

Interview met Duncan Kennedy

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1 Gestalt

In your article, you speak about initial framing, the first Gestalt. Could you describe that position as a kind of default position, a position which people fall back on when no legal work is done?

Yes, you might say that. But the minute there is a first moment of engagement with a purpose, then the Gestalt begins to transform itself. The position of the adjudicator is complex. At the moment of the arrival of the case, there are two different kinds of Gestalt processes that are going to be operative. The first is the feeling (probably because the judge read about the case in the newspaper or on the basis of the parties' documents) of: 'O my God, this party will certainly win...'. Or: 'Who knows? It is a hard case.'

But that is not the only initial Gestalt. There is also the apprehension of the legal field, in a sense much more elaborate and technical. The judge or other legal worker arranges particular fact-situations in sequences which are understood to involve different principles to different degrees. So, for example, let's take the requirement of delivery for the validity of a gift. Cases where delivery is a question 'arrange themselves'. If there is a manual delivery, it is an easier case than if the gift is transmitted by letter. And if there is a letter left in the drawer and a telephone call saying that there is a letter in my drawer and then I die, that is still a harder case. This arrangement is independent of what the Code or statute or case law may provide. So this Gestalt is the initial intuitive arrangement of fact-patterns along a continuum between fact-patterns which implicate very strongly a certain principle and fact-patterns that implicate it weakly. The process of arrangement of the fact-patterns is not something that is done by an initially conscious and rational act of the classical type.

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Why would one spend energy and work and time to destabilise such an initial Gestalt?

Let's take the hypothetical case of a judge presented with a fact-situation of which his initial apprehension is strongly -because of the way the field is constituted- that an unjust result is going to occur. This judge has a motive to work to destabilize the Gestalt so as to be able to reach a result he thinks is just. A first objection that is made by several of my colleagues, is: 'Wait a minute. That is not the job of the judge to ask himself whether the initial apprehension is one that will lead to a bad outcome. He is a judge. He is not an advocate of morality.' My response to that is that it is part of the conventional western understanding of the role of the judge that it is not permissible for him to simply go with the Gestalt. The minute any reason is offered against the Gestalt he has to think again. A duty to consider the justice of the outcome he initially thinks is obvious is built into the conception of the role that the judge is supposed to [fulfil]. He is not just a machine, in Max Weber's sense.

But in reality he will probably depart from that ideal because he has so much work on his desk.

Yes, sometimes. But at least one of the parties will make legal arguments that are designed to disrupt the initial apprehension. So it is not just the judge and the facts. The 'situation' of legal argumentation guarantees that sometimes the initial Gestalt will be destabilized, even if the judge is passive, because there is a lawyer working for money to bring that about.

So destabilisation is built in the judicial process as a whole.

Yes. Which is not to minimize the force of inertia...

2 Unselfconscious rule application

If we translate your views in the terms offered by Raz, that rules can be seen as exclusionary reasons that exclude the weighing of substantive pros and cons, would it be your position that prior to the decision to treat a rule as exclusionary reason, there is just such a weighing of pros and cons going on?

Sometimes yes and sometimes no. I would insist on the phenomenon we might call unselfconscious rule application. It is a familiar aspect of the phenomenology of rules that we often apply them without reflecting on their status at all and we are only preoccupied for example with the facts. So

we may apply, for example, the rule that there must be some specific intent for the crime of murder, without reflecting at all on the possibility of destabilizing the choice of a rule or the interpretation of a rule. I am aware of the position that insists on collapsing the distinction between unselfconscious rule application and interpretation. And at an epistemological level I think it is right, but of no interest whatsoever for legal theory. I just assume that the waitress who just passed through here, went through a door and not a window, but look again, and you might think because it was made of glass it was 'really' a window after all! But I didn't ask myself: is it a door or a window? So although I am ready to accept that 'no rule can determine the scope of its own application', I want to insist that for the judicial process, we need to theorize and then to concretely represent processes where there is a sharp distinction between the unselfconscious moment and the reflective moment. In unselfconscious rule application I don't think there is a previous stage that's well described as interpretation. The phenomenology of rule application presupposes that there is truly a world of norms that is there, and we sometimes 'just apply them'. Now imagine that the process of destabilization of the initial Gestalt has begun. At this point, before we decide to treat the rule as applicable and apply it as it initially seemed obvious to do, our view of the substantive pros and cons of that outcome will affect us by pushing us to work or not to work to reconfigure the field.

So then you are always in the default position.

I would say you always begin in what you are calling a default position. Let us say that there are two advocates and one is claiming that every contract must have two parties and that each party must agree and that a gift is a contract and that therefore this gift requires acceptance, and there was none. Suppose the applicable Civil Code says only that contracts require acceptance, but not whether gifts are contracts. Then the first party says: gifts are contracts, and the other party says: gifts are not contracts. And that is not a discussion about the facts, but a discussion about the development of the concept. Now what I don't understand about the English analytical jurists is that they *don't seem to be interested in this kind of thing*. But the typical American understanding is that the judge and the scholar are engaged in a very continental style of normative elaboration of the system. So the judge is not a guy sitting there with a wig, an applicable norm, and some facts. The judge is embedded in a complex normative context in which there are many potentially applicable norms, and the applicants are equally embedded. Sometimes it is indeed unselfconscious rule-application, and the judge and the advocate are only engaged in the question 'Did you hit him?' and then I say 'I was in another town' and you say 'I saw you the night

before', that is what it is about. But sometimes it is about this dimension where the question is...

But you are talking only of adversarial situations. There are so many officials and bureaucrats who are deciding cases by just applying the rules and who don't want to spend energy in reworking the initial Gestalt.

That is very true. And very important for the sociology of rule application. But for the analysis of the 'nature' of adjudication, it is only a difference of degree. Whether you are speaking of a housing official, or an immigration officer or of a judge, in each case there is a normative context and sometimes there is contestation. When you say the bureaucrat is 'just applying the rules', I assume you mean 'as they appear in the initial Gestalt'. As with the judge, the norm might be in a straightforward rule form – and here we come to the difference between rules and standards- phrased in such a way as to minimize discretion at the expense of over- and under-inclusion. Or it might be a standard. 'Just applying the rules' will look different depending on how we set up the normative context of the immigration officer. This is a basic kind of question of norm-formulation: Do we want the immigration officer to look simply at the amount of dollars, or whether the passport is valid, or do we wish to give the immigration officer those norms plus, let us say, a general clause. The actual legal order is a combination of standards, general clauses with relatively little 'formal realizability' in Von Jhering's words and rules. At this point, the official looks very much like a judge, though with less time to work at destabilizing Gestalts. The activity of the official is in no ways different from any other complex form of rule application.

3 Rules and Standards

But if you want to understand what a rule is, in contradistinction to what a standard is, it sometimes appears to me that the more formally realizable rules are, the more they invite discussion, whereas the vaguer norms are, the more they have the tendency to close that discussion. Because they are so malleable that you cannot properly discuss things. They simply don't offer enough 'topoi'. With precise rules such as 'No dogs allowed' you can have discussion whether seeing eye dogs are allowed or not. But with a norm like 'Don't make unreasonable noise' such discussion seems superfluous. You end up with nothing.

I see your line. Would you like me to respond? First of all: in the United-statesean discussion of rules against standards the starting position was, interestingly enough, just the opposite. Supposedly, because rules were cer-

tain they left no room for discussion. Because standards were supposedly open textured, they invited endless inconclusive discussion. But you can reverse that argument, as you just did: the under- or overinclusiveness of the rule provokes passionate discussion about the definitions, just because the rule seems arbitrary. The application of a standard with moral content, on the other hand, could radically restrict discussion, just because everybody thinks it is obvious what is immoral. 'Prostitution is immoral': what can I say against that? I would say, today, against the earlier position in the US, but also against your opposite position, that the question of the number of topoi is simply indeterminate. So under some conditions rules will invite discussion, and in other situations standards will elicit more discussion. I don't think that you can defend for one minute the general proposition that general clauses inevitably produce a *topoi-impooverished* argumentative universe.

Why not?

Take the example of the general standard of unconscionability in United-statesean contract law. Unconscionability doctrine was originally attacked as providing no basis for discussion – the bargain either shocked the conscience or it didn't. But a very large part of all the literature of law and economics is a complex ideological battle about the meaning of 'injustice in exchange'. 'Injustice in exchange' and 'good faith' invoke a whole discussion in which there are rival understandings of what it is to be in good faith (libertarian, utilitarian, neo-Kantian, post-Marxist, etc.). Now I speak as an observer of the legal discourse in the U.S. but I think it applies also to Western Europe in general.

It has been argued that a Dutch standard like 'contracts should not be enforced if contrary to reasonableness and fairness' might cause judges to become rather lazy in making explicit their motivation, since criteria about what constitutes reasonableness and fairness are lacking.

Why? I assume that in the Netherlands as everywhere else higher courts can review the lower courts. So the way lower courts justify their decisions is a function of the kind of explanation that higher courts demand of lower courts. You are talking as though the lower court judge has no superior.

Yes, but the judge is allowed to refer to reasonableness and fairness so the superior court would not find fault with that. On the contrary, the urge to refer to vague standards is all the more rewarding since they make the position of the lower judge less vulnerable than a precise argumentation.

That is not a function of the nature of a rule or a standard. It is a function of the dynamics of judicial review in a particular legal culture. In some contexts standards are used to require elaborate justifications from the lower courts, in other contexts standards are used to disguise discretion. There is nothing in the definition of a rule or standard that leads to the conclusion that any of these tendencies would be predominant in a particular situation.

But then you cannot maintain the opposite either [that standards are more suitable to invite discussion].

No, you cannot.

So you cannot say anything about rules and standards in general.

No indeed. That is: on the level of whether they are more likely to invoke discussion. There are many things to be said about rules and standards and I have said too many of them already.

But in your Form and Substance article of 1976, you say that there is a strong analogy between arguments in favour of standards and altruism.

Yes. I love to hear that you accurately state my position. It is so rare. I think that there is a strong *analogy* between arguments for standards and arguments for imposing high levels of altruistic duty in private law. Whereas people constantly say: you argue that altruism leads to standards.

But is this analogy a somehow universal phenomenon? Let us say in a strongly collectivist legal system, would the plea for standards be analogous to individualism, or would it also amount to altruism?

This is an interesting question which I didn't try to address. First of all, when I proposed using the term altruism in the rules/standards debate, I didn't mean collectivism. My notion of altruism was that it was about looking out for the interests of the 'Other', not of the 'Group'. But let's suppose that what we mean by a strongly collectivist system is one in which there are indeed high legally imposed duties toward others. In such a system there would still be a question as to just how far we should go toward imposing the duty. The argument for standards and the argument for yet higher levels of duty would be analogous in such a system, just as they are in our systems. But it might be the case that the strongly collectivist legal system was really deeply culturally different from our systems. If you tell me there

is a culture which has no distinction between standards and rules, either linguistically or practically, then the analogy is not going to work at all.

But there may be more to it. It may be that there is some inherent quality of individualism in rules. I don't know anything about it, but I am told that collective Confucianism made use of standards and no rules at all.

But the Emperor could of course decree...

A decree is not a rule.

I am beginning to like this conversation. Nobody in my milieu wants to discuss these questions in these terms, and I think this is great. Well, I don't think we can answer questions like this – whether there are cultures where the analogy doesn't work – by an appeal to legal philosophy. I have no strong feeling about how it might work in a Confucian system.

But if you don't feel strongly about this, why do you repeat again and again that there is an analogy between rules and individualism and standards and altruism?

I don't feel strongly about the boundaries of the validity of that statement. As long as it is very plausible for the Netherlands and for the World Trade Organisation, then I am willing to be agnostic about whether it is true in the sense of the 'truth of the matter'. You see, I am a constructivist.

4 Aspirational norms

You write in your recent article that rules are essentially compromises between conflicting values or interests. Therefore they are vulnerable to destabilization: they can be split open. I cannot agree with you more. But does the same apply to this new kind of aspirational norms that the contemporary legislator comes up with, like for instance the principle that the emission of toxics should be 'as low as reasonably achievable'.

Yes, I know about this. We don't have that. It is a Western European invention.

Aren't these downright translations of governmental policies and purposes? And if so, can they be destabilized in the same way as rules?

Let me answer in a round about way. The critics of formalism, of conceptual jurisprudence, of the jurisprudence of concepts, were ambivalent as to whe-

ther to replace formalism with a teleological jurisprudence or with a jurisprudence of proportionality. In both European and American legal thought there is endless ambiguity about this. Many people think that the answer to a jurisprudence of concepts is a jurisprudence of purposes or goals or policies, that has the same structure as conceptualism, because a single purpose or policy gives rise to rules in the same way as concepts once did. This was very effectively criticised in France by René Demogue, and in Germany by Philipp Heck. Heck's work insists that the norm is a 'conflict resolution'. And of course in the US it is Llewellyn and Lon Fuller. From their point of view, a teleological jurisprudence is irrational because it refuses to see the conflict between aspirations. In every single case there are always at least two conflicting aspirational ideas. Much of the current debate in Western legal thought seems to me to derive from this ambiguity in the critique of conceptualism. We seem to agree, you and I, with Heck and Demogue. The norm is both a conflict resolution between various purposes and a compromise between its substance and the formal requirements of a rule, as von Jhering said.

The aspirational norms you mentioned should be seen in the context of proportionality, rather than as attempts at teleological jurisprudence. Judging from the Italian context which I know a little bit better, I suppose that what has happened is that instead of using the norm to settle the conflict between justificatory purposes, the conflict between the various aspirational ideas now occur *in a diffuse space*. When it is said in such a norm 'to the greatest degree possible' and never 'to the utmost', the legislator presupposes that the adjudicator will attempt to achieve proportionality with other policies or purposes or aspirations. So that means that none of these aspirational norms has any stability to be destabilized. The author of the aspirational norm is saying: we are going to deformalize the process of application into a pure context of proportionality. And as I understand it, the Dutch private law world is indeed totally preoccupied with balance.

The problem remains: could you say that aspirational norms can also be split open in the same way as rules?

No. I'd say that many things can happen to them, but the notion of splitting up does not apply to aspirational norms. But because they conflict and have to be balanced, they are just as vulnerable as rules. But I wouldn't describe that to which they are vulnerable as destabilization, but just radically different degrees of realization. Second: the universe of aspirational norms has a semiotic tendency to proliferation. It is not that the norm is destabilized in its application to a particular case, as happens with rules. It is rather that the aspirational norm is subdivided into opposing sub-norms, which beco-

me counter-norms to be balanced, so 'as low as can be reasonably achieved' invites the advocates to invent more and more reasons why the actual level of toxics is reasonable or unreasonable.

And what about certainty in such a proportionality jurisprudence? Can a company know beforehand which levels of emission are permitted and which are not?

This familiar critique of aspirational norms underestimates the unpredictability of a rule-based system, which is the usual alternative. It is part of the traditional rhetoric of rules and standards that standards, and especially aspirational norms, because they can be realized more or less completely, are intrinsically less certain, because we don't know who will make the judgments of reasonableness that they require. But there is nothing 'inherent' to it. Rules are as inherently unpredictable as standards. What we know is that with rules, there are cases of gross under- and over-inclusion. And with standards: we know that cultural and other pre-dispositional constraints may give the litigants a better understanding of what the adjudicator will do than they would have with a rule. A rule, because it is an exclusionary reason, does not want these things to be part of a discussion.

Even if there is only some vague standard, if the procedures of the court allow environmental groups to participate in the litigation, and neighbourhood groups are allowed to participate as well, and if we are dealing with something that severely irritates the eyes, then it makes no difference that the polluting corporation says: no it is absolutely impossible to lower the emission level. They know perfectly well they will be nailed!

If such norms are embedded in a culture with a strong consensus at the pre-cognitive level, there can be a high level of certainty in the application of standards. It is an error to conceive of the question of certainty as a property of the norm, rather than as a kind of interaction of the characteristics of the norm-system with the parties involved.

5 Rights

It seems to be your point of view that rights, just as rules or standards, do not have any intrinsic qualities either.

Yes, the same as with rules. Rights are unselfconsciously operative in the same way as rules are. In the normative destabilisation of the Gestalt, arguments about rights are strictly parallel to the arguments about rules. The discussion till now can now be very useful, for what I want to stress here is: whether you see rights as a kind of aspirational standards, in which case

they are subject to the dialectic of proportionality, or whether you see them as rules, in which case we see them as a compromise, in either case I don't believe there is a difference in kind, but all the same problematics that exists for rules, exists for rights.

You once wrote that rights are no more than post hoc rationalisations of rules.

I can't remember writing anything like that, and if I did, I shouldn't have. What I want to insist on, over and over again, is the difference between statements like that one, which try to tell us what, say, a right 'is', and the description of how, say, rights discourse operates or functions or what it presupposes. What I would say is: the ontology of rights is a deep complex question like the ontology of the rule. But I am not interested in that. I am interested in how they function in a discourse.

To what extent does that position condemn you to the position of the external observer? I mean, Dworkin is able to stand up and write articles in The New York Review of Books.

Although I haven't written articles in *The New York Review of Books*, I have written my share of political articles, for example, on the Iraq war. But I don't do that as a lawyer. I can address political questions without acting as a jurist. The only thing that is threatened by the deconstructive attitude toward legal reasoning is the self-understanding of the progressive legal intelligentsia that they should be able to speak about politics with the authority of the jurist. In so much as we are dealing with a professional discourse addressed to courts, I can say to myself that I can use all the available legal rhetorical techniques, and that it is my task to develop, for the causes and the clients that interest me, the best arguments in the discourse. I don't consider that to be in bad faith, any more than any other *role in combat* is in bad faith. But I don't need to speak as a lawyer as I speak about Iraq.

Can you account for the current admiration for the Law? Its tremendous authority as it can be seen in international tribunals, with all these solemn judges wrapped up in dark red robes...?

There are many paradoxes involved here. An interesting one for me is this: I think that the longing for the judge is connected with the discrediting of the political. But that longing also comes from the discrediting of the bureaucratic. This is what is so paradoxical. Politics is identified with chaos, arbitrariness, and selfishness, and bureaucracy is identified with rigid formalism, arbitrariness and selfishness. The idea that rational bureaucracy

could be a conceivable alternative to politics is dead. After 1968, there is no longer the idea that the collective could organise itself bureaucratically to respond effectively to human needs. The judge is seen as an alternative both to the parliamentarian and to the bureaucrat.

The paradox is, that as the longing for the robe has become more intense, the plausibility of the judicial method has fallen exactly to the critique that it is at once political and bureaucratic. So they are in a very interesting vulnerable position in which there is a deep psychological need for some sense of transcendence. But the very things that put them in that exalted position – the critiques of politics and bureaucracy – are undermining the ground they are standing on, which is politics and bureaucracy.

You must be a disappointed man that after all your efforts of deconstructivism, the Dworkinian judge is the hero of the day.

I don't think that I ever considered myself as an intervener in general culture at all. I come from a different kind of psychology which is the psychology of avant-gardism. The classic ambition of avant-gardists is well described as exhibitionist.

Even you must want to have some impact...

I think I had some! You obviously don't have much sympathy for avant-gardism. It is like saying that Magritte had no impact because today... Would you say that modernism had no impact? Avant-gardist scholarly ambition is different from the ambition to have your ideas adopted officially and generally. My ambition was to have an effect on legal theory but not by putting forward ideas about which the mainstream would say: 'Hmm, very sensible. I guess those are our ideas too.' You have to distinguish two modes. The avant-gardist looks to a form of impact that comes from a negation, rather than a type of influence or success that comes from being the most sensible person in the world.