

## LEGAL PRINCIPLES, RULES AND STANDARDS

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In *The Concept of Law* H. L. A. Hart analyzes legal systems in terms of a set of rules. He claims that in the view of law as a union of primary and secondary rules he has discovered the key to the science of jurisprudence. Hart usually treats primary rules as those which impose duties or obligations and secondary rules as those which confer powers<sup>(1)</sup>. The most important secondary rule is what Hart calls a "rule of recognition" which specifies "some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule" of the legal system<sup>(2)</sup>.

Professors Ronald M. Dworkin and Graham Hughes have penetratingly criticized Hart's or any analysis of legal systems primarily in terms of rules<sup>(3)</sup>. Dworkin claims legal systems include norms called principles which have a different function from rules. He contrasts principles with rules in two respects. (1) Rules apply in an all or none fashion; that is, if they apply to a case they determine the decision without any leeway for a contrary decision. There may, of course, be exceptions to rules, but they can, though need not be, stated as part of the rules. Principles, on the other hand, do not necessarily determine decisions even in cases to which they apply. For example, that no man may profit from his own wrong is a principle of United States law, but this principle does not determine the decision of every case to which it applies. In some cases people do in fact legally profit from their own wrongdoing. Such counter-examples are not exceptions to the principle nor do they invalidate it. But they do need justification of some sort. (2) Principles may be more or less important in cases; they have a "weight" <sup>(4)</sup>. Principles can be added together in a way rules cannot. If several principles lead to one decision and one or two to the opposite, one may "add up"

the force or weight of the principles on each side to reach a decision. But if a particular rule applies it determines the decision. Other rules must be held not to apply to the case.

Two problems appear in Dworkin's discussion of principles. (1) He has been criticized in great detail for assuming rules can be stated containing all their exceptions<sup>(5)</sup>. Since not all exceptions can be stated in a rule, it is not clear whether or not a case falls under it. Since two or more rules may thus be relevant to a case, rules and principles cannot be distinguished in terms of whether or not they conclusively determine a decision in a case. Dworkin himself recognizes that the distinction between rules and principles is often difficult to make claiming that at times it seems to be a matter of form and at others a matter of substance<sup>(6)</sup>.

(2) It is not clear how Dworkin believes legal principles operate in the justification of legal decisions. In one passage he claims that both principles and rules "point to particular decisions about legal obligation in particular circumstances..."<sup>(7)</sup>. This comment suggests that principles, like rules, may be directly used to decide cases. But in another passage he indicates that principles are used to determine valid, applicable rules; "the court cites principles as its justification for adopting and applying a new rule"<sup>(8)</sup>. This comment suggests that in deciding a case a court always adopts a rule or *ratio decidendi* and that principles pertain to its justification and, hence, only indirectly to cases.

Philosophers have distinguished between two different types of evaluation<sup>(9)</sup>. Some evaluations admit of degrees and can be used to establish rankings. These evaluations are typically expressed in terms of good or bad. For example, apples are evaluated as good and bad, better and worse. Apples can fulfill the norm of a good apple in different degrees. On the other hand, some evaluations do not admit of degrees of fulfillment and are typically expressed in terms of right or wrong, correct or incorrect. An object meets the criteria of evaluation or not; it is not a matter of degree. Norms for evaluations of the first kind may be called standards and those of the second kind rules.

Legal rules, both power-conferring and duty-imposing, are rules as described above. They apply to the conduct of persons. When they apply the conduct is judged either right or wrong, correct or incorrect. Since in a decision conduct must be judged legally correct or incorrect two valid rules cannot both apply to a case and give incompatible results. For example, a person either satisfies a rule requiring three witnesses to a will or not. One cannot have two rules both properly applying to a case one of which permits as valid wills with less than three witnesses and the other disallowing such wills.

Three questions about the use of rules may be logically distinguished although their separation in practice is not so clear. First, one may ask whether or not a rule is relevant (applies) to a case. This question may be broken into two parts: Is this rule relevant in the sense of concerning the kind of issue in an instant case? Is this the rule which applies to or governs the case? In conflicts of law two rules are relevant, but only one applies. Second, one may ask for the meaning or interpretation of a rule. Third, one may ask what a rule requires in light of the facts of a particular case. Questions two and three become quite mixed in making legal decisions, but this mixture is not a defect of judicial reasoning. Also, the interpretation of a rule has an obvious bearing on whether or not it applies. But if it is given that a rule applies, is properly interpreted and the facts are clearly presented for the use of the rule, then no other decision can be correct.

Principles state the good- and bad-making characteristics or criteria used to evaluate objects by standards. Some good- and bad-making characteristics have degrees and are themselves standards, e.g., the redness of an apple. Other such characteristics do not have degrees, e.g., whether or not an apple has a worm in it. Thus, some principles apply in an absolute way, a thing either has the characteristic or not, but since principles only present one of several criteria, no matter how an object fares under one principle it may still be good or bad depending upon its other characteristics. Thus, Dworkin's principle that "One who does not choose to read a contract before signing it cannot later relieve himself of its

burdens" presents a characteristic which either applies or not, but does not necessarily determine a case (<sup>10</sup>).

In law "standards" and "principles" apply to different objects. Legal standards are standards of conduct or things such as due care, reasonableness, good faith and fair rate and are parts of rules. Rules with standards still apply in an all or none way, but it is often difficult to determine whether a standard has been sufficiently met for the purpose of a rule. Legal principles apply to rules. They "are made use of to supply new rules, to interpret old ones, to meet new situations, to measure the scope and application of rules and standards and to reconcile them when they conflict" (<sup>11</sup>). Some principles pertain to the application of a rule to a case, some to its interpretation and some to its validity.

Legal principles state the criteria for the standard of a good rule to be used in a judicial decision. A judge is guided by principles in determining a good rule for deciding a case. Since rules are evaluated by a standard, leeway is left for reasonable differences of opinion among competent judges as to what are good rules for cases. But their judgments about the matter are not arbitrary. And the standard of a good rule is one criterion of a good judicial decision. But it is not the only criterion since a judge can use a valid and applicable rule properly interpreted yet make a bad decision.

Upon this account of principles Hart's rule of recognition becomes a crucial principle for evaluating rules and, thereby, judicial decisions (<sup>12</sup>). But it does not constitute a sufficient condition for either a good rule or a good judicial decision. At best it only specifies some characteristics for the validity of rules. Sometimes rules enacted by legislatures or applied by previous courts are invalidated or overruled. Hart's rule of recognition cannot account for such cases without becoming analytic (<sup>13</sup>). For although it does include a reference to precedents, it cannot refer to the instant case without becoming a legal realist tautology, namely, that the rule for the case is the one the court uses.

On this account of rules and principles one should not speak of correct and incorrect judicial decisions and rules, but of

good and bad ones. The norms of judicial decisions and rules are standards, not rules. There are degrees of fulfillment; some decisions and rules are better than others. To speak of correct and incorrect ones implies decisions and rules are either appropriate or not. Surely some are more appropriate than others. But in the daily working of the law, say, traffic court, it is usually so clear what rule is most appropriate and what decision the rule requires that one naturally shifts to speaking of correct and incorrect rules and decisions. Decisions would be correct or incorrect not merely more or less appropriate if (a) rules were correct or incorrect instead of better and worse, (b) rules did not admit of alternative interpretations, and (c) facts could be presented so that what rules require was obvious. Ordinary cases approximate these conditions.

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#### NOTES

(<sup>1</sup>) (Oxford: The Clarendon Press, 1961), p. 79; cf. p. 92.

(<sup>2</sup>) *Concept*, p. 92; see also H. L. A. HART, "Review of Lon L. Fuller, *The Morality of Law*", *Harvard Law Review*, 78 (1965), 1292 f.

(<sup>3</sup>) DWORKIN, "The Model of Rules", *The University of Chicago Law Review*, 35 (1967-8), 14; HUGHES, "Rules, Policy and Decision-Making", *Law, Reason and Justice* (New York: New York University Press, 1969), p. 101.

(<sup>4</sup>) DWORKIN, p. 27. Hughes at first distinguishes rules and principles merely in terms of vagueness, but he later notes that principles can while rules cannot conflict in particular cases, pp. 111, 116.

(<sup>5</sup>) George C. CHRISTIE, "The Model of Principles", *Duke Law Journal* (1968), 649.

(<sup>6</sup>) DWORKIN, pp. 28 f.

(<sup>7</sup>) DWORKIN, p. 25.

(<sup>8</sup>) DWORKIN, p. 29; he is unclear whether the rule is formulated and used for the instant case or is only a rule for future cases. See HUGHES, p. 111; he clearly holds principles may be used directly to decide an instant case without the intervention of a rule.

(<sup>9</sup>) See Paul W. TAYLOR, *Normative Discourse* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1961), Ch. 1. Cf. Herbert MORRIS, "Review of H.L.A. HART, *The Concept of Law*", *Harvard Law Review*, 75 (1962), 1455-7; HART, "Review", p. 1282.

(<sup>10</sup>) DWORKIN, p. 24.

(<sup>11</sup>) Roscoe POUND, *An Introduction to the Philosophy of Law*, revised edition (New Haven: Yale University Press, 1954), pp. 56 f.

(<sup>12</sup>) See HART, *Concept*, p. 112.

(<sup>13</sup>) Cf. DWORKIN, p. 45.