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The One True Interpretation

When a lawmaker uses language to make law, a court often needs to make evaluative judgments (concerning the purpose of the law and the values that can be promoted by adopting one interpretation or another) just to apply the law laid down. The utterance of a form of words by a legislature or an international treaty organization is merely a social fact. The practice of treating the organization or the legislature as an authoritative body is merely a very complex set of social facts. But the law made by the lawmaker's use of language depends on evaluative considerations. In this essay, I will explain that view and assess its implications for old debates about the relation between law and morality.

Because I am a common lawyer, I will present the argument by referring to the reasons given by judges in resolving two disputes. But it is an argument that applies generally to the application of law made by the use of language. The cases demonstrate important ways in which the language of the law can make room for disputes that concern both the content of the law, and the values of the law. So if we understand what was going on in these two cases, we will have a way of approaching the old debates in legal philosophy concerning general relations between law and value. I have chosen the cases because each presents a different picture of the role of judges in resolving disputes over the interpretation of laws. In the first (*Adan*), the House of Lords suggests that one true interpretation resolves all such disputes; in the second (*Designers' Guild*), the House of Lords suggests that in one legal context, such disputes are a 'matter of impression', to be resolved in the discretion of the court. Each view, I think, is overly general: sound (or true) interpretation demands a particular resolution to some disputes, but leaves others to the discretion of the court.

I will argue that the interpretation of the language of the law sometimes calls for an explanation of the value of the law; there is one true interpretation of the language of the law to the extent that there is one such explanation that the law requires. This argument seems to conclude that the content of the law depends on its merits rather than, or as well as, on its sources. Paradoxical as it may seem, I will try to explain why I think that is not necessarily so.

What is a 'refugee'? –Incompleteness in a legal standard

Britain, Germany, and France have all signed the Geneva Convention, which defines a 'refugee' as a person who has 'a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' (Article 1A). The German and French authorities interpret the Convention as protecting persons with a well-founded fear of persecution *by state authority* (or of persecution in which the state is complicit). The British government wanted to interpret the Convention in the same way, but the highest court, the House of Lords, has forced it to act on a different interpretation, which concludes that 'being persecuted' does not mean 'being persecuted by state authority'. 'If for whatever reason the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete' (*Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 306 per Lord Lloyd).

In British law, the government can send an asylum seeker to a third country, as long as he can certify that the government of that country will not send her elsewhere 'otherwise than in accordance with the Convention' (Asylum and Immigration Act 1996 s.2(2)(c)). When asylum seekers flee Germany or France to take advantage of the British interpretation of the Geneva Convention, can the British government send them back to Germany or France? In British law, it depends on whether Germany and France would act otherwise than in accordance with the Convention.

Adan fled to Britain from Germany and Aitseguer from France. They were trying to escape the German and French interpretation of the phrase 'well-founded fear of being persecuted' in the Geneva Convention. Germany and France take the 'accountability theory', according to which the state authorities in the asylum seeker's country must be the agents of (or at least complicit in) the persecution. Adan was being persecuted by a Somali clan (and there was no effective state authority); Aitseguer was being persecuted by an Islamic rebel group in Algeria. Britain takes the 'protection theory' of the Convention, according to which an asylum seeker can be a refugee under the Convention even if the state was not involved in the persecution. The British government decided to send Adan back to Germany and Aitseguer back to France.

When Adan and Aitseguer challenged the decision in court, the British government argued that the Germans and the French have their ways of interpreting the Geneva Convention, and we have ours, and the court should not hold that Germany and France would act otherwise than in accordance with the Convention, unless their interpretations were outside the range of permissible interpretations of the Geneva Convention. The House of Lords rejected that argument. Lord Steyn said,

the Refugee Convention must be given an independent meaning ...without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty.

It is persuasive to say that if the German interpretation of the Convention is wrong on a point that affects Adan's status as a refugee, Germany will send her back to Somalia otherwise than in accordance with the Convention. I have argued elsewhere that the House of Lords was right to reject the argument that comity requires a British court to defer to the German and French interpretation of the Geneva Convention.¹ Here, I will argue that Lord Steyn's conclusion that there is only 'one true meaning' or 'one true interpretation' of the Geneva Convention is right as it relates to the issues in the case, but it is not supported by his argument, and it does not support his suggestion that the one true meaning of the Convention answers all questions of whether someone is a refugee under the Convention.

Lord Steyn's speech does much to explain why the proper interpretation of the Geneva Convention does not depend on where it is being interpreted. The Convention does not mean one thing in Germany or France and another in Britain. The best way to understand the protections that it offers does not vary with the conditions and views of the country to which an asylum seeker flees. The very idea of a Convention entails a commitment to a shared, common, standard for behaviour- in this case a standard for protection of refugees that is to be shared among the parties to the Convention.

But Lord Steyn proceeds as if it followed ('therefore') that there can *generally* only be one true interpretation of a treaty. With respect, it does not follow. A text may admit of more than one interpretation even without its meaning depending on local conditions. The treaty may be ambiguous, so that there is more than one legitimate way of understanding its effect. Or it may be vague, so that the only legitimate way of understanding it leaves many particular questions of its application unanswered. In fact, the difference between the British interpretation and the German and French interpretation arises from a more dramatic (but quite common) lawyer's technique for leaving an issue open: the use of the passive voice. The Convention could have specified the agent of persecution for its purposes by saying, e.g., 'a well-founded fear of being persecuted by a state authority or by any person whom the state is unwilling or unable to control' or 'a well-founded fear of being persecuted by a state authority'. Instead, the Convention simply uses the empty passive: 'a well-founded fear of being persecuted'. I do

¹ "'International Meaning": Comity in Fundamental Rights Adjudication' (2002) 13 *International Journal of Refugee Studies* 280-292, translated into Spanish by Maria Teresa García-Berrio Hernández and published as "'Significado internacional": la cortesía en la adjudicación de derechos fundamentales' in (2002) 3 *Anuario de Derechos Humanos, Nueva Epoca* 81-102.

not know why the framers of the Convention did that; we can imagine various possibilities—that they did not think of the problem, or that there was no consensus among the prospective parties to the Convention, so that it was a political necessity to leave the question unanswered in the text of the Convention in order to persuade the various states to sign. Or perhaps the framers were concerned not to embark on a process of defining the agent of persecution, because any attempt to do so would provide opportunities for evasion of the Convention protections, which could be avoided by good faith application of a text that did not state the agent.

In any case I call the text of the Convention ‘incomplete’ not simply because we can imagine disputes that are not clearly resolved by the text (every text is incomplete in that sense), but because the text equivocates on a salient general question of its effect. Then how can Lord Steyn be right, as I think he was, to hold that ‘the one true interpretation’ of the Convention requires the protection theory rather than the accountability theory? There are certainly potential arguments either way: there is no doubt that the Convention provides limited protection, rather than a right of refuge for every person who is in trouble; it could, for instance, be argued that the Convention was limited to protecting people from atrocities of the kind perpetrated by the Nazi regime, so that ‘refugees’ should be understood as victims of state action of the same kind. It could be argued that responsibility to give asylum to refugees from situations of civil disorder imposes an unreasonable burden on signatory states, which they should not be taken to have undertaken unless the Convention stated clearly that they were doing so. If Lord Steyn was right to reject that view, it is because the situation of Adan was so closely analogous to the situation of victims of state terrorism, that it gives rise to the same obligation on states that have signed the Convention. If he was right, he was right because the potential arguments to the contrary are not legitimate. The Convention does *not* leave a legitimate range of different views on the point, but demands protection for victims of non-state persecution. While the use of the passive voice in the text of the Convention expresses no answer to the question, a true understanding of the purpose of the Convention does so.

But it is possible to share a convention without agreeing on all questions of how to apply the convention. The Geneva Convention, like other instruments protecting basic rights, has many vague provisions: the protection it gives to an asylum seeker depends, among other things, on what counts as a ‘religion’, a ‘race’, a ‘social group, or a ‘political opinion’. Lord Steyn’s speech could be taken to suggest that in *any* case in which Germany and Britain treat applications under the Convention differently, Germany is acting otherwise than in accordance with the Convention. There would be no support for such a view of the law. The House of Lords has long been accustomed to the idea that, even when the court’s task is to identify another decision maker’s errors (and to protect an applicant for judicial review from their effects), its task is not necessarily to impose the decision it would have made. In *R v Monopolies Commission ex p South*

Yorkshire Transport [1993] 1 WLR 23, Lord Mustill pointed out that in judicial review for error of law, the court must interpret any applicable statute and impose a criterion for action on the decision-maker subject to review. But that criterion

...may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards v Bairstow* [1956] AC 14 at 32.²

By analogy, the criterion provided by the court's interpretation of some features of the Geneva Convention may itself be so imprecise that the authorities of other countries might reach differing conclusions when applying it to the facts of a given case. Consider for a moment the Convention's protection for persons persecuted for reasons of political opinion. There is an unlimited potential range of situations in which an asylum seeker might claim to be persecuted for political opinion, while a government might claim that the alleged persecution is for other reasons, such as public security. In some such cases the asylum seeker's argument may be overwhelmingly convincing; in others it may be weak or even fraudulent. There may be intermediate cases in which it would be reasonable to characterize the alleged persecution either way. In those cases, the 'one true interpretation' that the House of Lords gave to the Convention in *Adan* will not resolve the dispute, and while it will be possible for each side to offer more elaborate interpretations of the Convention on either side of the dispute, there may be no reason to conclude that either interpretation is the only true interpretation, in the sense that it *must* be followed by any party that complies with the Convention.

So Lord Steyn's statement of the law is overly general. But it would, conversely, be a mistake to say that no true interpretation provides any answer to a question of law that the text in question does not unequivocally express. Evaluative considerations can require one interpretation even when, as in our second case, the text is extremely vague.

² And in *Adan* itself, Lord Slynn suggested that not *all* conceivable questions of the application of the Convention would be answered by the one true interpretation: 'There may be cases in which an interpretation adopted by the Secretary of State can be carried out in different ways and in such a case it may well be that the Secretary of State could accept that such other ways were in compliance with the Convention. But the Secretary of State is neither bound nor entitled to follow an interpretation which he does not accept as being the proper interpretation of the Convention.'

What is a 'substantial part' of a work of art? – Vague legal standards

The British Copyright Designs and Patents Act 1988 gives the maker of an original art work a copyright. But the Act provides that the copyright is only infringed if another person copies the whole work or a 'substantial part' of it (section 16). In the *Designers Guild*³ case, the makers of a textile pattern called 'Ixia' sought damages for breach of copyright against a company that produced a remarkably similar pattern called 'Marguerite'. The issue in the case was whether the second company had copied a 'substantial part' of the Designers Guild design. In an extremely expensive dispute resolution procedure, a High Court judge looked at the two patterns and held that *Marguerite* was a copy of a substantial part of the *Ixia* design, then three Court of Appeal judges looked at the patterns and decided a substantial part had *not* been copied and overturned the trial judgment, and then five judges in the House of Lords looked at the two patterns, unanimously agreed with the trial judge that the copying *was* substantial, and restored the trial decision.

In the House of Lords, Lord Hoffmann said that the issue of substantiality was a 'question of impression', which was for the trial judge to decide. If the lower courts take him at his word, at least there will not be so much wasteful litigation in similar future cases, because the losing party will not be given leave to appeal from the trial judge's decision.

But the House of Lords missed the opportunity it has, as the highest court in a common law system, to state the principles of the law in a way that could serve as a guide to the application of the vague standard. There are various ways of understanding the 'substantial part' standard: it may be thought to apply whenever the copying is more than merely trivial, or it may be thought to apply only if the copy takes the whole gist or essence of the original, so that the copy is substantially a replica of the original. And there are various possibilities in between, such as that the standard applies if the extent of the copying is significant, or that the new work is more copied than not copied. By calling the issue a 'matter of impression', Lord Hoffmann in the *Designers Guild* case leaves all such questions to the court of first instance, and also leaves it to them to determine whether there is anything in the rationale for the test that might help to resolve the issue.

There are principles of the law of copyright that are important for deciding what counts as 'substantial' copying in the relevant sense.⁴ On the one hand, the law ought to maintain an incentive for original artists by giving them a limited form of monopoly power, and ought to give the original artist a certain measure

³ [2000] 1 WLR 2416 (House of Lords). For an analysis of the case and its implications for the law of intellectual property, see Michael Spence and Timothy Endicott, 'Vagueness in the Scope of Copyright' (2005), 121 *Law Quarterly Review* 657-680.

⁴ For further discussion of those principles, see Spence and Endicott, *ibid.*

of control over his or her self-expression; on the other hand, copyright ought not to give excess monopoly power or unduly restrict the creative freedom of someone who is inspired by an existing work. To achieve these purposes, it is necessary for the court applying the law both to know how the relevant market works (in order to understand what role particular similarities and differences may play in competition in the marketplace), and to understand the artistic conventions in the genre in question (in order to understand the difference between taking inspiration from another artist's work, and taking a copy of the work).

The right way to resolve a dispute over the substantial part doctrine depends on those considerations. But the right way *according to law*, or only as a matter of morality? That depends on whether, as Lord Steyn would say, there is one true interpretation of the substantial part doctrine according to law, or only different lawful interpretations. You can see from what I have said that I think there *is* one true interpretation- but that it is an interpretation that ought to be understood as the best explanation of what the legislature *did* when it enacted that a copyright is only infringed by copying of a substantial part of a work. That interpretation is *itself* vague, and therefore leaves a significant discretion to the courts.

What is the true interpretation?

An interpretation, in the sense that concerns us here, is an explanation of how to apply a standard. The Geneva Convention can be interpreted generally as a response to the Nazi atrocities of World War II, and the Copyright statute can be interpreted as a capitalist weapon in a class war, or as an expression of a particular theory of personality. But we are not concerned with such *generalizing* interpretations; we are concerned with an applicative interpretation - an account of the meaning of the text that is designed as a guide to its application.

A *true* interpretation is the same thing as a good interpretation, as far as I can see. That is, the predominant standard of excellence for an applicative interpretation is simply its truth. Different interpretations can be good in different ways, and there is one true interpretation only if there is one interpretation that is good in such a way that it would be wrong to adopt any other interpretation. If there is one single true interpretation, that is because there is no other good interpretation, or because the one true interpretation is better in ways that make it wrong to act on any other interpretation.

I propose that there is one true interpretation of the Geneva Convention, and the Copyright Act, to the extent that there is good reason to answer a question of interpretation in one way, so that it would be wrong not to take that interpretation. There can be more or less good reason to hold that Adan was a 'refugee' for the purposes of the Geneva Convention, or that the second pattern copied a 'substantial part' of the first pattern for the purposes of the Copyright Act. There is a

single true interpretation if, and only if, to act on any other explanation of how to apply the standard would mean misapplying it.

The *Adan* case and the *Designers Guild* case offer us two different accounts of what is going on when the sources of law use such incomplete or vague language to express a legal standard: we could say (as Lord Steyn suggests in *Adan*) that for any legal standard, there is one true interpretation according to law, which determines all questions of the application of the standard. Or we could say (as Lord Hoffmann held to be the case in *Designers Guild*) that the law offers no guide to the application of the standard, so that its legal effect is a ‘matter of impression’, just like an express grant of discretion to the adjudicator in any dispute to resolve the dispute as he or she sees fit. So as we turn from these questions of interpretation to the general theory of law, we do so with two models available of the legal effect of incomplete and vague language: the matter-of-impression model, and the one-true-interpretation model. In my view, either model would distort the situation.

The sources thesis

The view I have defended, concerning the role of evaluative considerations in *Adan* and *Designers Guild*, seems to have important implications for the long-running debates in theory of law over the relation between fact and value in law, and over relations between law and morality. The conclusion seems to contradict one of the most provocative and controversial claims in the theory of law--the ‘sources thesis’, which Joseph Raz has stated as follows:

All law is source-based. ...A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument.⁵

My argument seems to contradict that claim, because I have said that you cannot tell what the content of the relevant legal right or obligation is (whether *Adan* has the rights of a refugee; whether *Marguerite* is a copy of *Ixia*) without engaging in evaluative reasoning (as to the purpose of the refugee regime; or as to the reasons why the copyright regime prohibits copying of a substantial part rather than simply prohibiting all copying). We can only decide whether persecution by non-state agents is persecution *for the purposes* of the Geneva Convention, by understanding the Convention as pursuing a value, and by making an evaluative judgment as to whether that value is promoted by providing protec-

⁵ ‘Authority, Law and Morality’, in *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 194-221 at 194-5.

tion in the *Adan* case. So we cannot identify the content of the law without resort to evaluative reasoning.

Here are two possible answers to this apparent problem for the sources thesis. They correspond to the matter-of-impression model and the one-true-interpretation model:

The law is radically indeterminate: it is indeterminate to the extent that it has the features of incompleteness and vagueness that I have mentioned; there *is no* legally true interpretation;

There is always one true interpretation, as Lord Steyn called it, that answers every question of the application of the standard in question. The law *is* ‘the one true interpretation’ that uses moral considerations to decide what to do in light of the acts of lawmaking institutions.

The *Designers Guild* case suggests the first approach: the application of the vague standard was held to be a ‘matter of impression’, with no legal principles to guide the trial judge. On this approach, the law is radically incomplete. The reason why I think that this would be the wrong approach for us as legal philosophers is related to the reason why I think that the judges ought to have taken a different approach in the case. It leaves the law unintelligible. If ‘substantial part’, as a matter of the English language, could be applied in different senses to anything from a non-trivial but unimportant part of a work, to something virtually equivalent to the whole work, we cannot understand the law as a guide to the right in question. It leaves the right in question radically indeterminate, as if it said that the extent of copyright protection is in the discretion of the trial judge.

While the law of copyright *does* leave a considerable discretion to the court (because it does not draw any precise line between what does and does not amount to substantial copying), there is no reason to think that it leaves a discretion that is as unfettered as the use of the word ‘substantial’ is in ordinary usage. The legislature certainly used a remarkably vague phrase (‘substantial part’), but the very fact that the legislature used that phrase, in the context in question, makes sense as part of a regime of protection of original works that is designed to give the author of an original work a limited form of property protection, without stifling the inspiration that one artist can gain from another.

It is important to remember that the sources thesis is not a claim about what a court ought to do in any case, but a claim about the content of the law. So the first response to the problem for the sources thesis (the view that the law is radically incomplete) may seem attractive. It might seem possible to rescue the sources thesis by saying that the *law* is simply what the Convention *says* (‘...fear of being persecuted...’), so that the law itself is incomplete as to the agent of the persecution, and a court has to add something to the law by making a judgment (which is not legally constrained, but ought of course to be made on good moral grounds) as to the extent of the protection. Or perhaps we could say that the *law* protects against persecution by *every conceivable* agent, since the text uses the

passive voice (and there may conceivably be good moral grounds for limiting the protection in a way not laid down by law).

I hope it will be obvious that this defence of the sources thesis is not viable, from the simple fact that there are two possible ways of trying to account for the content of the law without making evaluative judgments. There is no way of identifying the *law* of the Geneva Convention without passing judgment on the *legal effect* of the use of the passive. We cannot even account for someone fleeing from *state* persecution as a clear case of a ‘refugee’, without passing that judgment. So the sources thesis seems to be contradicted even in the clearest cases of the application of the language of the law. In order to decide what the sources have directed, you need to understand the sense in which the language is used, and that task of understanding may require evaluative judgment.

But the existence and content of the law can still be identified by understanding what the lawmaker has done, without independently judging what the law ought to be. It is possible to decide whether *Marguerite* copied a substantial part of *Ixia*, without judging whether copyright law ought to protect an author from the copying of a substantial part of his or her work. The sources thesis articulates this important insight: the makers of *Ixia* were held liable *because the legislature had protected* works from copying of a substantial part. The protection that Adan sought is available in international law *because Britain, France and Germany acted* to sign the Convention (and that protection is available in English law *because Parliament acted* to give effect to the Convention).

Moreover, if the courts had not treated the Convention as protecting Adan, or the Copyright statute as protecting Designers Guild, or if government officials had not been prepared to treat the court orders in those cases as binding, then it would have become false to say that English law conforms to the protection theory of the Convention, or that it protects an original work from copying of the kind that *Marguerite* represents. Because law is systematic (the law itself gives legal institutions authority to identify the law), the social facts of the courts’ decisions (combined with the complex social facts of official recognition of the courts’ decisions) determine the law.

As I have argued elsewhere,⁶ Raz’s explanation of the nature of law is not undermined by the fact that evaluative judgments are necessary in order to identify the content of the law, as long as it is still possible for legal directives to have the exclusionary force that, in his theory of authority, they claim. The sources thesis is, I think, sound as long as the court in *Adan* can answer the question of the effect of the Convention, without having to judge whether it is a good thing for Adan to have protection as a refugee. The court was able to do that, but could only do so on the basis of a judgment of social fact that relied on evalua-

⁶ On related grounds: ‘How to Speak the Truth’ (2002), 46 *American Journal of Jurisprudence* 229-248.

tive judgment. The question of social fact was, 'did the parties to the Geneva Convention act to protect refugees from persecution by non-state agents?' Given the simple fact that the phrase in the text was '...fear of being persecuted...', the answer might be 'yes', 'no', or 'neither'. If the answer is 'neither', then there is a significant gap in the law, which a court must fill (and in this case the decision in *Adan* would be wrong, because there would be no reason to hold that France or Germany would be acting contrary to the Convention in giving effect to the 'accountability theory'). If, as I think, the answer is 'yes', then the decision in *Adan* gave effect to the content of the law. My argument shows that identifying source-based considerations requires evaluative reasoning, but not that the law is not a set of source-based considerations.

So I think we might restate the sources thesis as follows:

All law is source-based. A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument, except of course any evaluative argument that is necessary to identify the social facts.

The law, we might say, *is* the true interpretation of its own standards. That interpretation may or may not provide a resolution to a dispute. There is a gap in the law when there is more than one true interpretation, or when the one true interpretation does not require a particular answer to a question of application of the law. Since that happens often, it is an important responsibility of a court not only to identify the law, but also to elaborate it in the interests of justice. Both responsibilities require evaluative judgment.