

DWORKIN'S THEORY OF INTERPRETATION AND THE NATURE OF JURISPRUDENCE

Dworkin's theory of *law as interpretation* is a very complex challenge to analytical jurisprudence in general and legal positivism in particular. The challenge is both substantive and methodological. In substance, Dworkin aims to undermine the positivist insight that a clear distinction exists between law and morality. At the methodological level, Dworkin strives to undermine the traditional distinction between an analysis of the concept of law, and the interpretation of what the law is in particular cases. Analytical jurisprudence is based on the assumption that the general question of *What is law?* is distinct from, and independent of, the question of *What is the law?* on any particular issue in a given legal system. Dworkin challenges this traditional distinction. As he now sees it, there is no analytical distinction between a theory about the nature of law and a theory of adjudication; both amount to the same type of reasoning, namely, an attempt to impose the best available interpretation on a given practice.

The concept of interpretation plays an essential role in both of these critiques, namely, the substantive critique of legal positivism and the methodological critique of analytical jurisprudence. In fact, the general argument is very similar in both of these cases. Roughly, the framework of Dworkin's substantive argument runs as follows:

1. Each and every conclusion about what *the law is* in a given case is a result of interpretation.
2. Interpretation is essentially an attempt to present its object in the best possible light.
3. Therefore, interpretation necessarily involves evaluative considerations.

4. And therefore, every conclusion about what the law is, necessarily involves evaluative considerations.

A very similar framework underlies Dworkin's methodological argument:

1. A theory about the nature of law is an interpretation of a social practice.
2. Any interpretation of the law is basically an interpretation of the legal practice.
3. Therefore, both legal theorists and judges are engaged in an interpretation of a social practice.
4. The interpretation of a social practice, like law, purports to present the practice in its best moral light.
5. Therefore, both theorists and practitioners are basically engaged in the same type of reasoning, namely, an attempt to present the legal practice in its best moral light.

The purpose of this chapter is to provide a critical analysis of these arguments and the ways in which they are intertwined. I will argue that although some of Dworkin's premises are true and very insightful, particularly about the nature of interpretation, the jurisprudential conclusions do not follow. I will begin with a brief presentation of Dworkin's constructive model of interpretation, evaluating some of its strengths and weaknesses, and then I will proceed to focus on the methodological argument, offering a critique of Dworkin's conception of the relations between legal theory and legal practice. A critique of Dworkin's substantive argument against legal positivism will be discussed in later chapters. The gist of the critic is, however, that the first premise of the framework argument is false: it is not the case that every conclusion about what the law is, necessarily depends on interpretation (chapter 7). But again, this chapter is mostly about the nature of interpretation and the relations between theory and practice.

1. THE CONSTRUCTIVE MODEL OF INTERPRETATION.

I have argued in the previous chapter that interpretation is essentially concerned with meaning in its pragmatic sense, namely, *meaning that* such and such by a given expression. And I have also argued that this intentional grammar of interpretation can either refer to the intentions of

an actual speaker, or else, to a counterfactual intention presupposed by the kind of interpretation offered, that is, by a certain construction of a hypothetical speaker. I think that Dworkin's starting point is very similar. He also maintains that interpretation is concerned with intentions or purposes, and he takes the construction of such purposes as essential to what interpretation is all about. The gist of this constructive model, as he calls it, is the following:

'Interpretation of works of art and social practices, I shall argue, is indeed essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, *constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.*'

And, as Dworkin immediately clarifies: 'It does not follow.... that an interpreter can make of a practice or a work of art anything he would have wanted it to be, the history or shape of a practice or object constrains the available interpretation of it.'

(1986:52, my emphasis.)

There are three main insights about the nature of interpretation which are present here. First, that interpretation strives to present its object in its best possible light. Second, that interpretation is essentially genre-dependent. And third, that there are certain constraints which determine the limits of possible interpretations of a given object. A discussion of this third point will be postponed to the next chapter. Here I will be concerned with the former two, beginning with the question of why *the best*? Why should every interpretation of an object or text strive to present it in its best possible light? One who expects a detailed, argumentative answer to this crucial question is bound to be disappointed. Dworkin only offers two clues to his answer. The first clue is in a footnote: An interpreter is bound to strive for the best possible presentation of the object of interpretation, Dworkin claims, because 'otherwise we are left with no sense of why he claims the reading he does.' (1986: 421,n12). The other line of thought is less direct, deriving from Dworkin's assumption that the only

alternative to this constructive model is the traditional author's intention model, which he rejects for various reasons. So let us take up these two points in turn.

Perhaps Dworkin's intuition is clear enough: If two interpretations of, say, a novel, can be put forward, and according to one of them the novel emerges in a better light, that is, as a better novel, it would seem to be rather pointless if we insisted on rejecting that interpretation in favor of the one which presents the novel in a worse light. This is the kind of intuition we are familiar with from philosophical argument as well. If you want to criticize someone's thesis, you are not going to convince anyone of the cogency of your critic unless you have tried to present the object of your critic in its best possible light. It doesn't mean, of course, that anything you try to interpret must be presented as something valuable or particularly successful. But unless you try to make the best of it first, there is little hope in convincing anyone that it is a failure.

The only possible alternative Dworkin sees to this heuristic assumption is the author's intent model. According to the latter, interpretation is nothing but an attempt to retrieve the actual intentions, purposes, etc., that the author of the relevant text had actually had with respect to various aspects of its meaning. Therefore, if the assumption is that what the text means is only what its author intended it to mean, then, of course, the question of presenting the text in its best light doesn't arise. For better or worse, the interpretation of the text would only consist in whatever it is that we can find out about the author's intentions. If a better reading of the text is available, that would be an interesting critique, perhaps, but not an interpretation of it. So it seems that in order to substantiate the central thesis of the constructive model of interpretation, Dworkin must refute its obvious rival, the author's intent model. Or at least, this is what Dworkin's assumes here.

Dworkin has two main arguments against the author's intent model of interpretation. The first argument, which draws most of its intuitive support from examples in the realm of works of art, relies on the fact that artists typically intend their works to become cultural entities, detached from their original intentions and purposes. Once a work of art had been created, the artist would rather have it stand on its own, so to speak. Thus, at least in the realm

of the arts, it will often happen that the attempt to apply the author's intention model of interpretation would turn out to be self-defeating. You think that the text means what the author intended it to mean, so you seek out the author's intentions only to find out that she had intended her intentions to be ignored. Perhaps it is not accurate to say that this just may happen. Perhaps it is something deeper about the nature of art, or at least, art in the modern world, that works of art are typically created with such an intention to become cultural entities, detached, at least to some extent, from the artists' particular intentions. But there are two problems about this argument, both of them concerning its potential scope. First, even in the realm of works of art, there is nothing necessary or essential to this characterization. Some artists may simply not share the kind of vision it involves. So this self-defeating argument might defeat itself. If you argue that author's intentions should be ignored because it is the intentions of the authors that they should, you may find out that the intention you rely upon does not exist; perhaps the author of your text actually wanted his particular intentions to be relevant for the interpretation of his work. Why would you ignore that intention now? More importantly, this argument which is based on the ways in which artists tend to view their creative activities does seem to derive from certain aspects of the nature of art, and thus perhaps it could not be extended to other cases. In particular, it is doubtful that the argument can be extended to the realm of law without begging the question against its factual assumptions. Is it safe to assume that those who create legal texts, like legislators and judges, also tend to share this intention that their intentions not be taken into account? It is very doubtful that they do. Thus, if there is a general argument against the author's intention model, it must be a different kind of argument. Trying to refute the author's intention model on the basis of assumptions about authors' intentions is just too precarious and unstable.

Dworkin does have another argument against the author's intentions model which is actually much more nuanced and insightful. In order to understand it, however, we need to get a better sense of the ways in which interpretation is genre-dependent. An interpretation, according to Dworkin, strives to present its object as the best possible example of its kind, that is, of the genre to which it is taken to belong. This assumes that it is impossible to

interpret anything without first having a sense of what kind of thing it is, what is the genre to which it belongs. On the face of it, this may sound too rigid; after all, sometimes we do seem to be engaged in an interpretation of a text or object even if we are not quite sure what the appropriate generic affiliation of the text is. And sometimes the appropriate generic affiliation is precisely what is at dispute between rival interpretations of an object. An interpreter may argue, for instance, that Beckett's *Mercier and Camier* is best read as a play, and another may think that it is actually a novel. Dworkin, however, need not deny any of this. Even when the generic affiliation is the issue, one would still have to decide which affiliation presents the work as a better work of literature, for example. In other words, when the specific generic affiliation is not clear, we need to ascend in a level of abstraction and try to decide which generic affiliation of the text would present it as a better example of the higher-level affiliation, say, as a piece of literature, or if that is in doubt, as a work of art, and so forth. In any case, we must have a sense of what kind of thing it is that we strive to interpret, even if the classification is tentative or rather abstract.

There is, actually, a deeper insight here. We can only interpret a text if we have a sense of what kind of text it is, because we must also have a view about the values which are inherent in that kind or genre. Unless we know what makes texts in that genre better or worse, we cannot even begin to interpret the text. You cannot begin to think about the interpretation of a novel without having some views about what is it that makes novels good (or bad), and you cannot interpret a poem without having a sense of what are the values we find in poetry (or, in poetry of that kind) and so on. If you propose a certain interpretation of a novel, for example, you must rely on some views you have about the kind of values which make novels good and worthy of our appreciation. Otherwise you could not explain why should we pay attention to the kind of interpretation you propose, why pay attention to the aspects of the work you point out and not to any other. So I think that Dworkin is quite right to maintain that without having some views about the values inherent in the genre to which the text is taken to belong, no interpretation can take off the ground. The values we associate with the genre

partly, but crucially, determine what would make sense to say about the text, what are the kinds of meaning we could ascribe to it.

This insight also explains, however, the real nature of the debate about author's intentions in interpretation. As Dworkin explains,

'the academic argument about author's intentions should be seen as particularly abstract and theoretical argument about where value lies in art.' (1986:60)

'I am not arguing that author's intention theory of artistic interpretation is wrong (or right), but whether it is wrong or right and what it means . . . must turn on the plausibility of some more fundamental assumption about why works of art have the value their presentation presupposes' (1986:61).

This is very important. Those who maintain that the particular intentions of, say, a novelist, have a bearing on what the novel means, must also maintain certain views about what makes novels valuable and worthy of our appreciation. They must think that understanding what the author had strove to achieve, or the message the author wanted to convey, are the kind of considerations which bear on the novel's meaning, which also assumes that they are the kind of considerations which are related to what makes novels valuable. And *vice versa*, of course. If you deny the relevance of the novelist's intentions that is only because you have certain views about what makes novels valuable, views which are detached from the values we associate with the communication aspects of literature or perhaps art in general. Needless to say, art is just an example here. As we shall see later a very similar line of reasoning applies to the possible roles of the intentions of legislators in the interpretation of statutes (chapter 8), and the constitution (chapter 9). Whether it makes sense to defer to such intentions must also depend on a theoretical argument about where value lies in the relevant genre, namely, the authority of legislation (or of a constitution).

Thus the conclusion so far is, that the author's intent model of interpretation only makes sense as an instance or an application of the constructive model. It does not compete with it. Whether it makes sense to defer to the intentions of the author or not is a local issue, specific to the genre in question, and depending on the values we associate with the latter. Does it prove Dworkin's point that interpretation must always strive to present its object as

the best possible example of the genre it is taken to belong? It would prove the point only if we agreed with Dworkin that the only alternative to the constructive model is the traditional author's intentions model. But this is not a correct assumption. Interpretations need not strive to present the text in its best light; they could simply strive to present it in a certain light, perhaps better than some, worse than others, but in a way which highlights an aspect of the meaning of the text which may be worth paying attention to for some reason or other. Let us recall that Dworkin's insistence on 'the best' derives from the assumption that unless one strives to present the text in its best light, 'we are left with no sense of why he claims the reading he does.' (1986:421). But this simply need not be the case. And sometimes it just cannot be the case. Let me clarify. There are two points here: one about the motivation and interest in various interpretations, and the other about the limited possibilities of an all things considered judgment about what is the best.

First about motivation, then. Dworkin's assumption that unless one strives to present the text in its best light we would have no reason to pay attention to the interpretation offered, is just not true. We are familiar with many interpretations, in the realm of works of art, and others, where we have a very good sense of why the interpretation is interesting and worth paying attention to, even if it does not purport to present the text in its best light. For example, a psychoanalytical interpretation of *Hamlet* would be very interesting and certainly worth paying attention to, even if it does not necessarily render the play better than other, more traditional interpretations of it. It simply brings out a certain aspect of the play which is interesting on its own right. Perhaps it contributes to a better understanding of Shakespeare's work, highlighting aspects of it hitherto unnoticed, enriching our understanding of the subtleties and richness of the work, and so forth. It can do all this without assuming that the particular interpretation offered presents *Hamlet* in its best possible light. And the same thing can be said about, say, a modern adaptation of *Hamlet* set in a contemporary setting, or perhaps even a parody of it. Thus the general assumption that without striving to present the text in its best light we would have no sense of why the interpretation is worth paying attention to, is simply groundless.

Regardless of the question of motivation, however, there is also a question about possibilities. As several commentators have pointed out (e.g. Finnis, 1987: 371), Dworkin's insistence on the best possible light rests on the assumption that in each and every case there is the possibility of an all things considered judgment about what makes a given work valuable, what makes it the best possible example of the genre to which it is taken to belong. But this assumption, it is rightly claimed, ignores the problem of incommensurability. It is a rather prevalent aspect of the evaluative dimensions of works of art, and many other possible objects of interpretation, that often there is no possibility of rendering an all things considered judgment about their relative merits. There is simply no such thing as *the best*. Some interpretations may be better, or worse, than others, but none could be claimed to be the best. That is so, simply because some of the evaluative comparisons are incommensurable. The incommensurability of values consists in the fact that there are certain evaluative comparisons in which it is not true that A is better than B, and not true that A is worse than B, and not true that A is on par with B. That is typically so because A and B are mixed goods, comprised of numerous evaluative dimensions, and they just do not have a sufficiently robust common denominator which makes an all things considered judgment possible. There are numerous things that make novels valuable, for instance, and one interpretation may render the novel more valuable on certain dimension, while another interpretation may make it more valuable on other dimensions. Often it would be simply impossible to say which one of them, all things considered, is better (or worse). Think of being asked which novel is the best that you have ever read; you would probably remain completely baffled, unable to answer. It is a silly question, you would say, and rightly so.

If this is so obvious, why does Dworkin deny it? What is it in Dworkin's theory that makes him insist on the possibility of presenting an object of interpretation in its *best* possible light? I think that the answer to this puzzle is to be found in Dworkin's jurisprudence, not in his general theory of interpretation. The latter makes perfect sense without this problematic element. As I will argue below, it is Dworkin's attempt to derive from his theory of

interpretation certain conclusions about jurisprudence that explains his insistence on this element of interpretation.

In the following sections I will concentrate on Dworkin's critic of analytical jurisprudence on the grounds that legal theory can only be an interpretation of a practice and as such, it can only be the same kind of interpretation which is characteristic of the practice itself, namely, evaluative, moral and political in its essence.

2. THEORY AND PRACTICE

In some social practices, notably law and the arts, Dworkin claims, the participants develop a complex 'interpretive' attitude towards its rules and conventions, an attitude including two components:

'The first is the assumption that the practicedoes not simply exist but has value, that it serves some interest or purpose or enforces some principle—in short, that it has some point—that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of [the practice] . . . are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point.' (1986: 47)

Unfortunately, Dworkin does not identify the kind of social practices which can be said to display this interpretative attitude. My suggestion is the following: the interpretative attitude characterizes social practices which are constituted by norms. Let me explain. Not all the social phenomena where people's behaviour conforms to rules are social practices, properly so called. The distinction here is between normative rules which constitute a social practice, and rules which merely reflect social regularities.

I take it to be a defining feature of normative practices that the existence of the rules or conventions is of itself reason for action.⁹ Thus, consider the following example. Suppose we observe a regularity in a certain society, for instance, that most people drink tea at five o'clock in the afternoon. Is this a social practice which can be said to have a value or purpose or some point? We would hardly say that eating meals is a social practice, and that as such it enhances a value, since people have reason to eat meals regardless of any considerations about what other members of their society do, or should do. In other words, eating meals is not an instance of following a rule. When the reasons for doing something are socially independent, it is inappropriate to call the regularity of actions a social practice, even if it occurs as a social regularity. This might be the case with regard to five-o'clock tea; but then again it might not. It is possible that people in our imaginary society adhere to this regularity for reasons which are not socially independent. On the contrary, it may be meaningful for the participants that the regularity is a practice rather than mere coincidence, and they may act as they do, at least in part, for this very reason. It is in such cases that the social rule is normative. (One need not conclude that socially independent reasons are necessarily excluded in these cases. Sometimes they are, for instance, when the rule functions as a co-ordinative factor such as the one determining on which side of the road cars are driven, but this is not always the case.)

Now, the point is that our story cannot be concluded here. It still lacks an explanation of why or in what sense the participants in a practice conceive of its rules as reason for action. This is where the concept of the value or the point of this practice comes in. To make sense of the idea that a rule or convention is of itself a reason for action, we must assume that it is of some meaning or value for the participants. This then yields the answer to the question posed above. Constructive interpretation is the imposition of 'meaning' or 'point', or in general a

⁹ See Hart (1961:78-83). Of course, a norm can also be a reason for condemning or praising behaviour, etc., but these are parasitic on the fact that the norm is primarily considered a reason for action. Norms can also determine beliefs, attitudes, etc., but we need not go into this here.

value, on a normative-based practice in order to render intelligible the idea of norms or rules being reasons for action. In other words, social practices, that is, practices constituted by sets of norms, are only intelligible against the background assumption of a purpose or value that the practice is taken to enhance. In this sense it can be said that from the point of view of the participants, law, *qua* normative system, ought to be seen as justified.¹⁰

So much for the first component of the participants' interpretative attitude. What about the second one, namely, the view of the requirements of the practice as sensitive to its supposed value? Dworkin (1986:47) rightly acknowledges this as a distinct feature which is not logically entailed by the former. Again, he is not very clear in identifying the kinds of practices which are value sensitive in this sense. But the issue is both important and problematic. It is only natural to suppose that any activity performed (among other things) to advance a value or purpose, should display a sensitivity to the value or purpose it is taken to advance. But things become more complicated when we concentrate on social practices.

Most significantly, different social practices vary according to the different ways in which their requirements are institutionalized. By this I mean the various ways in which the requirements of the given practice are themselves determined, modified, etc., by a set of established rules and institutions. Consider, for instance, such practices like table manners, or perhaps etiquette more generally. Nobody is there to determine the rules of table manners, there are no canonical formulations of such rules, and there are no institutions which are entrusted with modifying the rules or instituting new ones. Law, on the other hand, does have such institutions and many more. In fact, law is probably the most institutionalized practice we know. (Art is an interesting intermediate case: viewed as a social enterprise, it certainly has many institutional features, manifest in the role of museums, galleries, art dealers, etc., in affecting the way art is viewed in a specific community. On the other hand, it is not clear that the concept of art is necessarily affected by such institutional elements.)

¹⁰ In this, Dworkin shares the views of Kelsen and Raz on the normativity of law, but not those of Hart (see nn. 11 and 12 below). One should realize, of course, that it is not necessary for all the participants in a social practice (constituted by normative rules) to regard the rules as normative. As we know very well from our legal systems, some of the participants can be anarchists, while many others comply with its rules for various prudential or personal reasons, or for no reason at all.

The institutional aspect of law is relevant here for the following reason: Dworkin's assumption that the requirements of law are sensitive to its point or value seems to be directly at odds with the legal positivist doctrine of the separation of law from morality, that is, the distinction between what the law is and what it should be. However, to be more precise, legal positivism need not deny that the requirements of law are sensitive to its point or value, as a matter of historical development. Over a certain period of time, people's actions are bound to be influenced by the way in which they understand or interpret the point or value of the practice, and this itself shapes the emergent forms in which the practice will be realized in detail. Such an account can hardly be denied. The dispute lies elsewhere. The question is, at what stage, and how, do evaluative judgments regarding the value of law actually become part of the law itself? Positivists argue that due to the institutionalized aspect of law, it is never *sufficient* for a rule or decision to be morally or otherwise justified in order to become law, without an actual and authoritative decision to this effect. However, this being one of the main points of dispute between Dworkin and his positivist opponents, Dworkin cannot at this initial stage presume law to be sensitive to its value in the manner that other, non-institutional practices might be, without incurring the charge of having assumed the very point at issue. Avoiding this requires the restriction of Dworkin's claim about value-sensitivity to the historical sense of this interpretative approach, which indeed should not be denied by legal positivism.

To sum up, the discussion so far has shown that the normative aspect of legal systems requires its participants to adopt a 'complex interpretative attitude' towards its rules. Now it must clarify the relation between legal theory and practice, providing an answer to the question of why the theory should also be interpretative, and why is it interpretative in the same way. The reply Dworkin proposes is rather surprising, namely, that there is no difference between theory and practice in this respect. Any attempt to explain a social practice such as law, must involve exactly the same kind of reasoning required for participation in the practice, that is, for accounting to oneself what it is that the practice requires. (For the sake of brevity, I shall henceforth refer to this thesis as the 'hermeneutic thesis', not because it

epitomizes the main ideas of German hermeneutics, but because in this Dworkin claims to have been inspired by this school.) The following is the relevant passage:

A social scientist who offers to interpret the practice must make the same distinction. He can, if he wishes, undertake only to report the various opinions different individuals in the community have about what the practice demands. But that would not constitute an interpretation of the practice itself; if he undertakes that different project he must give up methodological individualism and use the methods his subjects use in forming their own opinions about what courtesy really requires. He must, that is, *join* the practice he proposes to understand; his conclusions are then not neutral reports about what the citizens of courtesy think but claims about courtesy *competitive* with theirs. (1986:64)

Before I proceed to examine this thesis in some detail, let me mention a small point. The hermeneutic thesis gains some of its plausibility from a potentially misleading example. Dworkin sometimes compares legal theory to literary criticism (1985 : 158-9; 1986 :50). The latter, as I readily conceded, is undoubtedly an interpretative enterprise. But is literary criticism analogous to legal theory? This is far from clear. More plausibly, it is analogous to adjudication. It is the role of judges, like the role of literary critics, to decide what certain texts mean. While jurisprudence might be construed as analogous to some form of literary theory, the same questions on the relations between theory and practice would hold here as well. In other words, is a theory *about* literary criticism an interpretation of literature? Perhaps it is, but such a conclusion would need some argument in its support. Perhaps Dworkin is aware of this problem, claiming as he does at the very beginning of the book (1986 :14) that he will make the 'judges' viewpoint' the paradigm of his theory. But this only pushes the question one step further: why should the judges' point of view determine the perspective of

legal theory? In short, the analogy between jurisprudence and literary criticism does not hold independently; it can only follow from an argument which we have yet to explore.

3. THE INTERNAL POINT OF VIEW

In order to understand the significance of Dworkin's hermeneutic thesis we should take a look at the dispute about the normativity of law. The appropriate account of the normativity of law has always been one of the most contested topics among legal positivists. Bentham and Austin sought to provide a reductionist account of legal statements. Austin (1832: lecture 1), for instance, claimed that statements about legal duties are fully expressible in terms of the likelihood that one may come to harm of a certain kind.

Yet this reductionism formed one of the main targets in H.L.A. Hart's criticism of early positivism. Hart (1961:78-83) distinguished between the external and the internal points of view of normative systems. The Austinian description is external in the sense that it is a description of legal practice, or better, its regularities, as viewed by an outsider attempting to understand the participants' behaviour with no knowledge of their reasons for behaving this way. Such an alien sociologist could, for instance, observe that most people stop their cars when the traffic-light is red, and that most (or some?) of them are liable to sanctions when they do not. He could thus only describe the 'normativity' of law in terms of predictions about liability to sanctions. But an analysis of law confined to the external point of view would, Hart argued, be a serious distortion. Legal theory must take account of the internal, participants' point of view. Most of these (particularly judges and other officials) regard the law as *reason* for actions, hence their statements about the law are normative statements.

Hart himself, however, seems to have offered yet another type of reduction. He purported to explain the internal point of view in terms of what people *believe* to be reasons for action. He thought it sufficient for legal theory to account for the normativity of law from this sociological perspective, as it were; that is, in terms of people's beliefs, attitudes,

tendencies, and the like. Thus, according to Hart's view, we encounter two types of normative statement:

1. Made by people who believe in the validity of the normative system (that is, full-blooded normative statements), and
2. Made as statements about (1) by someone who does not necessarily believe in the validity of the norms.

Raz (1975 :171) recognizes the same two varieties of explanation of norms (which he labels 'normative based' and 'belief based', respectively) and acknowledges them as the basic types. However, he also argues that a third category, which he calls 'normative statements from a point of view' (1975 : 170-7) or 'detached legal statements' (1979:153), cannot be reduced to either (1) or (2). These are statements of the form:

3. 'According to the law *A* ought to do *x*.'

Nothing follows from statements like (3) as to what the speaker believes that ought to be done (all things considered), or as to what anyone else believes. They are statements 'from a point of view or on the basis of certain assumptions which are not necessarily shared by the speaker', or indeed by anyone in particular (Raz 1979 :156).

Raz's identification of this third type of normative statement, irreducible to the other two, helps explain for instance, how normative concepts (such as 'ought' and 'duty') do not have different meanings when used in different normative contexts (for example, law, positive morality, critical morality), while preventing the confusion of this issue with the question of the necessary connections between law and morality (Raz 1979 :158). But most important, it enables positivists like Raz (and Kelsen as construed by Raz) to reconcile positivism with the position mentioned earlier, that from the point of view of the participants, law ought to be considered as justified. Raz can explain Kelsen's dictum that even 'an anarchist, if he were a professor of law, could describe positive law as a system of valid norms, without having to

approve of this law' (Kelsen 1967:218n.),¹¹ while preserving Kelsen's concept of legal validity in terms of justification.

This is a crucial point. Dworkin has previously argued (1977 :48-58) against Hart's concept of normativity, that an adequate account of the internal point of view cannot be 'belief based', to use Raz's expression. This is so, as when the participants in a normative system make claims about what the norms require, they do not typically make claims about what other people believe that ought to be done, but simply about what ought to be done. We can now gather that Kelsen and Raz could agree with Dworkin on this point.¹² Legal positivism need not deny that the participants in a legal system (particularly judges) make full-blooded normative statements which are irreducible to belief-based explanations; but legal positivism is not forced to admit that an account of such statements must adopt the internal point of view, in a full-blooded, normative manner.

In other words, in-so-far as the issue is an account of normative statements, there does not seem to be any real difference between Dworkin and Raz. Both would agree that when a theorist or a participant seeks to account for what the law requires in a given case, he or she is bound to make some normative statements which are (at least in some cases) irreducible to belief-based explanations. Yet neither of them is logically obliged to contend that such an account must adopt the committed, rather than the detached point of view.

But now it is vitally important to see where the disagreement does in fact lie. It indeed has to do with the relevant point of view, not with regard to the explication of normative *statements*, but regarding the explication of the *concept* of law. Dworkin seems to be claiming that the concept of law is also a normative concept, that is, a concept which can only be accounted for from a normative point of view. This is why, or rather this is the sense

¹¹ See Raz (1979:156); see also his 'Kelsen's Theory of the Basic Norm' (ibid.: 123-45).

¹² I should mention that Hart himself objects to this account of the normativity of law, as depicted by Raz. He claims that 'when judges . . . make committed statements ... it is not the case that they must necessarily believe or pretend to believe that they are referring to a species of moral obligation' (1982:161). Hart's argument seems to dwell on the fact that people, judges included, can have various reasons for accepting the normativity of law, reasons which are not necessarily moral or political. I think Raz would not deny this, yet he would claim that these are somehow parasitic cases, i.e. parasitic upon the standard, moral conception. However, a full account of the dispute between the two would exceed the scope of this chapter, and in any case, even Hart does not deny that Raz's account of the normativity of law is compatible with legal positivism (1982:158).

in which, Dworkin's jurisprudence is a theory of adjudication. Dworkin declines to distinguish between the interpretation of the law, that is, its particular requirements, and the interpretation of law, that is, the general concept. For him, both amount to one and the same thing: imposing a purpose or value on the practice so as to present it in its best possible light (Dworkin 1986:90).

To sum up so far: the hermeneutic thesis should not be understood to deny the possibility of normative statements from a point of view. What it amounts to is a contention that jurisprudence—viewed as a theory of the concept of law—and a theory of adjudication, must adopt the *same* point of view, that is, the point of view of a committed participant.

In the following sections I shall try to present what seem to me to be Dworkin's arguments in favour of the hermeneutic thesis, arguing that none of them in fact turns out to be successful. Later, I shall say something more about the consequences of this failure.

4. THE ARGUMENTATIVE CHARACTER OF LAW

Dworkin first refers to the internal perspective on law in a reply to the possible claim that a proper understanding of law requires a scientific or historical approach. As the same argument is also mentioned later, however, in the context of the hermeneutic thesis, it deserves close examination. Consider the following passage:

Legal practice, unlike many other social phenomena, is argumentative. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are *given sense only by and within the practice*; the practice consists in large part in deploying and arguing about these propositions.

... the historian cannot understand law as an argumentative social practice ... until he has the *participants' understanding*, until he has his own sense of what counts as a good or bad argument within that practice. (1986:13-14 my emphasis.)

The main point here seems to turn on the question of what one must know or experience so as to be able to understand a social practice such as law. Yet the distinction drawn here by Dworkin between a sociological or historical approach to law and a 'jurisprudential' one (1986:14) indicates that he is dealing with two separate questions in one breath. The question of whether a causal explanation of social practices is possible, and if so, whether and to what extent it is preconditioned by an interpretative explanation, is a rather familiar issue, extensively debated in the philosophy of social science.¹³ But the question we are facing now is entirely different: it pertains to the role of the participants' point of view in an interpretative explanation. The two should be kept distinct, since answering the latter requires no reference whatsoever to the former (although, the opposite may not be the case).

Dworkin's answer to the second question would seem to run as follows: in the practices he has classified as 'argumentative', the intelligibility of certain requirements of the practice depends on understanding concepts or propositions 'that are given sense only by and within the practice'. But the term 'argumentative' may be misleading here. Consider games, for instance: terms such as 'checkmate', 'goal', etc. are clearly 'given sense only by and within' a certain game. Let us call these 'institutional concepts', concepts which gain their very meanings from the existence of a practice or institution. Certainly, one needs to know the pertinent practice in order to understand these terms. Someone with no idea of what chess is, for instance, would have to be taught the rules of the game (and perhaps, in some cases, the point of playing games at all) in order to understand what a 'checkmate' is.

The same point, however, can be taken a step further: background knowledge is not confined to institutional concepts. Clearly, for instance, a knowledge of the pertinent natural language is also required to render the requirements of law intelligible. Furthermore, recall Searle's argument that the literal meaning of sentences is only applicable relative to a set of background assumptions.¹⁴ What emerges then is a multi-layered picture of the necessary

¹³ See e.g. Taylor (1971) and (1985). See also Winch (1958), and cf. MacIntyre (1973).

¹⁴ Ch. 2, sect. 2.

background knowledge which makes the propositions of a social practice intelligible. Needed at some basic level is a knowledge of the natural language, which in fact amounts to knowing a great deal about the world as it is experienced and conceived of by the pertinent community. Yet the closer the attention paid to institutional concepts, the more necessary it becomes to know about the particular background of these concepts. The nature of the background information required here may also vary according to the nature of the concept. In some cases the institutional background is very specific, a particular game for instance (as in the case of understanding 'checkmate'), or a particular theory (required to understand 'quantum', for example). In other cases it is much more holistic, absorbed in large portions of our knowledge (for instance, the concept of 'contract').

These considerations thus establish that social practices are intelligible only relative to a body of background information, knowledge of which any interpreter either shares already, or must acquire. Does this prove the hermeneutic thesis? Clearly not. It only shows that in a familiar sense, all statements or propositions, especially those employing institutional concepts, are only intelligible against a complex background. But as we have seen, the hermeneutic thesis presents a stronger claim than this. It contends that participants' and theorists' interpretations must adopt one and the same *normative* point of view. Nothing in the necessity of background information can be taken to establish this.

Dworkin, I believe, would reply that I have missed a point here. It is not the necessity of background knowledge on which he relies, but the fact that it is controversial, and that these controversies form an essential part of the practice itself. (Perhaps this is why he calls such practices 'argumentative'.) Note, however, that the possibility of normative statements from a point of view does not depend on the assumption that the pertinent point of view is uncontroversial, either in its concrete judgements, or in the background assumptions that make the statements intelligible. Nor do I think that Dworkin would wish to deny this. As we have seen, the debate concerns the relevant point of view with regard to the concept of law, not its particular requirements. Nevertheless, Dworkin sees the problem of controversy as pertinent here.

Consider the following improvisation on a rather familiar example: while not a vegetarian myself, I could still tell my friend, whom I know to be a devout vegetarian, not to eat a certain dish, since it contains fish. According to Raz, I thus make a normative statement from a point of view. Now, suppose that it is controversial among vegetarians whether fish should or should not be eaten. Suppose further, that this controversy is due to different conceptions vegetarians hold about the nature and point of their practice. Should this make any difference with regard to my ability to make a detached normative statement?

To begin with, we must distinguish between two possible cases. First, perhaps there is a problem of identity here pertaining to the concept of vegetarianism: is vegetarianism a single normative practice or are there, for example, two such practices, one prohibiting the consumption of fish and the other allowing it? Thus, in saying 'according to vegetarianism, A should not eat fish', I might be making the mistake of over-generalization. I should have said, 'according to one school of vegetarianism, A should not eat fish', or something to this effect.

Alternatively, if it is not a question of identity, the issue of controversy boils down to the problem of applying rules to novel cases. It will not do just to repeat how the rule has been applied, since the case in question is a new and, so far, unsettled one. Here (and this has nothing to do with the nature of the background information required to understand a social practice), Dworkin would argue that both the participants and the theorists would have to decide what vegetarianism 'really requires' (1986:64), that is, in such a way as to present it in its best light. This, I take it, is the main argument offered by Dworkin in support of the hermeneutic thesis, and it is to this argument that I now turn.

As a first step, it is important to note that Dworkin makes two distinct points here. First, that the explanation of a social practice, like law or the arts, is essentially interpretative, and as such, necessarily value laden. Second, that the interpretation of such social practices, which Dworkin calls 'argumentative', is unique in the sense that the practice itself is an evaluative enterprise, and that therefore the interpreter of such a practice must form an evaluative judgment of her own about those values which are inherent in the practice that she

purports to interpret. Such evaluative judgments, Dworkin claims, are not essentially different from the kind of evaluative judgments made by the practitioners themselves.

I have nothing to say against the first thesis. I think that it is true that an interpretation of a social practice is value laden. In fact, this is true about any theory whatsoever. No theory, whether interpretative, scientific, or other, is free from evaluative judgments. After all, no complete theory is just a list of descriptions that the theorists purports to offer. Theories are based on various evaluative judgments. Those must include, for example, certain judgments about what counts as criteria of success for the kind of theory in question, judgments about what is it that the theory should try to explain, what are important aspects of the subject-matter, and less important ones, and so on and so forth. So any theory is value-laden in this respect and I doubt it that legal positivists have ever denied this. Perhaps H.L.A. Hart may be thought to have denied even this modest aspect of the evaluative dimension of jurisprudence, but I don't think that this would be quite accurate. Hart did not deny the fact that jurisprudence (just like any other theory, whether interpretative or not), must rely on certain meta-theoretical evaluative assumptions as the ones mentioned above. I think that what he denied is the further contention that such evaluative presuppositions prevent the theory from being *neutral* in a moral, political, sense. And in this he may have been quite right, because the thesis about the impossibility of neutrality actually derives from Dworkin's second thesis, one which is misguided, indeed. Let me explain.

Recall that according to the second thesis that Dworkin advances, it is the subject matter of interpretation in the case of legal theory that makes all the difference: Because the law is a normative practice, the interpretation of the practice is bound to be normative-evaluative as well. In the case of law, the interpreter, Dworkin insists, must make her own judgments about the values which are really inherent in the law, judgments that are not essentially different from those of the participants' themselves. Without relying on such judgments the interpretation of legal practice cannot be carried out; how else would one succeed in presenting the legal practice in its best light, that is, unless one relies on certain views about the values which are inherent in the practice one strives to interpret? But this last

move is questionable. What Dworkin seems to ignore here is that there is a crucial difference between forming a view about the values which are manifest in a social practice, like law, and actually having evaluative judgments about them.

Consider the example of vegetarianism mentioned earlier. When I try to understand what vegetarianism is about, so that I can better understand the controversy about, say, whether it prohibits the consumption of fish as well, I must form some views about the ways in which vegetarians conceive of their practice and the values they associate with it. That seems quite right. But surely it does not follow that I must rely on my own judgments about those values, and decide for myself whether I agree with them or not. Forming a theoretical view about the values which are inherent in a given practice, and make sense of its requirements for the participants, is not the same as forming an evaluative judgments about those values, and the latter is not entailed by the former. I think that this is precisely the sense in which Hart denied, and rightly so, that jurisprudence cannot be neutral. An account of the values which make sense of legal practice does not commit one to forming any particular evaluative views about them. I can certainly understand, for example, the moral assumptions which make sense of certain vegetarian practices and beliefs, without having any particular evaluative views about those moral assumptions; I need not decide for myself whether they are sound or not.

It seems to me that the only reason for Dworkin to deny this distinction derives from the constructive model of interpretation, namely, from the thesis that any interpretation must strive to present its object in its *best possible light*, that is, best all things considered. If this is true, then there is some plausibility to the claim that any interpretative understanding collapses into judgment. If the only way to account for the nature of vegetarianism is to undertake the task of trying to present it in its best possible light, then perhaps it is true that the interpreter must form his own evaluative judgments about those values which could best justify vegetarianism. In other words, Dworkin's argument about the identity of theory and practice depends on one crucial aspect of his theory of interpretation, namely, the idea that interpretation must always strive to present its object in the best possible light. However, we

have already seen that this aspect of the constructive model is very problematic. This linkage between interpretation and ‘the best’ is both under-motivated and often impossible. But at least now we can see why Dworkin insists on it. Without it, Dworkin’s thesis that legal theory, as an interpretation of a social practice, must rely on those same kind of evaluative judgments that the practitioners themselves supposedly entertain, remains unfounded.¹

The truth is, however, that even if we accept Dworkin’s thesis that interpretation must strive to present its object in its best light, it may still not follow that the kind of evaluative judgments that legal theory must rely on are necessarily the same as those judgments that judges and other practitioners are expected to make. For judges and other actors in the legal practice, the law purports to create reasons for action. They must regard the law as normative, guiding their conduct. Thus, from the perspective of the practitioners, it would make perfect sense to say that the interpretation of the law is partly a matter of moral judgment. They must decide which interpretation makes better moral sense. However, for the legal theorist, ‘the best possible example of its kind’ does not necessarily mean morally best. What it does mean would depend on the purposes of a theory about the nature of law. Only if you think that the main purpose of such a theory is *to justify* the law, to explain why would anyone have reasons to obey the law, then it may be the case that ‘the best’ is a moral best. But this is only one general question about law that one can ask, and as far as traditional jurisprudence is concerned, it is certainly not the main question. Analytical jurisprudence first and foremost strives to understand what the law is. It is a theory about the nature of law, and not about the obligation to obey it. The question of whether there is an obligation to obey the law is a separate kind of question, and one which is quite obviously a moral one.

5. CONSTRUCTIVE INTERPRETATION AND THE PRINCIPLE OF CHARITY

I would like to conclude this chapter with an examination of an alternative line of reasoning which might be thought to support Dworkin’s theory, that is, the principle of charity.

¹ Stephen Perry (1995) has also argued that jurisprudence must rely on moral argument. For my critique of Perry’s argument, see Marmor (2001: 153-159).

Although Dworkin himself refers to this option only briefly (1986 :53), there is a striking similarity between his account and some of the existing attempts to apply Davidson's principle of charity to the realm of social explanation. Recall that according to the principle of charity, 'the general policy ... is to choose truth conditions that do as well as possible in making speakers hold sentences true when (according to the theory and the theory builder's view of the facts) those sentences are true' (Davidson 1984:152). As I have already mentioned in the previous chapter, this principle makes sense, on Davidson's own account, only within a holistic conception of language and thought. One thing should thus be clear from the outset: the constructive model is not entailed in any straightforward sense by the principle of charity. Nor do Davidson's further conclusions, denying the possibility of conceptual schemes (Davidson 1984:193-8), have any direct bearing on our present concern. The hermeneutic thesis is not a denial of conceptual schemes or of radically different minds. My question then is this: is there any other form, perhaps less direct, in which Davidson's principle of charity could support Dworkin's constructive model?

Consider the following account. Root, exploring the application of Davidson's theory to social explanation, argues that the principle of charity 'tells against the idea that there may be a great difference between the perspective of the insider and the perspective of the outsider. Charity counsels the outsider to attribute a perspective to the insider that is very close to her own' (1986:291). I take it that what Root has in mind is not the hermeneutic thesis, but a somewhat weaker principle. Nevertheless, his arguments are instructive. He identifies three main features in Davidson's concept of interpretation that have a bearing on social explanations: (1) that interpretation is holistic; (2) that it is critical and normative; and (3) that the norms of interpretation are the norms of rationality. Most interesting is Root's characterization of the second and third features, in terms of the 'reflexivity' of interpretation. Since the norms that guide interpretation are the norms of rationality, 'the norms of interpretation are the norms that guide the interpreter . . . and the interpreted as well' (1986:279), and '[a]s a result, the critical principles that guide interpretation will limit the differences between the participant's account. . . and the interpreter's account' (1986:291).

Root, however, is careful to avoid an obvious mistake. He acknowledges that the 'principle of charity does not preclude disagreement; what it precludes is inexplicable disagreement' (1986:287). Nevertheless, he claims that '[According to Davidson, a weighted majority of the beliefs that the interpreter attributes to her subject must be beliefs that, on the interpreters own view, are true' (1986:285). But the point is that even this seemingly modest formulation should have been further qualified. First, recall the problem of incommensurability; 'rationality' is not a magic word capable of dismissing it. I do not intend to argue that there *are* radically different minds (or cultures), so different from our own as to make them inscrutable. The problem of incommensurability is a domestic one, as arguments in the previous section have pointed out. The idea that there is *one* principle of rationality guiding our behaviour, that is, even within our own culture, is far from obvious. But unless such a unified concept of rationality is presumed, it cannot be concluded that interpretation is necessarily guided by the same norms as the interpreted. Furthermore, the more general (and hence perhaps more plausible) the principles of rationality are taken to be, the less bearing they will have on the interpreter-subject relation.

Secondly, and more importantly, Root seems to be content to apply the principle of charity as a heuristic principle of interpretation of particular actions or practices. This takes the principle of charity closer to Dworkin's constructive model, but much further away from the truth. Root's mistake is due to the following unwarranted inference: suppose we concede Davidson's general assumption that disagreement of any kind is intelligible only against a background of agreement (Davidson 1984:153). It clearly does not follow that each particular interpretation must attribute beliefs to a subject in such a way as to make most of *his* beliefs true. Davidson himself (and Quine for that matter), cannot be accused of this *non sequitur*. When Davidson refers to 'a speaker', or a subject, it is a speaker of a natural language, *qua* speaker of such language. (Recall Davidson's own proviso on the applicability of radical interpretation to a 'passing theory'.) As far as the principle of charity is concerned, people who believe in voodoo can be interpreted as being utterly mistaken. The fact that one cannot understand voodoo unless one understands a great deal about these people does not entail that

the interpreter has to attribute any *true beliefs about* voodoo to anyone, let alone presenting voodoo in its best light.

The inevitable conclusion, therefore, is that despite apparent similarities between the principle of charity and constructive interpretation, the two are essentially different, and the former can lend the latter no support.

I believe that we are now in a position to draw conclusions. As we have seen, according to the traditional view of analytical jurisprudence, legal theory comprises *inter alia* a theory of adjudication which concerns the unique features of judicial reasoning. The hermeneutic thesis challenges this division. It contends that jurisprudence *is* basically a theory of adjudication, as both amount to one and the same form of interpretation, namely, imposing a point, purpose, or value on a practice in order to present it in its best possible light.

In this chapter, I have argued for the rejection of the hermeneutic thesis. This suggests a need to shift from an interpretative account of jurisprudence to the broader (and traditional) conception of jurisprudence as comprising a theory of interpretation. Interpretation is part and parcel of the legal *practice*. Jurisprudence should comprise a theory to account for this, a theory which is not itself an interpretation of the law, but a philosophical account of what it is to interpret the law.