Chapter in:
A Revolution in the International Rule of Law:
Essays in Honor of Don Wallace, Jr., Borzu
Sabahi et al. eds. (Juris Publishing , 2014)

CHAPTER 6

Can the Law Meet the Demands Made on It?

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We are increasingly becoming aware that we live in a world in which the economic and political systems of nation states—and thus also their legal structures—are becoming more and more intertwined. The greater mobility of people and the explosion of world trade have made this inevitable. In this short paper, I should like to point out the challenges that these developments place on national and transnational legal systems. It is not merely that the number of people whose interests are affected by the application of law on a national and transnational level is growing exponentially. What we seek from any legal system, at whatever level it operates, has also increased. Whether we like it or not, the combination of these two factors—particularly the latter—has forced us to ask what do we really mean when we talk about the "rule of law" and seek to extend that concept to cover a larger number of human activities as well as a larger geographic area. Dealing with this expansion of the range and scope of legal norms has not been made any easier by the increasing delegation, whether consciously intended or not, of important policy and moral issues to judges for judicial determination.

For John Locke the essence of the rule of law was the existence of a known law, enacted and promulgated by an entity that was accepted as the legitimate law maker, and administered and applied by an impartial judiciary.[1] This is obviously a very simplified model of what the formal structure of a society governed by the rule of law should look like. In a short paper, addressed to legally trained audiences, it is unnecessary to consider how such a model might be extended to cover the acceptance of

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[1] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, Ch. IX, at 70-73 (T.P. Peardon ed., Macmillan/Library of Liberal Arts 1986) (1690).

customary law and the related long tradition of judge-made law in the common-law world. I shall only discuss the ends that we hope to achieve by the rule of law and why courts might not always be able to meet our expectations.

We certainly want a fair judicial process. We would certainly begin by insisting on an unbiased judge. No one disputes that. More troublesome is a fair judicial process's additional requirement that we should have a "known law." Even if we have agreed on a written text of the applicable law, we still face the problem of determining the meaning of that text—that is to say, using the customary jargon, the problem of how that text should be "interpreted." It was in order to meet that problem that the predominant schools of jurisprudence in the nineteenth century and their twentieth century successors insisted on the analytical separation of law and morality.[2] The failure to insist on this separation, it was maintained, would open the judicial process to all the uncertainties and potential bitter ideological controversies that the rule of law was meant to avoid. Is that separation practically possible, however? Justice William J. Brennan was not the first to note that many of the more important terms used in the United States Constitution are the sort of terms whose meaning and use is largely taken from moral discourse.[3] The implication of this observation is not merely that it is impossible for decision makers to completely insulate their legal reasoning from contamination by moral considerations but that, on the contrary, the letter of the law actually requires them to consider the moral aspects of both the dispute before them and the broader moral aspects of the law they are striving to apply.

As is well known, Ronald Dworkin embraced the notion that law and morality were inextricably intertwined.[4] He maintained that this was not a problem because, if one thought deeply enough about the matter, one would realize that in advanced societies, such as the United States and the United Kingdom, there were morally correct right answers in all (or almost all) hard cases. What bothered Dworkin was the view that, when in doubt, the courts should also resort to public policy. For Dworkin,

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[2] *See, e.g.*, JOHN AUSTIN, LECTURES ON JURISPRUDENCE, Lect. V, Note at 214-19 (5th ed., R. Campbell ed., 1885) (1861); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458-61 (1897). The point is repeated in the twentieth century in H. L. A. HART, THE CONCEPT OF LAW 7-8 (2d ed. 1994) (1961).

[3] *Gregg v. Georgia*, 428 U.S. 153, 227-31 (1976) (Brennan, J., dissenting).

[4] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986). For a partial summary of Dworkin's copious work, *see* George C. Christie, *Dworkin's "Empire,"* 1987 DUKE L.J. 157.

public policy was something to be decided by pragmatic considerations and was thus largely a political question; it was not something that should be considered in the exercise of judicial discretion. Assuming that policy is something that is easily and clearly distinguishable from morality—a questionable assumption to say the least—it goes against not only common sense but also against long judicial practice to believe that policy considerations should or could be ignored in judicial decision making.[5] What might seem curious at first sight, but on reflection seems somewhat understandable, is the contrary argument that it is policy and the concrete pragmatic considerations that underlie the making of public policy that should govern in situations of uncertainty because policy issues can be objectively resolved, whereas issues involving conflicting moral values involve too many subjective considerations. For example, the assumption behind the Law and Economics Movement is that, if one accepts that economic efficiency is the guiding principle of the legal process, there actually are right answers to legal controversies because long term cost/benefit economic analysis will indicate the appropriate legal directives that should be applied to the disputes coming before the courts. The proponents of a law-and-economics approach would maintain that moral considerations, because they are so much influenced by subjective factors, are unable to give this more concrete kind of guidance. Whether the judicial use of a cost/benefit analysis can be as objective a process as this approach's academic proponents maintain is another question.

A practicing lawyer, particularly one engaged in what might be called a "commercial practice" in the broadest sense of that term, would undoubtedly look at the question of what constitutes "the rule of law" from a somewhat different perspective. While neither indifferent nor unconcerned with the moral and policy aspects of law, he would want a legal regime that was easily administered. That is to say, he would seek one with a relatively clear textual base that, ideally, would also minimize as far as practically possible both elaborate discovery procedures and the need for extremely detailed findings of fact. A process that could further those objectives would not only simplify and shorten the litigation process but would also provide guidelines for settlement talks. Certain spillover effects from academic works have made those objectives more difficult to achieve, however, by their insistence on a more nuanced, detailed, and

[5] This point is discussed at some length with citation to judicial authority in GEORGE C. CHRISTIE, THE NOTION OF AN IDEAL AUDIENCE IN LEGAL ARGUMENT 117-28 (2000).

fact-specific approach in order to reach the "correct" decision from a broader social perspective that may often go well beyond the judicial process itself. I am referring to the rise of a particular type of interest balancing that achieved considerable academic support first in Europe and later in the United States that is often referred to as "factor analysis."[6] This phenomenon was a consequence of the late nineteenth century academic interest in the actual social structure of a nation-state and the concomitant belief that the results of this study would produce a science of social organization. The belief was not merely that the scientific study of social life was a worthwhile endeavor and capable of providing useful information for the formulation of social policy but that, because it was truly a science, it was also capable of providing right answers for the pressing social problems of the day. The rise of the modern administrative state, with its combination of scientific expertise, regulatory authority, and even quasi-judicial functions, is what might justly be called an inevitable and, for the most part, useful consequence of that line of intellectual endeavor. Carried to its limits, it certainly is the reason, as well as justification, for awarding a Nobel Prize in Economics.

In the discussion that follows, I shall describe the difficult issues that arise when courts are confronted with having to decide questions that initially seem largely fact-driven but whose resolution actually requires judicial determination of more complex basic questions that often force judges to decide between broadly accepted, but often competing, human values. I shall start by first considering that courts are asked to decide controversies where decision largely depends on the prudential resolution of matters of social policy. I shall then turn to instances in which the burden placed on the courts is to come up with a morally correct decision produced by a morally acceptable social process.

The first example is the attempt to replace what was basically a rule-based approach to an important issue of tort law with a more policy-based approach that depended largely on factor analysis and focused primarily on arriving at the correct decision in the case before the court—an approach that, if carried to extremes, would make each case *sui generis.* The example is drawn from the American Law Institute's treatment of the strict liability for the miscarriage of what are now known as "abnormally dangerous" activities. Section 520 of the *Restatement of Torts*, which appeared in 1938 and used the term "ultrahazardous" activities, imposed strict liability on an activity if it "necessarily involves a risk of harm to

[6] *See id.* at 166-79.

others" and "is not a matter of common usage."[7] When the *Restatement (Second)* provisions on this were published in 1978 and the title of this category of liability was changed to "abnormally dangerous activity," the relatively short definition of the *Restatement* was replaced with a six factor test that asked courts to consider: (i) the existence of a "high degree of risk"; (ii) the likelihood that the resulting harm would be "great"; (iii) the inability "to eliminate the risk by the exercise of reasonable care"; (iv) the extent to which the risk was "not a matter of common usage"; (v) the "inappropriateness of the activity" to the place where it was conducted; and (vi) the extent to which the activity's "value to the community is outweighed by its dangerous attributes."[8] How should the balancing of these factors be carried out? The comments declared that this determination should be made by the court and not a jury "upon consideration of all the factors listed ... and weight given to each that it merits on the facts in evidence."[9] Were this approach to be taken in all cases, to say that the task of applying it would be daunting and that the guidance given was minimal would be an understatement. The potential expense and delay of the type of judicial decision making envisioned by § 520 of the *Restatement (Second)* could be staggering. Consider from the litigant's perspective *Doundoulakis v. Town of Hempstead*,[10] a case in which the New York Court of Appeals adopted § 520 of the *Restatement (Second)* as the law of New York. The case involved "a hydraulic landfilling project ... on 146 acres of swamp meadowland abutting plaintiffs' houses."[11] In remanding, because of lack of an evidentiary basis for applying the analysis of § 520, the court declared:

> The pivotal issue is whether it was established that hydraulic dredging and landfilling, that is, the introduction by pressure of ... massive quantities of sand and water is, under the circumstances, an abnormally dangerous activity giving rise to strict liability.
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> There is little if any information, for example, of the degree to which hydraulic landfilling poses a risk of damage to neighboring

[7] RESTATEMENT OF TORTS § 520.
[8] RESTATEMENT (SECOND) OF TORTS § 520.
[9] *Id.* at cmt. l.
[10] 368 N.E. 2d 24 (N.Y. 1977).
[11] *Id.* at 25.

> properties. Nor is there data on the gravity of any such danger, or the extent to which the danger can be eliminated by reasonable care. Basic to the inquiry, but not to be found in the record, are the availability and relative cost, economic and otherwise, of alternative methods of landfilling. There are other Restatement factors, and perhaps still others, which the parties may develop as relevant, about which there is little or nothing in the record.[12]

It is not surprising that this section and the approach it took to judicial decision making were widely criticized. The *Restatement (Third)* completely abandoned the factor analysis approach and, reverting to the approach of the *Restatement*, focused only on the conjunction of a "foreseeable and highly significant risk of physical harm, even when reasonable care is taken" and the activity creating the risk is not "a matter of common usage."[13] In fact, many jurisdictions have, in practice, often dropped the common-usage exception and focused merely on the dangerousness of the activity.[14]

The issue we are discussing goes well beyond the question of whether the courts should take over the functions of a land-use planner. In the remainder of this brief article we shall discuss the increasing tendency to delegate to courts the obligation to decide even more important issues. We are all familiar with the recent decision of the French constitutional court that a proposed 75% rate of taxation on incomes of over €1,000,000 was confiscatory[15] as well as of several earlier decisions of the German courts as to what the relationship must be between the value of the tax exemptions and cash payments to families with dependent children and the welfare payments paid for the benefit of dependent children.[16] More recently we have seen Germany's participation in the attempts to prevent the insolvency of countries like Greece and Spain being put in abeyance while the German courts resolved the question of whether the German government had the authority under the German Basic Law to make that commitment.[17] The

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[12] *Id.* at 25, 27.

[13] RESTATEMENT (THIRD) OF TORTS § 20.

[14] *See Luthringer v. Moore*, 190 P. 2d 1 (Cal. 1948).

[15] Gabriele Parussini, *In Blow to Hollande, France Drops Tax on Rich*, WALL ST. J., Mar. 22, 2013, at A9.

[16] *See, e.g.*, 82 BVERWGE 60, 98 (1990).

[17] Quentin Peel, *Constitutional Court Refuses to Block Creation of Rescue Fund*, FIN. TIMES, Sept. 13, 2012, at 3. Although refusing to block the operation of the measure then

implications of inserting courts as necessary participants in the fiscal life of a nation are significant to say the least. It is too big a topic to be discussed in this article. I will, instead, concentrate on what, from a practical perspective, may seem less important but which, from the perspective of legal theory, is potentially of equal if not even greater significance in a democratic society.

The European Convention for the Protection of Human Rights and Fundamental Freedoms,[18] to which all 47 countries that are part of the Council of Europe have subscribed, has been an important and, on the whole, welcome development. It has given legal protection and established a transnational court, the European Court of Human Rights, to ensure proper implementation of a number of human rights that had previously only been the subject of hortatory declarations with no binding legal status or, to the extent that they had such status, lacked an effective enforcement mechanism. At the same time, however, the Convention has thrust upon courts a task that is proving extremely difficult to perform. For present purposes it suffices to focus on the provisions of the European Convention that protect privacy and family life (Art. 8), freedom of thought, conscience, and religion (Art. 9), and freedom of expression (Art. 10). All these rights are defeasible in times "of public emergencies threatening the life of the nation" and, more importantly for our purposes, because they affect everyday life, also subject to defeasibility for a number of important reasons such as "national security," "public safety," "the protection of public order," "health or morals," and "the rights of others." Although on their face these rights seem to be protected only against the actions of the state, as is the case under the United States Constitution, the European Court has held that the Convention also requires the states that are parties to it to protect its citizens against invasion of those rights by other citizens.[19]

The most common type of such litigation between private individuals has involved conflicts between privacy and freedom of expression. How are those conflicts to be decided? That task has been made particularly difficult by the adoption by the Parliamentary Assembly of the Council of Europe in 1998 of a resolution[20]—undoubtedly prompted by the tragic

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before it, the German Constitutional Court thought it might take a different tack with regard to other related parts of the EU program.

[18] 213 U.N.T.S. 221, Nov. 4, 1950.

[19] *A. v. United Kingdom*, 27 Eur. H.R. Rep. 611 (1998).

[20] EUR. PARL. ASS. RES. 1165, ¶ 11 (1998).

death of Princess Diana a year earlier—declaring that the rights of freedom of expression and privacy are of equal value, a position that was soon thereafter adopted by the European Court of Human Rights.[21] Whether that general proposition makes sense as the governing rule of decision making is another matter. All that can be done in this short article is to point out that there are at least three scales of value that come into play in the application of law. In addition to the formal value of fairness, law and its application also implicate both political and moral values. As I have pointed out elsewhere,[22] freedom of expression is predominantly a political value while privacy is predominantly a moral value, especially in disputes between individuals. Given these different types of value, a serious quasi-objective balancing exercise involving two or more of them would require some meta-value into which each of the conflicting values involved could be translated. Thus far, no such meta-scale has been discovered. Since all the cases thus far have involved a plaintiff who claims that his right of privacy has been invaded by the defendant's exercising his freedom of expression, it is not surprising that, in the European world of equal values, if the plaintiff can plausibly claim that he had a reasonable expectation of privacy regarding publicly available or lawfully acquired information, even with regard to information concerning activities conducted in public space, the plaintiff is entitled to legal redress unless the defendant can justify his expression. Even a critic of this approach, such as myself, can understand why it has been adopted. If speech and privacy were really of equal value, each case—even more than in the example presented earlier of the now-rejected use of factor analysis to decide whether an activity is an abnormally dangerous one and thus subject to strict liability—would be *sui generis*, since the resolution of such controversies is extremely fact dependent. Whether one likes it or not, one value will in practice be given some *prima facie* preference over the other; otherwise very little guidance will be given to future litigants and courts.

Given that in Europe, when privacy and expression come into conflict, some initial preference will be given to privacy, what showing must the defendant make to justify his expression and escape legal sanction? The case law in Europe has established that in order to succeed the defendant must show that the expression in question concerns a

[21] *See, e.g.*, *von Hannover v. Germany*, 40 Eur. H.R. Rep. 1, ¶ 42 (2004).

[22] GEORGE C. CHRISTIE, PHILOSOPHER KINGS? THE ADJUDICATION OF CONFLICTING HUMAN RIGHTS AND SOCIAL VALUES 167-75 (2011).

matter of public interest or concern. To guard against the obvious retort that the defendant would not likely try to share his information with a wider audience if he did not believe that the public was interested in what he has to say, the courts in the United Kingdom as well as the European Court of Human Rights have made it clear that the fact that the public might actually be interested in the information in question is not the issue.[23] It is rather for the courts to decide what is really (or properly) a matter of public interest regardless of what the defendant or many members of the public might think.[24]

If the courts, in addition to supervising the allocation of public resources, are to determine what expression is *really* sufficiently in the public interest to deserve wide public distribution, how are they supposed to do that? If the criterion of public interest were to be based on what the public is *actually* interested in, one could try to decide that question, in a somewhat objective fashion, by asking what information, in the absence of public censorship, the public in a market-driven economy would in fact show an interest in acquiring. This is particularly true of the photographs taken by paparazzi that are featured, together with gossip collected by reporters, in what are now pejoratively labeled "tabloids." But that approach to determining public interest or concern has been rejected in Europe, including the United Kingdom, in favor of an approach that relies on the expression in question meeting judicially approved values. The European Court of Human Rights has declared that the disclosure of little known private facts about another can only escape legal sanctions if it "contribute[s] ... to a debate of general interest" to society.[25] The courts of the United Kingdom have declared that some sorts of expression, such as political expression, scientific expression, educational expression, and aesthetic expression might *prima facie* be entitled to some privileged status in the quest of deciding what information is properly or really in the "public interest" to warrant distribution to a wider audience.[26] No one would dispute that the types of expression that are mentioned in the courts of the United Kingdom are almost universally considered valuable. But what falls under any of these broad categories is not self-evident.

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[23] *See e.g., Jameel v. Wall Street Journal Europe SPRL (No. 3)*, [2006] UKHL 44, [2007] 1 A.C. 359 [49]; *von Hannover, supra* note 21, at ¶¶ 76-77.

[24] *Id.*

[25] *von Hannover, supra* note 21, at ¶ 76.

[26] *See, e.g., Campbell v. MGN Ltd*, [2004] UKHL 22, 2 A.C. 457.

Would one really want to live in a world in which judges decide what information the public should be entitled to know? No matter how much they might strive to be "impartial," judges can only reflect the preferences and biases of the relatively privileged classes of society from which they are drawn. The dangers of the judiciary imposing some sort of political correctness are obvious. There is the further problem that, as modern developed societies become increasingly diverse, what might be generally considered appropriate expression is constantly changing. Nowhere is this seen more clearly than in a 1988 decision of the European Court of Human Rights which upheld the lawfulness of the confiscation of allegedly obscene paintings in 1981 by a court in Fribourg, Switzerland, even though by the time of the European Court's decision, the law even in Fribourg had already changed.[27] In doing so, the European Court remarked that "the requirements of morals vary from time to time and from place to place, especially in our era."[28] This is precisely the reason that the late Justice Brennan not only agreed with the extremely stringent evidential requirements imposed by the Supreme Court of the United States in order to secure a conviction for obscene expression, but also maintained "that *any* regulation of such material with respect to consenting adults suffers from the defect that the concept of 'obscenity' cannot be defined with sufficient specificity and clarity."[29]

Admittedly, with the changes in the composition of the Supreme Court in the last few decades, a number of justices have exhibited a disposition to retreat from the extremely broad pro-speech position taken by Justice Brennan, such as by imposing some sort of judicially administered public concern or interest requirement on expression that inflicts severe emotional pain on other individuals.[30] Nevertheless, the Court has not retreated from the position that freedom of expression is of such important political value that even speech which most people would find offensive can only be subjected to legal sanction for very important interests, and that is especially true for the publication of truthful, lawfully acquired information.[31] It is this privileged position enjoyed by expression that has led to the statutory prohibition of the enforcement of foreign judgments for the publication of false and defamatory statements

[27] *Müller v. Switzerland*, 13 Eur. H.R. Rep. 212 (1988).

[28] *Id.* at ¶ 35.

[29] *Pope v. Illinois*, 481 U.S. 497, 507 (1987) (partial dissent of Brennan, J.)

[30] *See* George C. Christie, *Freedom of Expression and Its Competitors*, 31 CIV. J.Q. 466 (2012).

[31] *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

rendered in jurisdictions in which defendants are not accorded the protections afforded by the First Amendment of the United States Constitution.[32] It also explains the reluctance of American courts to enforce judgments seeking damages for Holocaust denial activities violating European statutes,[33] and is likely also to be the case regarding foreign judgments based on invasion of privacy that would not have been successful in the United States because of the constraints imposed by that amendment.[34] More importantly from a global perspective, with the advent of the internet the effort to suppress any kind of public disclosure of information is now to a large extent fruitless. One might note, as an example, the futility of a court in the United Kingdom forbidding publication of Tiger Woods' private troubles, when that information was already widely available in the United States and was readily accessible online throughout the world.[35]

[32] *See* 28 U.S.C. §§ 4102-03, enacted in 2010.

[33] *See, e.g., Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc) (per curiam).

[34] *See, e.g., SARL Louis Feraud Int'l v. Viewfinger Inc.*, 406 F. Supp. 2d 274 (S.D.N.Y 2005), *vacated*, 489 F.3d 474 (2d Cir. 2007).

[35] *See* Afua Hirsch, *Tiger Woods Gags British Media*, GUARDIAN.CO.UK, Dec. 11, 2009, *available at* http://www.guardian.co.uk/sport/2009/dec/11/tiger-woods-gags-english-media.