance and practicalities of law and a noteworthy development in the theoretical sophistication of much legal research. The series seeks to encourage these trends and to make available studies in law which are both genuinely philosophical in approach and at the same time based on appropriate legal knowledge and directed towards issues in the criticism and reform of actual laws and legal systems.

The series includes studies of all the main areas of law, presented in a manner which relates to the concerns of specialist legal academics and practitioners. Each book makes an original contribution to an area of legal study while being comprehensible to those engaged in a wide variety of disciplines. Their legal content is principally Anglo-American, but a wide-ranging comparative approach is encouraged and authors are drawn from a variety of jurisdictions.

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Preface and Acknowledgements

This book started out as a project designed to provide a brief exposition of Legal Positivism as a normative political philosophy which was to be followed by a series of applications within different areas of law exploring the advantages and disadvantages of channelling governmental power through the formulation and administration of specific rules. Owing to the breadth of the task it has turned out to be more substantially a book concerned with the general theory of 'Ethical Positivism', as I have named that aspect of the positivist tradition which presents moral justifications for a system of government through positive rules and requires adherence to an ethics of positivism on the part of legislators, administrators, judges and citizens.

The illustrative applications which remain concentrate on various topics concerning freedom of expression so that a significant portion of the book focusses on free speech as a particularly challenging area for a political philosophy which opposes the imposition of abstract rights through judicial power and favours the articulation of concrete rights through democratic debate and the enactments of accountable legislatures. Since it is part of the argument of the book that the formulation of acceptably specific rules requires clarity and decisiveness in the selection of priority purposes, the chapters on free speech involve discussion of substantial issues which go beyond illustrating the implications of Ethical Positivism and are of independent interest in terms of the analysis and justification of law with respect to freedom of expression.

Even so, the discussion of Ethical Positivism remains rather sketchy, at least with respect to the justifying arguments which would be required to render the theory thoroughly convincing. The reader is advised to expect the contextual staking out of a position rather than its comprehensive vindication. I believe that this largely expository project has considerable significance as a way of reconciling the most persuasive ideological critiques of legalism with a constructive approach to law reform in a postmodern environment. At any rate, it

has proved a formidable enough task to outline an approach which deconstructs the standard caricatures of Legal Positivism as inherently insensitive, inegalitarian and impractical and identifies an ideal of a fallible but legitimate legal process as a necessary ingredient of progressive political endeavour.

My debts in this enterprise arise principally from the constant stimulation of colleagues and students at Glasgow University and the Australian National University and generous leave granted by both institutions. I also acknowledge the substantial assistance provided by the Australian Research Council. In personal and intellectual terms I owe much to the writings, conversations and enthusiasms of Neil MacCormick and Frederick Schauer. They are not, however, to be implicated in the outcome.

This preface also gives me the opportunity to mention the cheerful and trusting involvement of John Irwin who, as the managing director of Dartmouth Publishing Company, adventurously took on the Applied Legal Philosophy series and has continued to provide unobtrusive support and encouragement. The community of legal philosophers owes him a great deal.

It is, however, my wife, Beth Campbell, who has, more than anyone else, made it all seem worthwhile.

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Canberra

1 Introducing Ethical Positivism

Introduction

In legal theory, Legal Positivism is generally taken to be the view that the concept of law can be elucidated without reference to morality, and that it is the duty of judges to determine the content of and apply the law without recourse to moral judgments. To many people, lawyers and laypersons alike, this seems outrageous. If the law is not deeply imbued with our moral convictions, how can it command our respect? If law can be law without being moral then our legal obligations can be no more than coercion. Nor does it seem that the actual operations of law are intelligible unless they are brought into some sort of supportive relationship to at least part of the morality of the community in question.[1] Legal Positivism must, therefore, be mistaken in theory and perhaps immoral in practice.[2]

It is the thesis of this book that the belief in the amoralism (and certainly the immoralism) of Legal Positivism is profoundly mistaken. For while it is correct to say that Positivism insists on the practical importance of the distinction between morality and law and equally correct to say that Positivism holds that judges should not themselves normally make moral judgments in the course of their judicial activities, these positions are commended on the basis of foundational moral views about what law and politics should be all about. My purpose is to bring to the fore these ethical aspects of Legal Positivism, to defend them against philosophical and political objections and to illustrate some of their implications in relation to human rights and, more particularly, freedom of expression.[3]

'Ethical Positivism' is the label chosen to identify the sort of theory that centres on the ethical functions and prerequisities of positivist models of law. The legal theory of Ethical Positivism (hereafter LEP) is not an analytical view about the semantics of 'law' or the deep meaning of legal discourse, nor is it a descriptive/explanatory theory about the best way to understand law and its social functions. Rather,

LEP is a moral theory about the exercise of political power which it views as the activity of seeking to control and coordinate in a morally defensible manner the conduct of large numbers of people. The particular focus of LEP within political philosophy is the proper modus operandi of the state as the main institution through which political power is exercised in the modern world. The framework for its analysis is a discussion of the acceptable form of the organised use of collective power over a whole society. LEP is thus essentially a critical (justificatory/condemnatory) theory of the state and contemporary political process.

In brief and highly simplified summary, LEP presents an aspirational model of law according to which it is a presumptive condition of the legitimacy of governments that they function through the medium of specific rules capable of being identified and applied by citizens and officials without recourse to contentious personal or group political presuppositions, beliefs and commitments. LEP depends both on the analytical thesis that law can be conceptually, argumentatively and operationally separated from morality and on the sociological thesis that actual legal systems can approximate to a situation where their laws are administered in a rule-deferential manner. However, the organising and motivating force of LEP is a substantive political view about the moral significance of the positivist vision of what a good legal system looks like and how it contributes to a just, effective and democratic polity.

LEP is a broad approach within legal theory. It covers a variety of ways of unpacking the political ideal that government should be conducted through the creation and (separate) application of specific and objectively operable local rules. LEP emphasises that it should be the task of courts both to express and to limit the legitimated political will of a community via the impartial implementation of its rule-formulated decisions. Courts ought to assist in maximising the effectiveness of constitutionally legitimate government activity but must do so in a way which facilitates control of those failures and abuses which it is part of the function of the positivist model to identify and check. LEP is, therefore, a highly political theory of law, albeit one which concentrates on the legal contribution to political objectives which flow from the form and process of law, rather than its specific contents.

The Ethics of Positivism

The label 'Ethical Positivism' signals that LEP goes beyond what is sometimes called Institutional or Normative Positivism, the view that law consists of a system of rules, where rules are understood in

cognitive and institutional terms rather than as reducible to near brute facts, such as sanctions and commands.[4] The Ethical Positivist endorses the basic ontology of rules which characterises Normative Positivism but argues for this view of law on prescriptive rather than philosophical grounds.

In the terminology of contemporary theory, LEP subscribes to the 'separability thesis', namely the view that law and morality *can* be separated (in that, for instance, legal decisions need not draw on moral premisses) but rejects the 'separation thesis', if this is construed as the claim that law and morals actually are separate, for LEP acknowledges that this is not generally the case.[5] Rather, LEP represents what might be called the 'prescriptive separation thesis' according to which the identification and application of law ought to be kept as separate as possible from the moral judgments which go into the making of law. This is to adopt as a prescription, rather than an analysis, the contention of Joseph Raz that the tests for determining the existence and content of a law should be value-free.[6] It goes further than H.L.A. Hart, whose rule of recognition, which sets out the criteria for identifying first order legal rules, can include moral criteria, a position which has been described by W.J.Waluchow as 'inclusive legal positivism'[7] and by Hart himself as 'soft positivism'.[8] However, there is no actual disagreement here as Hart's position is a descriptive one whereas LEP is a prescriptive theory which does not deny that actual legal systems routinely permit the moral judgments of judges a major role in legal process.

The term 'ethical' is preferred to 'moral' because it better connotes a system of second order moral reasons which have bearing on the design of institutionalised practices and the ways in which those entrusted with institutional roles conduct themselves. Somewhat arbitrarily, I take the term 'ethical' to point us towards the appraisal of complex institutional patterns and roles, which have to be seen largely in terms of their instrumentality for a range of morally significant human objectives, in contrast to the 'morality' of more direct one to one social interactions. The label 'Ethical Positivism' indicates that law is to be valued as an institutionalised way of doing things which serves important societal purposes.

Further, it is part of the theory that the effective accomplishment of these purposes calls for ethical conduct on the part of participants in their various roles, as judge, as lawyer, as policeman and as citizen, a matter of role morality as distinct from personal morality.[9] This ethical conduct will standardly involve role occupants presumptively subjugating their own moral beliefs about what would be substantively good law in favour of their moral commitment to obeying formally 'good' law. This requires participating in and fostering a community of understanding, in the legal profession and beyond,

which embodies certain types of relatively 'objective' standard as to how legal disputes are to be settled and what counts as a sound legal argument. The main thrust of this ethic is a subordination of personal views to the morality of the role which recognises the moral priority of the overall objectives of the system and the duties of the individual as performing a part within that system.[10]

A sub-theme is that, when the pure positivist model is inapplicable or impracticable, or where the legal system in question falls short of the positivist ideal, courts can properly be viewed as having a certain moral authority which derives from their institutionalised impartiality with respect to the parties in dispute and, to a lesser extent, the interest groups whose political differences are manifest in litigation. The impartiality of courts is very limited in relation to value disputes, but to the extent that they are not parties to the conflicts that they are required to resolve courts have a degree of moral legitimacy which can make them appropriate sources of minor changes in the substance of law, provided that these law-making activities are subject to legislative review with respect to their precedential force.[11]

That the conjunction of 'ethical' with 'positivism' is a somewhat jarring combination is a tribute to the extent to which Natural Law theory has come to be identified with the moral approach to law.[12] Indeed, it is a considerable propaganda blessing for Natural Law theory that it is easy to pillory Legal Positivism as unfeeling and insensitive on account of its efforts to distance law from morality. Assumptions of the amoralism, even the immorality, of Legal Positivism persist despite the evident value commitments of Legal Positivists from Thomas Hobbes to Jeremy Bentham and John Austin to H.L.A. Hart, Neil MacCormick and Joseph Raz.[13] In this context, the apparent oxymoron, 'Ethical Positivism', has the heuristic merit of expressing in an arresting manner the insight that the justifying grounds of Legal Positivism can be viewed as primarily ethical, rather than analytical, descriptive or explanatory.

In so far as classic Legal Positivism has moral associations these are, of course, generally of a utilitarian variety. Legal Positivists of the English-speaking world trace their ancestry to Thomas Hobbes, who embraced the absolutist state as a way to maximise the fulfilment of desire, particularly pleasure, and minimise that to which people are averse, particularly death.[14] The greatest Legal Positivist of them all, Jeremy Bentham, and his follower John Austin, were part of the reformist movement, Philosophical Radicalism, which taught that law and its sanctions have a particularly important role in directing the selfish actions of individuals towards outcomes which serve the greatest happiness of the greatest number.[15]

While such utilitarian explications of the term 'ethical' in 'Ethical Positivism' draw attention to the hoped for beneficial consequences

of positive law in the sort of institutional terms that characterise LEP, it is as well at the outset to emphasise that the theory is not tightly bound to such a limited theory as Benthamite utilitarianism. As we will see, the purposes which law may serve are by no means confined to the minimisation of pain (harm) and are rarely extended as far as the maximisation of human happiness (benefit). Other, non-hedonistic, objectives may be involved, such as distributive justice and individual autonomy (whether or not these bring happiness or freedom from harm). Legal process may also be valued simply as fair process, independent of its outcomes. LEP is morally eclectic and politically tolerant. One attraction of LEP as an aspirational model of law is that it can be taken to serve the values of a wide range of particular philosophies, individualistic, communitarian, hedonistic or pluralist.

Certainly, there is an historical association between Ethical Positivism and individualistic or libertarian ideologies in which the self-sufficient individual is all-important and the activities of states are to be kept to the law-and-order minimum. However, Legal Positivism is not tied to the ideology of its origins. Law as a system of rules can serve collective as well as individual ends, and the individuals involved may be constituted in large measure by their social roles, group affiliations and societal environment without undermining the assumptions of LEP. Indeed, respecting the purposes of sovereigns as the source of legal authority can have a distinctly holistic ring, particularly where the sovereign is conceived in democratic terms.[16]

In general, the sovereign power aspect of Legal Positivism carries few of the connotations of those liberal forms of the 'rule of law' which present law as a morally neutral framework within which autonomously constituted individuals are free to pursue their private objectives under the umbrella of a non-partisan state. An element of this model will exist and may be welcome to the extent that law embodies rules of mutual convenience which aid social cooperation, but, in most areas of morally justified legal restraint and permissibility, law takes some sort of stand on the allowable range of individual and group activities. What sort of stand should be taken is, for LEP, an open question which is normally best left for independent political determination outside the legal system.

A Positivism of Rules

It is central to LEP that a system of law ought to be a system of rules.[17] Further, the rules in question must be 'real' rules, that is rules which have, in Raz's term, 'exclusionary force' in that they function

in decision making partly by excluding considerations which are not indicated by the rule in question, even if such considerations would otherwise have been relevant.[18] To adopt the metaphor popularised by Dworkin in relation to rights, for LEP, rules are trumps. No mere 'rules-of-thumb' or general guidelines to aid decision makers will suffice for the decisive role of rules within the state.[19] In addition, if they are to fulfil this role, rules must have considerable specificity, clarity and mutual consistency.[20] While rules in a positivist system must be 'general' in the sense of universal as opposed to particular (referring to classes of person and events rather than individual persons and instances), they need not be general in the sense of applying to all persons and must not be general in the sense of being vague or unspecific. Positivistic rules, as we shall see, are as specific as is necessary to capture the perhaps controversial political choices relevant to the conduct in question and must be at a level of abstraction which makes them effective instruments for their social purposes and, at the same time, enables citizens to assess the fairness of the distinctions drawn between types of person and conduct in question. The prime purpose or function of law is to facilitate political choice. The core limitation on legal subservience to political decision making is that political authority must be mediated by such rules and not simply a matter of ad hoc particularistic decrees or discretions.

We will see that there are a number of powerful normative arguments which support LEP's commitment to rules. Many of these are based on the utility of rules in relation to the control and coordination of conduct. Less frequently noted is that rule format is also appropriate for expressing and hence for assessing proposals for morally justified limitations on human freedom in the promotion of welfare and justice. Rules are often opposed to principles, but in fact rules are the best expression of principled decision making. By expressing the maxim of the action that is required, prohibited or empowered, rules encourage rational, in the sense of reasoned, decision making in a form which exhibits the moral issues at stake, namely the desirability of the *type* of conduct in question.[21]

Rules also have a role to play in facilitating meaningful democratic choice by presenting precise choices in an intelligible form. They are also a significant ingredient in any system which seeks to combat the majoritarian difficulties which concern such classic democratic theorists as Rousseau and John Stuart Mill.[22] Finally, rules serve to provide a structure for such community life as is possible in large and complex societies.[23]

For these reasons LEP affirms the centrality of rules in relation to the legitimacy of claims to impose mandatory requirements on the members of a society. This entails that courts should ideally be limited to the application of rules politically arrived at in other fora.

However, LEP is not a pure Formalism which reads laws without regard to their purposes, although it is a foundational tenet of the theory that rule application can and ought to be relatively detached from the ulterior purposes of such rules, particularly if this takes the adjudicator beyond what is apparent from a contextual understanding of the rules themselves. In particular, LEP is opposed to the Formalist pretence of deducing legal decisions from broad abstract concepts, such as 'coercion', 'contract' or 'title'. The move from broad to specific requirements involves a series of moral and political choices, not a mechanical extrapolation from key concepts. Moreover, a rule cannot be interpreted without an understanding of the situations to which the rule is intended to apply and the general nature of the political choice that was involved in its formulation or retention.

LEP is, of course, in substantial conflict with the sort of prescriptive Legal Realism that seeks to encourage acceptable outcomes from legal process by a pragmatic judicial assessment of their consequences without deferring to the well-formulated prior decisions of rule-creating authorities. LEP requires citizens and adjudicators to interpret and respect laws as carefully worded formulations of specific political choices, representing one among the many political determinations that could be made on the issues in question within that community. Law courts should not be simply arenas for the determination of an outcome that the participants deem socially or economically desirable. LEP does not deny the reality that specific rules are often absent or ignored, or that there are systems in which judges are encouraged to take rules as no more than tentative guidelines, but such matters are to be portrayed as unwarranted departures from the positivist model and deplored as unethical dereliction of legislative and judicial duty.

The desirability of the basic positivist model is enhanced by conjunction with democratic institutions, such as elected legislatures and freedom of the media. Institutionalised democracy is crucially dependent on the ideal of government through rules, for rules provide an effective focus for making ethical choices about legitimate coercion and make it feasible to exercise some control over the power of officials within democratically approved boundaries. However, the merits of the model are not entirely extinguished in non-democratic systems. It is accepted that the cumulative advantages of government through rules are morally defeasible, particularly where the substance of legislation is so evil as to outweigh the benefits of the legalism of the system in question. LEP generates strong but overrideable moral presumptions in favour of the legitimacy of governments which operate through specific rules impartially administered. Moreover, LEP, being concerned primarily with the form rather than the content of ruling, is compatible with a wide range of sub-

stantive political philosophies, although, as we shall see, the values which underlie its appeal do have direct relevance to material as well as formal matters. LEP has, therefore, considerable potential as a consensual framework for law makers as well as law applicators. In particular, forms of both Rights Theory and Economic Analysis of Law can be tied into the positivistic model without serious modification, provided that the rights or the economic assessments are determined by legislators and not by courts.

In other ways also, LEP is not a complete political philosophy, for it allows that there are more basic sources of legitimacy, such as the consent of the governed and the pursuit of the general good (incorporating public and individual goods) which may legitimate at least some governments' actions which do not conform to the positivist model. However, many elements of the justification of government through rules themselves draw on notions of consent and the common good, so that there is no simple opposition between rule through positive law and these, more fundamental, ideals.

The values on which LEP draws include those traditionally associated with the idea of rule of law:[24] liberty, effectiveness, systematic allocation of power and at least the potential for fairness in the distribution of benefits and burdens. However, the positivist version of 'the rule of law' in terms of visibly enacted empirically applicable and suitably specific rules relates to other values with a more evident social dimension, such as cooperation, community, non-discrimination and equality of welfare.

The rationales for government through specific rules are, in combination, sufficiently powerful to make approximation to the positivist model a condition of government legitimacy, such that serious and consistent departures from the model may serve to delegitimate governments, so depriving them of any justified authority they might otherwise possess. In this way LEP can be as radically destabilising as any anarchist critique. Ultimately, such moral judgments involve a balancing of factors which cannot be reduced to a rigid formula. Nevertheless, we may reasonably contend that LEP sets out a model which is a necessary ingredient of an acceptably democratic system and a mitigating aspect of non-democratic regimes.

Some Implications of Ethical Positivism

The practical import of LEP is explored as the analysis of the book unfolds, but it may be helpful at this stage to mention just some of the political implications of the approach.

First, LEP, especially in its democratic mode, has a preference for statute law over common law as better adapted to expressing current

political choices in a positivist manner, while accepting the need for clarification of statutory enactments and sometimes delegated legislative authority by precedent-creating judicial decision. Established common law systems can develop acceptable positivist rules, in their (often covert) creative law-making mode, but as vehicles of legal development they are broadly undemocratic and tend to breed confusion through the indeterminacy which derives from loose analogical reasoning under whose guise judicial legislation normally takes place.[25]

Second, LEP is opposed to the extensive use of judicial or administrative discretion directed only by general standards. For instance, it argues that the alleged benefits of inserting 'moral' escape clauses relating to such matters as 'unconscionability' can never be more than peripheral in an acceptable system of commercial law.[26] On the other hand, we will see that LEP favours that positive law should be couched at a level of generality which matches the justified purposes of government, so that judicial reasoning must involve the interpretation of rules in the light of their overt and publicly stated purposes.

Third, LEP is hostile to Alternative Dispute Resolution where this involves imposing decisions outside a framework of specific rules and is thought to dispense with the need for law as a social regulator. This does not imply that the methods of law are always to be preferred in settling conflicts. Indeed, law is often a second-best strategy to be applied where agreements cannot be achieved by other means. It is where coercively imposed mandatory decisions are involved that Alternative Dispute Resolution is suspect as potentially oppressive and unprincipled.[27]

Fourth, LEP rejects constitutional arrangements whereby court-administered human or fundamental rights are used as a higher locus of power than the electoral and representative institutions within modern democratic politics. This is not because LEP is hostile to the idea of basic human values which ought to be respected in all systems, but because it declines to give the power to define the content of fundamental rights to persons who are not accountable for what are in effect major legislative decisions.[28]

These apparently conservative points do not depend on any light dismissal of evidence of the limited success of government through law in combating the dominant prejudices, biases and oppressions at work in all societies. Indeed, LEP can be seen as a framework for the powerful critiques of false claims to political and legal objectivity. However, its modest but important claim is that, given the appropriate political and legal culture, specific rule governance can have an important role to play in moving societies towards the attainment of general prosperity, effective humanity and social justice. It follows

that, while Legal Positivism in general has been the whipping-boy of many communitarian, socialist and feminist theorists, it can be argued that LEP is better adapted to serving important aspects of collectivist, egalitarian and humanitarian ends than available alternatives. There may be Socialist Positivists and Feminist Positivists as well as Libertarian ones.[29]

The Scheme of the Book

The legal theory of Ethical Positivism is expounded and defended in the first six chapters. Following the general overview presented here, Chapter 2 sets out the context of the theory through an analysis of the intractable problem of dealing with inherent danger of establishing governments that are strong enough to deliver effectively the benefits which legitimate the existence of states, a problem which is described as 'the tragic paradox of politics'. Chapter 3 carries this through into a consideration of the nature and functions of rules and their role in ameliorating the practical detriments arising from the paradox of politics. Chapter 4 uses the preceding analysis to develop and defend LEP in the context of current legal theory, preparing the way for Chapter 5, which concerns the ethics of lawyering, and Chapter 6, which deals with the proper limits of interpretation in judging, a topic which is central for establishing the plausibility and practicalities of LEP in the processes of rule identification, rule following and rule application, including the vexed matter of how LEP can respond to second-best situations in which there are insufficient or inadequately specific authoritative rules.

Chapters 7 to 9 are more applied. They illustrate and commend LEP through an examination of various approaches to the legal regulation of communication, with particular reference to defamation. These chapters on freedom of expression have their own intrinsic interest and objectives, but they also serve to indicate the practical significance and feasibility of LEP.

Overall, no more is claimed for the book than that it makes explicit and plausible an approach in legal theory which may give a sense of direction to those who are persuaded by the prevalent criticisms of conventional Legal Positivism, which point to its unwarranted pretensions and traditional ideological biases, but remain convinced that rule-centred law reform is still a worthwhile and important goal in any democratic polity that is serious about countering injustice and inefficiency.

Notes

1 With variations in emphasis, these arguments may be found in Finnis (1980), Detmold (1984) and Beyleveld and Brownsword (1986).

2 The immorality argument relates to the alleged affinity of Positivism with unconditional obedience to evil regimes. The classic dispute in Fuller (1958) and Hart (1957–58) has been revived in Dyzenhaus (1991).

3 See Campbell (1988a). In writing of 'Ethical Positivism' I do not imply that there is a readily identifiable and cohesive school of such theorists. Rather, the position is constructed from themes and aspects within both historical and contemporary authors. The nearest approximations to the position I adopt are some recent essays by Neil MacCormick, particularly MacCormick (1989) and elements of Frederick Schauer's 'presumptive positivism', in Schauer (1991). Schauer notes that normative issues have always been one aspect of Legal Positivism: 'For generations, legal theorists have been debating the conceptual validity, descriptive accuracy, and normative desirability of a perspective on law known as *positivism*, which under one view, is the systematic embodiment of a rule-based perspective on normative systems' (p.197). In commending his account of the role of rules in legal decision making, Schauer notes that 'If this normatively appealing picture of the role of rules is also descriptively accurate for many legal systems, it provides for us a new way of looking at an old issue' (p.197). Conversely, Alexy (1989b, p.169) notes that the necessary connection of law and morals can be interpreted as a normative argument.

4 Thus MacCormick and Weinberger (1984).

5 For this terminology, see Coleman (1982a) and (1989).

6 Raz (1985, pp.39–40).

7 Waluchow (1994, p.4). Waluchow uses 'exclusive legal positivism' for the view that 'excludes morality from the logically or conceptually possible grounds for determining the existence or content of valid law'.

8 Hart (1961, 2nd edn, 1994 p.250).

9 On role morality, see Emmett (1966) and Downie (1971).

10 See Chapter 5.

11 Adam Smith erects an entire moral and legal theory on the limited idea of impartiality as non-involvement in the dispute under consideration. See Smith (1976).

12 Similar paradoxical terminology is to be found in MacCormick (1985), the general drift of which I applaud. However, his thesis differs from mine to the extent that he is centrally concerned with giving moral reasons for substantive law not embodying too much of the dominant social morality, a position he calls 'moral disestablishmentarianism'.

13 This may arise from the confusion of Legal Positivism with Philosophical Positivism, the view that all knowledge is empirical in its basis and that moral evaluations, being non-empirical, do not give rise to knowledge. An extreme version of Philosophical Positivism is Logical Positivism (see Ayer, 1936). Most Legal Positivists have not been Philosophical Positivists, but see Lee (1989). In terms of the classical Positivists, Hobbes is most evidently embedded in political philosophy: see Boyle (1987). A similar interpretation of Hart is given in Simmonds (1993, p.154) with respect to the idea that Hart identifies as the most 'important' features of law those relating to security.

14 Hobbes (1990, Part I, Chapter 6).

15 The resultant artificial harmony of interests is a basic theme of the Philosophical Radicals, including James Mill's theory of democracy. See Mill (1821).

16 On this theme, see Campbell (1983), especially Chapter 6.

17 In what follows I adapt Hart's analysis of a legal system and distinguish primary rules of conduct and secondary rules relating to the recognition, alteration and interpretation of first order rules (Hart, 1961).

18 Raz (1975, pp.35–45, 73–6).

19 For 'rules-of-thumb', see Schauer (1991) and Alexander and Sherwin (1994).

20 In this, as in some other respects, LEP echoes Fuller (1969) but does not take up Fuller's famous thesis that formal legality is necessarily productive of substantive justice.

21 For this essentially Kantian approach in relation to law, see Lamont (1981).

22 Rousseau (1963) and Mill (1910).

23 Here I adopt the analysis of Durkheim (1933) in relation to complex societies.

24 An example is the 'thin' model of the rule of law put forward by Summers (1992, p.213):

> Citizens ought to be governed, but only by persons duly authorized by law to govern, *and* citizens ought to be governed only in accordance with precedents, statutes and other forms of law all of which ought to be reduced to rules that are:
> (1) general
> (2) determinate and clear
> (3) applicable to official and subject alike (as appropriate)
> (4) public
> (5) constant through time
> (6) uniform within the jurisdiction
> (7) free of conflict with other rules
> (8) susceptible of compliance.

However, Summers takes all these standards to be subject to the discretionary duty of the judge to have regard to equity at the point of application. Unfortunately, this qualification undermines the normal rationale of the cluster of requirements, namely to promote the predictability of official coercion. See Waldron (1989).

25 For a radically opposed view, see Allan (1993).

26 Kronman (1980) rightly points out that such concepts invite decisions based on background values such as distributive justice.

27 See Fiss (1984) and Brunet (1987).

28 See Chapter 7.

29 See Chapter 10.

2 The Tragic Paradox of Politics

Introduction

Every legal theory requires a political setting and no political philosophy should lack a theory of law. These truisms are routinely ignored, even by those who hold that politics concerns the state and acknowledge that the state is primarily a legal institution. The de facto division of labour between legal and political theorists – deriving, in part, from their institutionalised separation within academia – fragments what should be an integrated enterprise: the elucidation and defence of a principled and comprehensive justification and critique of the roles and procedures of law and state.

In neither sphere does the distancing of legal from political analysis routinely take the form of denying the significance of the other. However, many political theorists simply take the institutions of law as given and unproblematic, assuming the end product of the political process to be law making, in practice ignoring law application, compliance and policy implementation. Legal philosophers are often equally at fault in omitting genuine consideration of the political process from which law emanates and to which it is ultimately accountable.[1]

Amongst those theorists who do attend to the legal–political nexus are to be found, at one extreme, those who believe that it is possible to conceive of the legal and political functions as theoretically distinct and separable, however much they may often be mingled in actuality. At the other extreme are those who take the view that there is no way, either in theory or practice, that politics and law are separable. The former approach, following the tradition of Hans Kelsen, generates legal theories which exclude the political considerations from legal theory as a matter of theoretical principle.[2] The latter approach, characteristic of the Critical Legal Studies movement, generates work which concentrates on exposing the political nature of processes which are claimed to be purely legal.[3] Some-

where in between lies Dworkin's *via media*, a theory which is to be commended for its explicit attention to the political theory of jurisprudence, although ultimately the basis for the distinction between the two spheres is inadequate.[4]

The argument of this book is that there are both moral and political reasons for seeking to distinguish in analysis, and separate in practice, the legal and political functions, at least in certain respects and to a significant extent, but that there are equally strong moral and political reasons for acknowledging openly both the political nature of the acceptable rationales for distinguishing law and politics, and the inevitable and sometimes desirable residual politicality of some important legal operations.

Political Philosophy

There are no tenets in political philosophy that command general assent. This applies to conceptual matters relating to the analysis of the 'political' itself as much as to issues concerning the proper content of specific political decisions. For some theorists, politics is quintessentially about power, that is the capacity of some people and groups to get others to do what they wish, whether or not they would independently have so acted.[5] For other theorists, politics is about the pursuit of a society so organised that there is no room for unwilling or manipulated acquiescence in such common decision making as is required for the general good. Thus conflict and consensus models of social and political processes diverge on what politics is about and not just on what particular political systems and decisions are correct.[6]

It may be assumed that a degree of irreconcilable conflict is inevitable in any actual polity, in that choices will always have to be made between incompatible but equally defensible courses of action, but that the pursuit of consensus, especially in relation to such conflicts, is at least part of what politics is about and something to which law can contribute. In crude terms, conflict theory is descriptively more correct, while consensus theory has the edge as a morally superior (and at least partly realisable) model of politics. Without making any strong assumptions as to the actual balance of conflict and consensus elements within polities, it will be assumed that this balance is a variable of immense moral significance. Thus, even if we define the state in terms of the distinguishing characteristic that it, with some success, claims the possession of a monopoly of coercive power, we need not draw the conclusion that coercion is the inevitable essence of the state's activities in the sense that it must always be the dominant characteristic of all political relationships.[7]

For contemporary polities at least, there is a requirement for a more or less centralised decision-making process to determine national and external community objectives and how these are to be pursued. In the modern – and even in the postmodern – world there must be some decisions made relating to the society as a whole which are binding on its constituent parts. However broad or narrow its actual or proper scope, however decisions are made and applied within its bounds, contemporary societies cannot survive without a state.[8]

The necessity of statehood is derived in part from the fact that, without a state, any society lacks the preconditions for preventing itself being split into parts or gathered up into one or other actual state. Boundaries and organised defence are de facto requirements of an independent and continuing society. The necessity of statehood is multiplied by the identification of the least controversial prerequisites of tolerable existence: internal order in relation to material possessions, reproductive relationships and economic activity.[9] While such ordering functions can be performed by relatively unchanging traditional or customary norms, albeit with some sort of enforcement mechanisms, it is almost uncontroversial to point out that modern economies require a measure of centralised decision making, certainly in relation to the basic structure within which individual and group economic conduct takes place, and also as a way of entering into agreements with other independent societies, or states, and other similarly essential public goods. Such centralised decision making cannot be conceived of except in a social context, that is within a relatively stable customary pattern of social relationships, but this context does not render states redundant. However much a society may rely on custom and tradition, its adaptability to modern conditions requires that there is some means for introducing changes into this inherited structure and dealing with challenges to its authority within its territorial boundaries.[10]

To these banalities may be added others concerning the pervasive disagreement between members and groups within a polity regarding both the proper ways of making and enforcing decisions which are binding in that society, and the principles and goals which ought to determine the content of these decisions. These disagreements stem from conflicts of values, conflicts of interest and differences in knowledge, all of which have individual and group bases.[11] Underlying such basic disagreement about the role and substance of state activity there are more immediate practical conflicts over who it is that should do and get what in the social and economic interactions of any social group, the very conflicts which give rise to some of the necessities for states. Further, these disagreements and conflicts do not arise between social and economic equals. Independent of state

activity, some persons and groups have more capacity to achieve what they want and value than do others with whom they are in dispute or competition. Thus inequalities of capacity lead to inequality of holdings.[12] The inequalities may be in physical strength, intellectual capacity and personal persuasiveness, and the resulting inequalities may be in charisma, wealth and hence in power. The inequality of outcomes arises from the operation of these different capacities in particular economic and social environments and the scarcity of what is valued by those in competition for whatever it is they desire.

This developing thumbnail sketch of the political dimension of human life concentrates on basic societal necessities rather than desirable possibilities. However, states may also be more positively beneficial in relation to the communal objectives that they, perhaps alone, can generate or enable in complex societies: the cultural achievements made feasible by the pooling of resources, the sustenance of interdependent ways of life which are deemed to be intrinsically desirable, the focus for a sense of communal identification as an ingredient of individual wellbeing, the provision of an infrastructure for creation and distribution of substantial quantities of material goods and multiple other objectives made possible by the cooperative opportunities of a central decision-making process which helps to sustain and adapt organised conformity within a given territory.[13]

The most evident forms which the benefits of a political structure take are the reduction of harm and the production of benefit through the prohibition of harmful, and the prescription of beneficial, conduct. This is primarily the role of criminal law.[14] If this has an unduly utilitarian ring to it, much the same point can be put in terms of the prohibition of wrong and the prescription of right conduct, with no implication that wrongness and rightness is always to be given substance in terms of human harms and benefits.[15] This conduct control function of the state is also a feature of those perhaps less coercive and less centralised constraints exercised through the medium of societal rules and social pressures. States both extend this community-based function to cover all those within large territorial boundaries and develop it through the introduction of mechanisms to enforce and adapt conventional behavioural rules. Given that the control of conduct in these regards is never going to be completely successful, states are expected to exercise the capacity to rectify harms done and make up for potential benefits lost, either by way of compensation or through punishments and rewards. Such rectification is both a precondition of ensuring tolerable adherence to conduct and a requirement of fairness. This is primarily the role of corrective justice.[16]

The remedy of those other unacceptable inequalities which arise without evident human wrongdoing but are nevertheless susceptible