

Cambridge University Press

978-0-521-14430-8 - How to Do Things with Rules: A Primer of Interpretation, Fifth Edition

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Excerpt

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Part I

1

Some food for thought

1 Introduction

In this chapter we have collected together some concrete examples that illustrate the main questions and themes that are explored in the book as a whole. The purpose of presenting them at this stage is partly to generate interest and puzzlement, and partly to encourage you to start to think actively about some basic issues.

The first two sections illustrate the pervasiveness of law and other forms of ordering in the world at large and in our daily lives. The *Newspaper Exercise* should make clear how law not only features on every page of the newspaper but also serves as a lens for both interpreting and constructing 'news'. Section 3 introduces the phenomenon of rule pluralism – the plain fact that each of us is subject to a multiplicity of legal and other orderings that coexist, interact and sometimes conflict with each other at many different levels from the global, regional and transnational down to the very local, such as your neighbourhood, your club and your living room. Both sections reinforce the point that, far from being an entirely new and strange subject, every beginning law student has had a wide experience of law as a party to contracts, as a family member, and as a student as well as a music pirate, copyright violator, debtor, trespasser, slanderer and almost certainly a criminal! Law and rules are everywhere and everyone has experienced them in many ways. What is new about studying law is not so much the subject matter as the focus; for many of you this may be the first time you have consciously thought about legal and other rules and their interpretation in a sustained way.

The materials in Chapter 1 also indicate some of the varied contexts in which problems of interpretation of rules arise: relationships within the family, in everyday social life, in institutions such as schools, prisons and factories, in commercial relationships as well as in formal legal processes such as prosecutions for bigamy and claims for compensation, whether they are settled out of court or by litigation. One section deals with dispute settlement in a traditional African society, another with provisions protecting human rights under a written constitution, in domestic, regional and international law. This variety of contexts is intended to emphasise the thesis that nearly all the factors which give rise to difficulties of

interpretation – what we refer to as the conditions of doubt – are present in a great variety of very different types of social situation, and can cause difficulty in almost any kind of case, whether it is trivial or momentous, simple or complex, legal or non-legal.

Each of the sections is designed to introduce one or more particular topics. Section 4 concerns the concept of interpretation and introduces the idea of legalistic behaviour. The admittedly artificial example of *The Case of the legalistic child* raises a variety of analytical issues about rules as responses to problems and the relations between rules, processes and roles. This leads onto section 5, which contains materials and exercises on differentiation and clarification of standpoint. This section brings out the crucial importance of differences of standpoint, role and objective in understanding problems of interpretation. We shall stress throughout the book that any particular problem of interpretation needs to be set in the context of some conception of a wider process – a series of events and decisions which have led up to the moment when the interpreter is faced with a choice and which will continue after that moment. Interpretation does not take place in a vacuum. The notion of a total process is just as important in non-legal contexts, where there may be few or no formal procedures, as in the typically formal context of legal processes.¹ There is also a tendency in legal literature to assume, either explicitly or implicitly, ‘top-down’ points of view – exemplified by the standpoint of a legislator, judge or other official making or applying law. There is accordingly a tendency to underplay or to ignore entirely the points of view of those who are subject to the rules – worm’s-eye views or ‘bottom-up’ perspectives. Yet typically (but not universally) the interpreter is someone who is confronted with a pre-existing rule, made by someone else, and which he has no authority to change. His standpoint may be neither that of the eagle nor the worm. The viewpoints of both eagles and worms, and of others, are directly relevant to problems of interpretation.

Section 6 deals with rules and relationships in different social and institutional contexts. It includes some material constructed around the much debated example of problems of interpreting a rule banning vehicles from a park. Sections 7 and 8 deal with questions about reasons for having rules and relations between rules and results – especially gaps between what is prescribed by formal rules and the actual outcomes of particular processes. These materials also introduce another central theme of the book: that it is not only officials, adjudicators and judges who are faced with problems of interpretation of rules; all interpreters need to clarify their situation by asking three preliminary questions: who am I? At what stage in what process am I? What am I trying to do?

Sections 9 to 11 introduce some specifically legal material relating to the interpretation of statutes and cases. Section 9 presents one form of visual

¹ See further Appendix I, section C.

presentation of rules, algorithms, which are particularly helpful in finding your way around and using complex rules. We have put nearly all of the more complex or lengthy materials on the website with links to them clearly indicated at the relevant points in the text. At this stage we suggest that you do read only two cases. *Allen* (section 10) concerns the interpretation of the notoriously problematic section 57 of the Offences Against the Person Act 1861 and we use it throughout the book to illustrate a wide range of points. *Buckoke v. Greater London Council* (section 11), besides raising some further questions of interpretation, illustrates two classic dilemmas: that of someone who is faced with seemingly conflicting instructions; and that of judges when confronted with a statutory enactment which leads to an undesirable result. Can and should judges mitigate the rigours of the law where Parliament has been unwilling or unable to make an explicit exception covering apparently deserving cases? Underlying this is a more general issue: do officials (and others) ever have a discretion, or even a duty, to disobey the law?

Section 12 introduces some basic material on human rights. The major part of the material included here comprises provisions that are to be found in such documents as the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and domestic Bills of Rights, including the Human Rights Act 1998. There are special considerations which affect the styles of drafting and approaches to interpretation of such provisions. The main examples selected here deal with extreme forms of treatment, notably 'torture, inhuman or degrading treatment or punishment' and 'cruel and unusual punishments'. These raise a number of issues: about the connections between moral principles and legal provisions; about the workability and the justification of 'absolute' prohibitions, especially in extreme cases; and about the relationship between ordinary municipal laws and rules which are claimed to be 'fundamental' or 'universal' or 'entrenched'. They also suggest some less obvious questions directly relevant to interpretation. Concepts like 'torture' and 'inhuman treatment' are rather more complex than they seem. It is worth asking questions about the use of highly emotive terms like 'torture' in drafting legal provisions and, as with most other examples in this chapter, about the interaction between appropriate modes of interpretation and the context of interpretation.

As was suggested in the Preface, it is not necessary to read the whole of Chapter 1 before proceeding to read the rest of the book. We do, however, recommend that you read the following sections at the outset: 2–5, 7, 8.1, 11 and 12.1. In reading Chapters 2–11, reference will be made from time to time to material in this chapter and on the website. The material in Chapter 1 is usually followed by questions which we urge you to tackle, or at least to think about, as you come to them. They are supplemented by further material and exercises in Appendix I.

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2 The pervasiveness of norms

The Newspaper Exercise

Buy a copy of *The Times*, *The Independent*, *The Guardian*, *Financial Times* or *Daily Telegraph*. Read through all of your chosen newspaper and mark the passages that have some ‘legal’ or ‘law-related’ content. Before starting this exercise, stipulate your working definition of ‘legal’ and ‘law-related’. Then answer the questions below. You are advised to spend between four and six hours on this exercise.

Questions

1. Identify three passages in your newspaper that you would expect would be more easily understood by a person with a law degree.
2. What branches of law would you expect regularly to feature in, or be relevant to, understanding items in: the letters page; the sports pages; the arts section; the business section; and advertisements?
3. Identify the national legal systems and other bodies of law (e.g. public international law, Islamic law, human rights law) that would be directly relevant to the items reported on one of the foreign/international pages in your newspaper.
4. Which features more prominently in your newspaper: legislation; case law; or ‘non-legal’ rules? Find examples of each.
5. Identify examples of social problems either created by law or to which law is expected to contribute to a solution.
6. Give examples from this newspaper of passages that caused you difficulty in deciding whether they fall within your working definition of ‘legal’ or ‘law related’.
7. What have you learned from doing this exercise?²

3 Normative and legal pluralism³

3.1 Introduction

Normative pluralism is said to occur when two or more normative orders coexist in the same time–space context; for example, when religious law exists in a society independently of the state or semi-autonomously. There is extensive controversy about what counts as a ‘legal order’ for this purpose. We all experience normative pluralism every day of our lives without being unduly puzzled unless we think about it. With the rise of awareness of ‘globalisation’ and ‘multiculturalism’, normative and legal pluralism are increasingly on the agenda of jurisprudence.

² For a suggested answer to this, see *LIC*, pp. 210–13.

³ Additional materials on normative and legal pluralism are included in Appendix II.

3.2 Normative pluralism

(a) A week in the life of a law student

Write down in chronological order the twenty main transactions and relations in which you were involved during the last week (for example, telephoned mother in Hong Kong; visited Registry about late payment of fees; played tennis with friend; received email from suspected hacker; spent two hours with local family support centre; joined the Students' Law Society; attended tutorial on EU law; violated 'fair-copying' restrictions). Identify the main legal and other normative orders substantially relevant to each of these transactions and relations.⁴

(b) An iron cage

'it seems to me that the great mass of confusion and distress must arise from these less evident divergencies ... the moral law, the civil, military, common laws, the code of honour, custom, the rules of practical life, of amorous conversation, gallantry, to say nothing of Christianity, for those that practise it. All sometimes, indeed generally, at variance; none ever in entirely harmonious relationship to the rest; and a man is perpetually required to choose one rather than another, perhaps (in this particular case) its contrary. It is as though our strings were each tuned according to a completely separate system ... it is as though the poor ass were surrounded by four and twenty managers.'

'You are an anti-nomian,' said Jack.

'I am a pragmatist,' said Stephen. (Patrick O'Brian, *Master and Commander* (1971), p. 319)

(c) Bonds of freedom

She is as in a field a silken tent
 At midday, when a sunny summer breeze
 Has dried the dew and all its ropes relent,
 So that in guys it gently sways at ease.
 And its supporting central cedar pole
 That is its pinnacle to heavenward,
 And signifies the sureness of the soul,
 Seems to owe naught to any single chord,
 But strictly held by none, is loosely bound
 By countless silken ties of love and thought
 To everything on earth the compass round.
 And only by one's going slightly taut
 In the capriciousness of summer air
 Is of the slightest bondage made aware.

(Robert Frost, 'The Silken Tent')

⁴ See Appendix I, section A for an alternative exercise.

3.3 Pluralism in law

Perhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems. It is the plurality of jurisdictions and legal systems that makes the supremacy of law both necessary and feasible. (H. Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (1983), p. 10)

Questions

1. 'So-called "legal pluralism" is impossible because the concept of law involves the idea that the state has a monopoly of legitimate coercive force within a given territory'. Discuss.
2. Give three examples of situations of legal pluralism existing in fact in the world today.
3. To what extent is it possible to have a unified legal system in a multicultural society?

3.4 Globalisation and levels of law

(a) The significance of 'globalisation'

Words like 'globalisation' and 'global' are used very loosely. Here, it is useful to distinguish between two primary uses. First, 'globalisation' is sometimes used to refer to certain recent tendencies in political economy – the domination of the world economy by a group of interrelated ideologies and practices, commonly referred to as 'The Washington Consensus'. This usage is clearly illustrated by 'the anti-globalisation' movement, which has rather diffuse targets, including American hegemony, Western dominated international financial institutions, free market ideology and capitalism in general. The issues are important, not least in respect of poverty and environmental matters, but this usage is too narrow in the present context. I shall use the term 'globalisation', following Anthony Giddens, in a much broader, less politically fraught sense, to refer to those processes that increase interaction and interdependence in respect of not only economy and trade, but also communications, science, technology, language, travel, migration, ecology, climate, disease, war and peace, security and so on.

[One point] is especially important for lawyers: the literature on globalisation tends to move from the very local (or the national) straight to the global, leaving out all intermediate levels. It is also tempting to assume that different levels of relations and of ordering are neatly nested in a hierarchy of concentric circles ranging from the very local, through sub-state, regional, continental, North/South, global, and beyond to outer space. But the picture is much more complicated than that: it includes empires, alliances, coalitions, diasporas, networks, trade routes, and movements; 'sub-worlds' such as the common law world, the Arab world, the Islamic world, and Christendom; special groupings of power such as the G7, the G8, NATO, the European Union, the Commonwealth, multi-national corporations, crime syndicates, and other non-governmental organizations and networks. Talking in terms of vertical hierarchies obscures such complexities. It is especially

important for lawyers to be sensitive to the significance of boundaries, borders, jurisdictions, treaty relations, and legal traditions....

Common sense suggests that the extent of interdependence and interaction is likely to be greater where there is proximity in terms of space or such factors as historical association (ex-colonies, trade routes, traditional alliances) or language or legal tradition (e.g. the common law) or patterns of migration, or complex combinations of these. The important point here is that most institutions, regimes, orders, and orderings with which we are concerned operate largely at sub-global levels and in studying such phenomena it pays to have a reasonably realistic demographic picture of their scale and distribution across space and time. (*GJP*, pp. 13–18, footnotes omitted)

(b) Levels of law

Law is concerned with relations between agents or persons (human, legal, unincorporated and otherwise) at a variety of levels, not just relations within a single nation state or society. One way of characterising such levels is essentially geographical:

- global (as with some environmental issues, a possible *ius humanitatis* – e.g. mineral rights on the moon – and, by extension, intergalactic or space law);
- international (in the classic sense of relations between sovereign states and more broadly relations governed, for example, by human rights or refugee law);
- regional (for example, the European Union, the Council of Europe, and the Organization of African Unity);
- transnational (for example, Islamic, Hindu, Jewish law, Gypsy law, transnational arbitration, a putative *lex mercatoria*, Internet law, and, more controversially, the internal governance of multinational corporations, the Catholic Church, or institutions of organised crime);
- inter-communal (as in relations between religious communities, or Christian churches, or different ethnic groups);
- territorial state (including the legal systems of nation states, and sub-national jurisdictions, such as Northern Ireland, Scotland, Wales or Quebec);
- sub-state (e.g. subordinate legislation, such as by-laws of the City of Cardiff) or religious law officially recognised for limited purposes in a plural legal system; and
- non-state (including laws of subordinated peoples, such as native North Americans, or Maoris or illegal legal orders such as the Southern People's Liberation Army in Southern Sudan and the 'common law movement' of militias in the United States).

Which of these should be classified as 'law' or 'legal' is essentially contested within legal theory, and also depends on the context and purpose of the discourse. (Adapted from *GJP*, p. 70.)

3.5 Transnational and devolved systems

European Communities Act 1972, s. 2(1)

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ‘enforceable Community right’ and similar expressions shall be read as referring to one to which this section applies.

Northern Ireland Act 1988, s. 4(1)

‘the Assembly’ means the New Northern Ireland Assembly, which after the appointed day shall be known as the Northern Ireland Assembly.

Scotland Act 1998, s. 1(1)

There shall be a Scottish Parliament.

Government of Wales Act 2006, s. 1(1)

There is to be an Assembly for Wales to be known as the National Assembly for Wales or Cynulliad Cenedlaethol Cymru (referred to in this Act as ‘the Assembly’).

Questions

1. Give three examples of significant legal patterns (e.g. the common law world) that exist at sub-global levels.
2. The examples listed in section 3.4(b) are candidates to be included as ‘legal orders’ in a map or overview of law in today’s world. Which of these would you exclude from such a map because ‘they are not really law’?
3. What is the difference between a transnational, a devolved and a subordinate legal order?

4 Interpretation

[T]he interpretive function may be said to be the central function of a legal system. (Talcott Parsons)

4.1 Introduction

In this book we use ‘interpretation’ to refer to the activity of puzzling over, considering, arguing about and determining the meaning and scope of an object of interpretation. Difficult questions arise about legal and non-legal rules as objects of interpretation, the relationship between meanings of words and meanings of rules, how interpretation in legal contexts is similar to and

different from interpretation in literature, theology and social relations, and questions about literal, legalistic and purposive interpretation. This section introduces some examples and quotations that raise some basic questions about these themes.

4.2 Interpretation: what?

Applying the law always involves interpreting it. Any norm posed in an authoritative legal text has to be understood before it can be applied. Accordingly in a wide sense of the term ‘interpretation’, every application of law requires some act of interpretation, since one has to form an understanding of what the text says in order to apply it, and any act of apprehension of meaning can be said to involve interpretation... This applies even to mundane settings ... A narrower or stricter conception of interpretation is more useful and relevant in the study of legal reasoning. This is the sense according to which we ‘interpret’ only when facing some occasion of doubt about meaning, followed by a resolution of that doubt by reference to some reason(s) supporting the preferred way of resolving it. (Neil MacCormick, *Rhetoric and the Rule of Law* (2005), p. 121)⁵

First, it is an *explanation* or (in performance-interpretation) a *display* of an object.

Second, it explains an object by making plain its meaning. Only what has meaning can be interpreted.

Third, some interpretations are good and some are bad, and some are better than others. This is not to say that all interpretations can be ranked by how good they are. Some are incommensurable.

Fourth, a good interpretation is one that explains the meaning of its object, and thereby the object that has that meaning, so that the intended audience does, if it tries, understand it.

These four features are probably true of interpretation in general. The special kind of interpretation [that we are concerned with] shares these four marks of interpretation, but has three additional ones:

Fifth, a good interpretation provides understanding, not merely knowledge.⁶ This in itself excludes the giving of a dictionary meaning, substitution of synonyms or near synonyms, and translation; that is it excludes semantic meaning.⁷

Sixth, interpretive pluralism: there can be more than one good interpretation of objects with meaning.

Seventh, some good interpretations are innovative, in a strong sense. That is they are not merely new in having been hitherto unknown to some or all. They are innovative in that the meaning they explain is not one the object has independently of them. (Joseph Raz, *Between Authority and Interpretation* (2009) pp. 301–2)

⁵ On routine and problematic readings, see Chapter 6.

⁶ On wooden interpretations and unthinking obedience, see below Chapter 3, p. 115.

⁷ On language and interpretation see Chapter 5, section 4.