'Legal philosophers argue… about an ancient philosophical puzzle of almost no practical importance that has nevertheless had a prominent place in seminars on legal theory: the puzzle of evil law." - Ronald Dworkin, Justice for Hedgehogs (Harvard University Press 2013) p 410

Critically assess this statement and evaluate its relevance, both in terms of Dworkin's own theory and the theories of his critics.

Introduction

The puzzle of evil law refers to the dilemma which judges find themselves in when asked to apply a rule which purports to be law that happens to be morally reprehensible, such as the American Fugitive Slave Act or the dictates of the Nazi regime. Does the evil rule qualify as law, despite being evil? If it is law, is a judge obliged to apply it, and what is the nature of that obligation? Does the legal nature of the rule have any bearing on the judge's obligations to apply it? In his book *Justice for Hedgehogs*, Dworkin characterises this debate as one which occupies much theoretical time but which is nevertheless of little practical importance.[1] This essay will critically assess this view and evaluate its relevance, both in terms of Dworkin's own theory and the theories of his critics. It will be argued that, contrary to Dworkin's view, the debate as to what the judge should do when confronted with evil law is in fact of practical value; it can be determinative of whether a judge ends up applying that law or not, and will certainly affect the basis on which he or she decides to do or not do. The judge's moral reasoning in applying or not applying a law, which is also affected by one's stance on the evil law debate, may also have significant impact on the future development of the law.

[1] Ronald Dworkin, *Justice for Hedgehogs*, (Belknap Press, 2011), 410

Why is the Puzzle Theoretically Important?

The puzzle of evil law is a particular problem for natural law theorists. Those who ascribe to the positivist view of law classify as separate questions whether a rule is a law and whether that law is just or good. Law and morality are, under the positivist view, not linked in any necessary way; law exists simply wherever a set of predetermined social facts have come into being in the proper way according to a particular society's norms.[2] As such, the obvious answer to the puzzle from a positivist perspective is that the judge is not entitled to refuse to apply the rule on the basis that it is not law, and whether the judge can refuse to apply the law on a moral basis is down to moral reasoning in any given case, not legal reasoning.

Natural law theories, on the other hand, purport the existence of an inherent link between law and morality, whereby morality contributes in some fashion to the authority of law, such that a morally unjust rule has a suspect claim to the title of law.[3] This raises issues when severely unjust rules purport to be law, or evil regimes purport to be legal systems. As Dworkin links law with morality and rejects the positivist separation, Dworkin's theory is one of natural law, and so he addressed the problem in formulating his theory of adjudication and legal obligation.

Summary of Dworkin's Theory

In his earlier works, Dworkin equated legal obligations with political obligations, and then equated the latter with 'associative obligations', which are the sort of obligations members of an association (such as a family or a group of friends) feel towards one another, fuelled by their collective sense of belonging.[4] These associative obligations only apply to members of that group, and can cease to exist if the rewards and benefits of membership are not extended to

[2] HLA Hart, 'Positivism and the Separation of Law and Morals', [1958] 71 Harvard Law Review 593
[3] David Dyzenhaus, 'Unjust Law in Legal Theory' in Ralf Poscher (ed), *Freundesgabe für Bernhard Schlink*, (C.F. Müller GmbH, 2014)
[4] Ronald Dworkin, *Law's Empire*, (Belknap Press, 1986), 206

every member of the group.[5] Dworkin also argued that this legal associative obligation would only arise where the associations existed for the purpose of discharging a '*universal moral duty*' from the perspective of its members, and so was a just association overall (an association which does not exist to discharge a moral duty, such as a crime association or an evil dictatorship would therefore not give rise to such associations).[6] In later works, Dworkin classified the legal obligation as a special form of political morality; therefore, a moral obligation.[7]

In developing his theory of adjudication, Dworkin distinguishes between the 'positive law' (or what he sometimes termed to be 'pre-interpretive law'[8]) which is the law one can positively identify, such as common law rules and statutes, and the 'full law', which is '*the set of principles of political morality that taken together provide the best interpretation of the positive law*'.[9] The best interpretation of the positive law, he argues, is that which '*provides the best justification available for the political decisions the positive law announces*', and shows the positive law '*in its best light*'.[10] The best interpretation will both 'fit' the body of positive law the judge has before him in an adequate fashion, and be the best justification in terms of 'political morality' (the latter consideration taking priority over the former when deciding between two interpretations).[11]

Dworkin argues that judges are often engaging in form legislation when they engage in this sort of interpretive exercise, as they can enunciate new rules which were not part of the positive law or render obsolete old rules, but this change in the law is nevertheless guided by the positive

[5] Ibid., 196-198
[6] *Justice for Hedgehogs*, (n 1), 315
[7] Ibid., 410
[8] Stephen Guest, *Ronald Dworkin*, (Stanford University Press, 1991), 83
[9] Ronald Dworkin, "Law's Ambitions for Itself", [1985] Virg. L. Rev 173, 176
[10] Ibid., 176-177
[11] Ibid., 178

law due to the requirement of 'fit'.[12] Since each of these changes will make the law more morally justified, each change improves the law. However, the best interpretation is not just a change in the law, but also an enunciation of the full law; there was always a right answer as to what the law was, in this sense.[13]

From this, one can see Dworkin's approach to the puzzle of evil law. Edicts produced by a wholly illegitimate regime, such as Nazi edicts, can safely be ignored by the judge as not constituting law at all.[14] However, where the association is legitimate, the rule is law, and the judge's only excuse not to apply evil law (an evil law in the context of Dworkin's theory being one that is still evil even after it has been interpreted in its best light) is that it is simply too unjust to do so.[15]

What is the Relevance of the Debate on the Puzzle of Evil Law?

The reasoning behind Dworkin's dismissal of the relevance of the puzzle of evil law debate is unclear. It seems to stem from a view that regardless of whether one thinks an evil rule can be a law or not, everybody is in agreement that the judge who is faced with the evil law ought not to enforce it.[16] In any case, he expressed doubts that evil laws within legitimate associations would be common enough to be of note. [17] Another interpretation of his remarks, put forwards by Waldron, is that when confronted with evil law one should purely be concerned with competing moral merits in favour of or against applying or not applying the law: answering the

[12] Ibid., 181
[13] Ibid., 182
[14] *Justice for Hedgehogs*, (n 1), 411
[15] Ibid.
[16] Dyzenhaus, (n 3), 125
[17] Ronald Dworkin, *Taking Rights Seriously,* (Harvard University Press, 1978). 326-327

question as to whether Nazi law is law has no real bearing on whether one should apply it or not.[18]

On their face, neither of these views are obviously true. The first is patently false; not everyone is in agreement that the judge should refuse to apply an unjust law. A number of positivists, for example, are of the opinion that the judge is in fact obliged to apply the evil law, having obligations above and beyond the obligation of the average citizen to obey that law.[19] Even some natural law theorists accept that even 'bad laws' can have obligatory effect.[20] Certainly there is nothing inherent in Dworkin's own theory which mandates that a judge in an ostensibly legitimate associative obligation would not have a moral obligation to apply an evil law. Given he classifies the legal obligation as one of political morality, it is perfectly feasible that the moral cost of refusing to apply the evil law within the otherwise legitimate system outweighs the moral cost of applying it (say if the law was merely to arbitrarily fine a minority subgroup a penny for walking on the wrong side of the road). It is for this reason that some positivists suggested that Dworkin's made it legitimate for a judge in 1980s South Africa to see himself as under a moral obligation to apply and even extend the rules of apartheid.[21] This ties in to why the second interpretation of Dworkin's remarks is not acceptable either: if legal obligation is a form of moral obligation, plainly it is relevant to the moral pros and cons involved in the evil law case whether or not the rule actually is a law or not.

The second line of argument against the irrelevance of the debate outside of the theoretical sphere is that the puzzle does not merely apply to the debate over whether or not to apply the

[18] Jeremy Waldron, "Jurisprudence for Hedgehogs", (*Yale*, 13 March 2013), <https://www.law.yale.edu/system/files/documents/pdf/Intellectual_Life/LTW-Waldron.pdf> accessed 25 July 2016, 26

[19] HLA Hart, *The Concept of Law*, (Clarendon Press, 1994), 208

[20] Lon Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart", [1958] Harv. L. Rev. 630, 632

[21] Joseph Raz, 'Authority, Law and Morality' in Joseph Raz, *Ethics in the Public Domain*, (Oxford University Press, 1994), 194

law, but also to how to go about applying and how to justify its application. A number of academics have argued that one's stance on the puzzle of evil law affects the outcome of cases, or the at the very least the reasoning engaged in applying them. At one extreme, there is Radbruch's argument that a positivist view of law leads to a feeling that one must obey even horrifically unjust law, because it is the law, and was behind the acceptance of the Nazi regime.[22] While the most stalwart defender of positivism, HLA Hart, responds to this that to separate law and morality is not to assert that law supplants morality[23], and therefore dismisses Radbruch's view as a mere misunderstanding of the positivist ideology, his rebuttal accepts that one's stance on the puzzle of evil law affects the moral discourse. He gives the example of post-Nazi regime cases in Germany, where serious moral questions about the legitimacy of creating retroactive laws was ignored in favour of bald assertions that Nazi law was not real law.[24] In this sense, he argues that is a practical, not just a merely theoretical, advantage to accepting the positivist approach to evil law, and a plain speaking approach is one that is more likely to be taken at face value by the public and deemed to be acceptable. In any case, a matter of constitutional reality, the German courts would likely not have had the legal authority to create retrospective law, so the judge's natural law stance had a tangible difference on the outcomes of those cases.

Whether it makes a difference to the outcome of a case or not, the moral reasoning of the judge is important. Dworkin placed little emphasis on the option of applying evil law under protest (and indeed seemed to characterise it as only a negative option[25]), despite the power that this sort of protest can have in instituting legal reform and moving the system towards a more moral one. A strong example of this in action is the system in place under the UK Human Rights Act

[22] Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law", [2006] O.J.L.S. 1
[23] Hart, 'Positivism', (n 2)
[24] Ibid., 620
[25] Wil Waluchow, Stefan Sciaraffa, *The Legacy of Ronald Dworkin*, (Oxford University Press, 2016), 121

1998, whereby if no human-rights-compatible interpretation of a law can be made to fit a statute, the court cannot change the law, but can make a declaration of incompatibility, giving reasons.[26] Most of these declarations have led to a change in the law, despite the legislature being under no positive law obligation to pay them any heed.[27] It is not a large leap of logic to think the scathing moral criticism of a judge applying the evil law in other cases would often have the same effect.

Conclusion

In conclusion, the debate over the puzzle of evil law is one of more than theoretical significance despite Dworkin's dismissal of it as 'sadly close to a verbal dispute'.[28] Dworkin's view seems to be based on a sweeping assumption that all are in agreement as to whether or not a judge should apply an evil rule purporting to be a law, or alternatively that the question of legality is irrelevant to whether or not an evil law ought to be applied, when these views is far from intuitive or widely accepted. In addition, one's view on the puzzle of evil law has significant bearing on how a judge should reason his way through the problem when confronted with such a law, and this reasoning, and the potential moral protest embedded into it, may serve to make clear the moral defects in the law and often provide a powerful incentive for the reform of injustices, at least in what Dworkin would term 'legitimate' systems. In this sense, the positivist versus natural debate can be seen as an acutely instrumental one, as well as a theoretical one.[29]

[26] Human Rights Act 1998, s.4

[27] Department for Constitutional Affairs, "Declarations of incompatibility made under section 4 of the Human Rights Act 1998", (National Archives, 1 August 2006), <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf> accessed 25 July 2016

[28] *Justice for Hedgehogs*, (n 1), 412

[29] Frederick Schauer, "The Legality of Evil or the Evil of Legality", [2011] Tulsa L. Rev. 121, 128-129

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