BOOK REVIEW

THE UNITY OF LAW AND MORALITY:

A REFUTATION OF LEGAL POSITIVISM

(London: Routledge Kegan Paul, 1978)

271 + xx pp, $29.50

The separation of law and morals has been the cornerstone of legal positivism ever since the time of Jeremy Bentham and John Austin. This book is a novel and wide-ranging attempt to undermine that thesis. Before looking at the specific contours of Detmold's arguments, it is first necessary to identify what he means when he rejects the separation of law and morals. What he does not mean, notwithstanding a chapter entitled 'The Freedom and Objectivity of Reasons', is that the law must have a necessary moral content; rather, his rejection of the doctrine is intended to embrace the notion that the very act of deciding cases according to law does not absolve the judge from *moral* responsibility for the consequences. In Detmold's terms, 'Nothing is exclusively Caesar's' (p 37). In particular, he argues that 'Legal positivism, a philosophy of law that has been dominant for over a century and a half, disguises the audacity of rules by holding that the logical character of judgment under rules is such that one can make it without being committed to that judgment in any ultimate moral sense' (p 21). Judges, therefore, according to this view, by deciding a case in favour of a particular party are thereby exhibiting a moral commitment to the legal rule or principle embodied within it.

This point, however, does not involve rejecting all forms of legal positivism. As the author acknowledges, the positivist's positivist, Hans Kelsen, specifically insisted that a judge could not, on applying a legal rule, simultaneously feel that it is morally wrong. That is, he claims, because legal statements involve an assumption of bindingness such that any contrary assertion on non-bindingness, whether based on moral or other grounds, must vitiate the legal statement. This runs directly counter to a central element in, for instance, H L A Hart's positivism, namely, that there is no logical inconsistency in suggesting that a particular rule of law is valid while holding that it is morally forbidden. Detmold quite rightly identifies this fallacy as due to a confusion of external descriptive sociological accounts of obedience and internal normative statements where the question of bindingness and moral force are integral. It remains to be said, however, that the deference which Detmold affords the legal positivist Kelsen contradicts the claim that his project refutes legal positivism *per se*. Indeed, Kelsen himself would want to argue against those other strands of legal positivism which the author spends so much time attacking.

The argument continues from this initial position to examine the objectivity of morals (p 153). In this he is at one with Kelsen and Hart in that he wholeheartedly endorses ethical non-cognitivism, or the thesis that there are no absolute 'true' morals, or, citing Hume, that one cannot derive an 'ought' from an 'is' (p 153). This is important, for it shows how Detmold's arguments implicitly reject traditional natural law positions. However, it is somewhat difficult to square this with his claim that as far as judicial decision-making goes, objectivity and freedom go hand in hand and that 'the best judge is the freest' (p 120). This freedom, it transpires, amounts to a capacity to be able to escape from the control of the violent as opposed to calm passions (p 120) but this raises the question, 'which passions are calm and which violent?'. This question Detmold studiously avoids, though posing the issue in these terms would necessitate he address it. One tentative suggestion he provides is that 'freedom is my capacity to control those parts of me which restrict my attention to the world' (p 120). In a sense, this is one of the most important sentences in the book, but it is somewhat unfortunate that the author does not devote more attention to it. In particular, this might have led to some consideration of that world and how some perspectives come to dominate others, and might have forced the author, for instance, to say something more about the place that law occupies in it. The point is that premising freedom on a true analysis of the world, that is an analysis based on 'calm' passions, must involve choosing between different and incompatible world views, and this, in turn, involves choosing between different *political* perspectives. It is difficult to see Detmold's position as providing a basis for this. Does the *legal* judgment that categorises, to use the author's example, convicted IRA hunger-strikers as criminals (and, for the author, this is a moral judgment too) simultaneously amount to claiming that such a judicial morality is governed by violent rather than calm passions? In order for him to make a distinction between the calm and the violent he has to make his political analysis clear. This, of course, is just as it should be and it is a great strength of this book that it poses the issues in these terms. Freedom, or the 'freest' judge, cannot be a question merely of subjective interpretation but rather depends upon a capacity to see the world objectively. In another context, Isaiah Berlin put the issue in this way: is the period of Nazi rule in Germany to be described as: (a) 'the country was depopulated'; (b) 'millions of people died'; (c) 'millions of people were killed'; or (d) 'millions of people were massacred'? Each statement is factually true, yet (d) is the most accurate. It also has an obvious evaluative (i.e. moral and political) colouring, but this, crucially, does not detract from its truth but *enhances* it. Thus values, or to use Detmold's term 'passions', are essential for objectively true analysis of the social world. But Detmold's reluctance to specify possible criteria for distinguishing those passions or values which make a particular judge 'unfree', though consistent with his ethical non-cognitivism, ultimately means that no-one can validly measure in any objective way which judges are the 'best' or 'freest'. Thus, having initially claimed that freedom and objectivity go hand in hand, his argument suggests that neither can ever be substantially revealed. At another level the author's argument here is a

symptom of a more general reluctance to address the question of power, for the conventional designation of terms like 'calm' and 'violent' depends in the main on how they are culturally determined, and the role played in that process by dominant groups and classes. Thus the British Government's ignoring of the struggle on the part of the hunger-strikers against the British legal system is much more than wickedness and obtuseness (p 58) and the hypothetical example of a judge refusing to acknowledge a revolution-based discourse (p 45) amounts to more than Detmold's implied breakdown in communication (pp 55-6). Additionally, a fundamental tenet of Chapter VII ('Law-Game') that law and games (such as chess and 'Christians-and-Lions') exhibit closely analogous characteristics is almost a caricature of fact. The point about games is that they are, by and large, optional. Law is not generally optional, though in differing degrees as regards, say, primary and secondary rules in Hart's sense. It follows that the analysis of power and the State must be a central aspect of legal theory. Detmold avoids this. His 'game' of Christians-and-Lions was in fact but a ritualised form of criminal torture and execution of a particular class in Ancient Rome and represented one brutal aspect of political struggle.

The vexed question of judicial discretion occupies a central position in the book. the theories of Dworkin, Raz and Hart are dissected in turn. In the main he employs Dworkin's 'hard case' example and proceeds to examine what can be made of the term 'discretion'. Hart's and Raz's belief that discretion means that the judge can do what he thinks is right is characterised as either stating too little or being meaningless (p 108). Dworkin's solution is seen to be no more satisfactory for the reason that though he tries to establish that institutional principles really do constrain judges to come to a right answer, he still shares the positivistic fallacies, (i) that judges can weigh principles and rules without being morally committed to them, and (ii) that there is no material difference between the judge's *power* to reach a wrong decision and the judge's *duty* to reach a right one. With respect to (i) this is a convincing development of Detmold's overall argument: with principles as with reasons and rules lawyers must be morally committed to them if they employ them in their day-to-day practices. (ii) is, however, problematic. He points out that '[t]he power to make the final decision in a matter (the power to make a wrong decision) is the only substantive meaning of 'discretion' (p 171). While clarifying the issue, however, this does not really get us beyond the implicit conclusions of Raz and Hart, since they insist that the open-textured nature of rules and the indeterminacy of language prevents anyone (including Detmold given his conclusion that there are no 'true' values) from proving objectively that a particular judicial decision, though final, is *wrong*. Notwithstanding this point, however, there is much perceptive analysis here of current jurisprudential argument of legal rules and reasoning, especially in the meticulous distinctions drawn between internal and external statements of rules and reasons (esp. Chs VIII and IX). This serves to demonstrate the normative dimension and therefore

the gradation of moral commitment to a legal order where claims that 'x law is valid' are made.

The strength of this book lies in the author's detailed and critical scrutiny of the processes of legal reasoning, in particular the various manifestations of an 'internal attitude'. In this way he highlights what is now generally recognised as the hermeneutic approach to law, that is, how meanings are attached to particular norms. Both Hart and Kelsen in their own separate ways sought to incorporate this element into legal theory and were thus at pains to distance themselves from the mechanistic positivism of John Austin. However, they failed to explore in any great detail the different ways in which normativity is evidenced in specific acts of decision making. This is redressed by Detmold's separate analysis of rules, reasons and principles. For him, rule decisions involve unstated assumptions of the applicability of a previously determined legal rule - rule 'pre-empts heroic judgment' (p 128) - whereas reasons decisions involve the conscious weighing up of the reasons given for an earlier rule. The concept 'principle', central to Dworkin's theory, is seen to be too loose for it fails to distinguish between those cases where principles are applied independently and where they operate to impose a certain interpretation of statutes (p 169). The importance of such distinctions is that it makes possible an examination of certain historical patterns of judicial practice, thus allowing for example, the identification of whether, as some have suggested, the doctrine of precedent permits today certain types of *purposive* reasoning at odds with former preferences for strict constructionism (or rule-based decision-making).

This latter element has always been seen as an integral element of positivism, a point which Detmold rightly identifies as having appeal for positivists as it claims to minimise hard decisions under the guise of the logical character of rules. There is more to it than this, however. Legal positivism's insistence on the scientific nature of rule-application gives it an inherent legitimacy in an essential empiricist culture where values (including, of course, morals) are seen as arbitrary and subjective.

On a broader level, this book represents a sharp divergence from traditional forays into the realm of legal theory in its attempt to identify the origins of and necessary basis of moral thought. It is held by Detmold to emerge from the mysterious character of the world, and is centrally connected to beauty and love: '[t]he affirmation of the mysterious particularly of the world is an affirmation of beauty. The denial of respect for that world is a denial of love' (p 7). While the laying of philosophical foundations is commendable it is hard to see how this formula (and the relied-on particulars/universals dichotomy) has any direct bearing on the intricacies of judicial reasoning and legal structure. Other sweeping statements such as for instance, '[t]he fundamental judicial project is probably : keep the community together' (p 172), are made without any thorough-going attempt to examine their relationship to the argument as a whole. It will have to be seen whether Detmold will

achieve that in a later work. Nonetheless this work stands on its own. It combines a thoughtful and original analysis with a literary freshness uncommon in this field. These elements help to make it a provocative intervention in contemporary jurisprudence.

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BOOK REVIEW

JUDGING THE WORLD: LAW AND POLITICS IN THE WORLD'S LEADING COURTS

by Garry Sturgess and Philip Chubb, Butterworths, Sydney, 1988

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> The timorous have always been in the ascendant [in British courts]. But you can understand it. It's very important the law should be certain and that lawyers are able to advise clients what the result of a case would be. I can understand the two points of view; certainty on the one hand and justice on the other, but I feel that I'd always come down for justice.

This comment, made by Lord Denning, Master of Rolls in the English Court of Appeal for twenty years, should whet your appetite for this unique new book, which explores the jagged line of intersection between law and politics through interviews with over forty judges of prominent courts throughout the world.

The book is divided into two parts. The first, 'Judging the World', explores the general theme of the relationship of the courts to executive and legislative power. In this part the authors focus on the courts of Britain, Australia, New Zealand, United States, Ireland and India, examining judicial power in each country and exploring the ways in which the different constitutions in these states, and particularly the presence or absence of an entrenched Bill of Rights, affect the political nature of judicial decision-making. The debate over the desirability of incorporating a Bill of Rights into the Australian Constitution is covered in this section. The book also looks at the courts in the international arena, principally the International Court of Justice, where, just as in national courts, there is a debate between activist and more restrained judges.

In a chapter entitled 'Horses for Courses', the authors examine the issues involved in judicial appointments as they throw light on the theme of the book (did you know, for example, that in Wisconsin, candidates for the state Supreme Court actually run for office, with a campaign, donations and a platform!). Two chapters, 'Courts in Collision' and 'Judges in Collision' explore many instances of courts and their judges in conflict with governments. The latter chapter includes a detailed account of the Murphy saga; the interview Justice Murphy gave for this book was his last. Perceptive comments are made about the conclusions which can

be drawn from the various conflicts about the central theme of the book. The whole of the first part of the book is full of fascinating case histories and details of events which illustrate the political nature of judicial decision-making.

The second part, 'Judging by what they Say', provides edited accounts of the judicial wisdom brought out in the interviews for the book. The questions put to the judges (unfortunately including only one woman) revolve around the central themes of the book: how judges are appointed, to what extent and how they make law, whether and to what extent what they do is political, judicial independence and accountability, and so on. The frank and open answers to these questions provide a fascinating variety of views on all of these issues.

The book is hard-covered and beautifully presented. Included are many interesting photographic portraits of the key players. Although *Judging the World* addresses one of the most fundamental jurisprudential issues, it is not an academic text. It is thoroughly readable and will not only appeal to those with legal training. Lay people will also find it provides fascinating insights into the nature of judicial power.

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