FACING JUDICIAL DISCRETION

Law and Philosophy Library

VOLUME 49

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FACING JUDICIAL DISCRETION

Legal Knowledge and Right Answers Revisited

by

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SPRINGER-SCIENCE+BUSINESS MEDIA, B.V.

A C.I.P. Catalogue record for this book is available from the Library of Congress.

ISBN 978-90-481-5637-5 ISBN 978-94-015-9684-8 (eBook)
DOI 10.1007/978-94-015-9684-8

English translation of El problema de la discreción judicial.
Una aproximación al conocimiento jurídico, Centro de
Estudios Políticos y Constitucionales, Madrid, 1999,
translated by S.C. Mendlewicz.

Printed on acid-free paper

For Nuri Vila,
the noblest dreamer

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ACKNOWLEDGEMENTS

This book began life as a doctoral thesis, submitted at the Universitat Pompeu Fabra, Barcelona, in 1997, which I completed thanks to the financial support of the Generalitat de Catalunya. It is the result of several years of study, reflection, and persistency with ideas that only hesitantly assent to leave darkness.

Special thanks are due to all those who made its publication possible both in its Spanish as well as in its English version, in particular, to the managing editors of Centro de Estudios Políticos y Constitucionales and Kluwer Academic Publishers. I am grateful to the translator, S. C. Mendlewicz, for her work and for the long hours of detailed discussion. Her observations have helped me clarify a number of points.

Intellectual activity is not the product of mere individual effort. Philosophy benefits markedly from hard questions, criticism and discussion. I have greatly benefited from the intellectual atmosphere I was privileged to enjoy at the Department of Legal Philosphy of the Universitat Pompeu Fabra. I wish to express my gratitude to its director and my supervisor, Albert Calsamiglia, who provided not only the support, which means so much, but constant guidance and invaluable criticism from the beginning to the end. His striking ability to create a fruitful environment for philosophical exchange afforded me a unique opportunity to meet and learn from thinkers such as Ernesto Garzón Valdés, Carlos Santiago Nino, and Eugenio Bulygin.

I am deeply indebted to José Juan Moreso, Ricardo Caracciolo, Cristina Redondo and Maribel Narváez for the many stimulating and fruitful discussions on the issues addressed in this book, and for reading and commenting upon large portions of earlier drafts. Their incisive criticism and fine observations have led to many improvements.

Many thanks must go to Jordi Ferrer, Josep Maria Vilajosana, Teresa Pascual, José Luis Pérez Triviño, Jorge Malem, Pablo Navarro, Daniel Mendonca, Roberto Gargarella, and Víctor Ferreres for their patience and encouragement. I have been the grateful recipient of their suggestions in developing the ideas in this book. Most importantly, I have had the pleasure of sharing with them my passion for philosophical inquiry.

I wish to thank Neus Torbisco, and all my friends for their unfailing support. They have been wise to remind me the other strands in my life during the difficult moments in the writing of this book. And, of course, I shall not forget to mention Africa.

Finally, and most of all, my everlasting gratitude goes to my parents and sisters, Cristina and Elisabeth, without whose affection, warmth and generosity this book would never have seen the light of day.

INTRODUCTION

In response to ETA's 1997 kidnappings and murders thousands of Spaniards attended mass demonstrations to express their contempt for violence as a means of political pressure. The demand that public authorities prosecute and condemn those who directly or indirectly support ETA and its terrorist attacks was one of the most prevalent slogans in the marches. Indeed, the social response was aimed not only against the terrorist group, but also against Herri Batasuna (HB), the political party that openly endorse ETA's armed actions in the Basque Country.

From the legal point of view, it is interesting to examine what it is citizens are requesting from the government in the above-mentioned case. How do these collective claims translate into legal language? One may think it fit to answer that Spanish citizens want violence to be met with the institutional punishment prescribed by the legal order. Nonetheless, it could also be argued that citizens in fact demand that certain kinds of behaviour be regulated by the law in their country. While from the latter viewpoint citizens wish for the creation of new legal norms, from the former they are just calling for the application of the law. What reasons may render us inclined to sympathise with one of these two views rather than the other? Which one of these two options is most appropriate?

At first sight, this may appear to be a simple question. Answering it requires no more than consulting the normative texts and determining what is prescribed by the Spanish law with regard to this point. If it is the case that support to terrorism falls into a delictive category, citizens just claim an effective application of the law. Otherwise, they are demanding that a new criminal figure be created.

However, there is more to it than that. Let us inquire about what would make support to terrorism a legally regulated action. The literal meaning of normative texts is usually malleable. How would otherwise members of HB have eluded convictions of an offence of conniving at terrorist acts by expressing approval of them, or co-operating with armed terrorist organisations? Precisely the legal qualification of the conduct of HB's members has been widely debated in connection to the limits of free speech, and the room for political action as a sign of democratic pluralism. Thus, the answer to which alternative better describes citizens claims against the support of violence is not obvious at all - it very much depends on the conception of law we choose to embrace;

but law is a dynamical social practice that involves argument and discussion, and in which interaction is driven by some specific purpose. We know what law is when we are able to account for this complex social practice.

This book is an attempt to address this issue from an epistemic point of view. I will explore some of the assumptions that account for particular conclusions of certain legal theories about which behaviours are legally regulated. My discussion will develop in the context of legal adjudication. Over the last few decades, legal philosophy has paid much attention to the analysis of judicial reasoning. This has proven an interesting starting point to explore questions of a wider scope such as what is law, how do we come to know it, and what are its limits. For this reason, investigating judicial discretion and legal interpretation will ultimately enable us to identify some of the elements that a view of law should incorporate to warrant its viability. The main question I will attempt to answer to is how to ensure the existence of objectively right legal answers. With a view to doing so, I will investigate some of the difficulties encountered by a theory of the truth conditions of legal propositions that assumes, at least, partial legal determinacy. I will suggest an answer along the lines of Dworkin's theory, the thesis of internal objectivity, as to how to justify the existence of right legal answers, and yet avoid falling into semantic realism. Moreover, I will hint at reasons that prevent the determinacy of law in all cases.

The first chapter outlines the different meanings ascribed to the expression 'judicial discretion' in the context of legal theory. The features of each one of these uses are described and particular attention is paid to weak and strong discretion. Each of these two uses of discretion yields a separate model about what is law and how it is identified.

In the second chapter, the 'strong discretion model', mainly endorsed by Hartian positivism, is introduced. The distinguishing features of this model can be summarised in the four postulates: I) the thesis of the social sources of law; II) law as communication; III) meaning as settled use; and IV) the partial indeterminacy of law. The purpose of an analysis of these theses is to show the difficulties met by Hartian positivism and its conventionalist semantics to overcome the sceptical challenge of rule-following without falling into semantic realism. Additionally, I point to certain deficiencies in the justification of the positivist claim that semantic disagreement necessarily leads to legal indeterminacy.

The third chapter is devoted to an analysis of what I shall call 'the weak discretion model', whose chief exponent is Ronald Dworkin. I develop three aspects of this theory of law: I) the relationship between legal theory and normative adjudication; II) the interpretive view of law; and III) law as integrity or narrative coherence. The purpose of

this chapter is to illuminate the epistemic assumptions of Dworkin's theory and to point to the main objection that can be pressed against his model, namely how to justify optimism about the possibility of eliminating the need for strong discretion in adjudication.

The starting point of the fourth chapter is the idea that every theory supportive of the existence of right legal answers ought to account for the distinction between interpretation and invention. The ultimate goal of this chapter is to provide an answer as to how to draw this distinction objectively and simultaneously avoid externalism or semantic realism. To this end, I set forth the epistemic grounds of the interpretive theory of law and evince the advantages of such an approach over Quine's holism and Davidson's epistemic coherentism. This leads to the conclusion that the best way to distinguish between invention and interpretation is by adopting a theory of truth as assertability for legal statements in line with Putnam's internal realism.

The purpose of the fifth chapter is to advocate a theory of truth as assertability that adopts coherence as the criterion to determine what it is we are entitled to assert. I consider coherence as a property and as a relationship. Moreover, as far as coherence as a relationship is concerned, I distinguish between vertical and horizontal coherence. My claim here is that for a coherentist theory to avoid both foundationalism and a too strict form of holism it should take into account vertical and horizontal coherence, as suggested by the idea of reflective equilibrium. I argue that coherence within a complex interpretive scheme can warrant legal determinacy, albeit only partially. Thus, although judges always require a weak form of discretion when they adjudicate norms, there is evidence to support the need for strong discretion in the resolution of certain cases.

Finally, Chapter 6 relates the postulates of Hartian positivism to those of Dworkin's theory, and shows their differences and similarities. I favour Dworkin's view on the grounds of its epistemic accessibility and its higher explanatory output. I specifically stress that Dworkin's position permits a viable strategy to overcome the problem of rule-following, and distinguish interpretation from invention. This leads to the conclusion that legal indeterminacy does not necessarily follow from semantic disagreement.