LAW'S MEANING©

BY BRIAN SLATTERY*

It is often thought that the meaning of a legal provision must reside in the minds of its authors or its interpreters, or a combination of the two. Indeed, the point may seem so obvious that it scarcely needs any justification. Is there any sense, then, in the claim sometimes made by judges that a law has a meaning *of its own*, one that is distinct from the intentions of authors and interpreters alike? At first sight, the claim appears extravagant and self-serving. However, there is more to it than meets the eye. Drawing on an example from the world of games, this essay argues that the law makes up a "participatory order of meaning," an autonomous order to which legal drafters and interpreters bend their minds as they create particular patterns of meaning. Ultimately, a legal order should be understood as a concrete instance of a transcendent order of justice and basic values, which in some sense lies both within and beyond the laws of a particular time and place.

On considère souvent que le sens d'une disposition juridique doit s'établir soit dans l'esprit de ses auteurs ou des personnes qui l'interprètent, soit dans une combinaison de ceux-ci. Cette prétention peut paraître si évidente qu'elle n'a point besoin d'être justifiée. Est-il donc juste de proposer, tel que le font parfois les magistrats, qu'une loi possède un *sens propre à elle-même*, également distinct des intentions de ses auteurs et de ses interprètes? A première vue, cette prétention paraît exagérée et égoïste. Pourtant, elle mérite d'être examinée de plus près. En utilisant un exemple du monde des jeux, cet essai soutient la thèse le droit constitue un «ordre participitoire de signification», un ordre autonome auquel les auteurs et les interprètes des lois réfléchissent lorsqu'ils créent des sens particuliers. En fin de compte, on doit comprendre l'ordre légal comme étant la manifestation concrète d'un ordre de justice et de valeurs fondamentales qui le transcend et qui, en quelque sorte, se trouve à la fois à l'intérieur et au-delà des lois, à une époque et à un endroit particulier.

---

* Associate Professor, Osgoode Hall Law School, York University. This essay has benefited from the comments and criticisms of many readers and listeners, too numerous to list here. However, I would like to acknowledge in particular the contributions of John Evans, Marc Wright, Hans Mohr, Brian Langille, Marc Gold, Ted Morton, Jim MacPherson, Howard Adelman, Rhoda Howard, Steve Newman, Lynda Larmour, Peter Penz, Cran Pratt, Robert Vipond, Heidi Libesman, and Jacob Bakan.

> *If I begin from where I am and see it as I see it, then it may also become possible for me to see it as another sees it.*
>
> —Chuang Tzu[1]

What does a statutory provision mean? In some obvious (and yet puzzling) sense, it seems to express the intentions of its authors—the people responsible for drafting and enacting the provision. After all, a statute is not drawn up haphazardly. Its language is normally chosen with some care and scrutinized in public debate before being approved. It would be hard to deny that the authors of a provision intend it to mean *something*. So it is tempting to think that the reverse is also true: that the provision means just what its authors intended it to mean. This view, which has a strong common-sense appeal, may be called *intentionalism*.

Of course, in practice it may be hard to find out what a statute's authors actually had in mind. They do not always leave behind much evidence of their intentions beyond the bare words of the text. Even when we can discover some evidence outside the text (what lawyers call "extrinsic evidence"), it may well reflect the attitudes of only a few of the many individuals involved in the process of drafting and enactment. In any case, this supplementary evidence may be ambiguous or contradictory or it may have little bearing on the particular question that has arisen. For the authors of a statute are only human: they cannot foresee all the situations that the statute will be called on to resolve and so they inevitably lack formulated views on how the statute should be applied in certain circumstances.

These are practical difficulties. But they do not necessarily go to show that intentionalism is wrong; just that it may be difficult to carry out in some situations. In principle, it is still possible to hold that a statutory provision means whatever the authors intended it to mean. According to this viewpoint, the interpreters of a statute should make their best efforts to find out what the authors had in mind, making use of the text and whatever extrinsic evidence is available. When these sources fail to provide a definite answer, interpreters may have to resort to other methods of construction, just as someone who is hard of hearing may have to rely on clues provided by gestures and the overall context in order to piece together what a speaker is saying. But these methods are

---

[1] Quoted in T. Merton, *The Way of Chuang Tzu* (New York: New Directions, 1969) at 42.

secondary. Their only purpose is to determine indirectly what cannot be determined directly.

But is intentionalism correct? Does a legal provision mean just what the authors intended it to mean? And if not, what else could it possibly mean?

The *interpretivist* school of thought provides an alternative answer. This school argues that the meaning of a statutory provision lies in the interpretations of the people responsible for putting the provision into effect: especially lawyers, judges, and state officials. These people make up a community of interpreters, whose language, values, beliefs, and practices provide the context within which a legal provision gains its meaning. In its purest version, this theory holds that a statutory provision has no inherent meaning of its own; it means whatever the community of interpreters decides it means.

Between the intentionalist and the interpretivist camps lie a variety of more moderate positions. For example, it can be argued that what a legal provision means is a blend of what its authors intended it to mean and what its interpreters think it means. The core meaning of the provision is found in the authors' intentions, as manifested in the text and any extrinsic evidence. But at the fringes of the provision, where the authors' intentions become frayed and obscure, legal interpreters weave their own meaning into the text, guided by what they take to be its underlying policy.[2]

Others argue that the intentionalist and interpretive theories are not necessarily inconsistent. They point out that there are two different sorts of authorial intent. At one level, the authors of a statute have certain ideas about the substance of the provisions they enact. These ideas make up their *substantive intent* But the authors may also have views on the proper methodology for interpreting legal provisions and in particular the extent to which judges and other state officials are entitled to rely on their own sense of what the statute means, rather than search for the authors' substantive intent. These views make up the authors' *interpretive intent*.[3] The distinction highlights the fact that authors do not necessarily have the *interpretive* intent that their *substantive* intent should carry much weight with the courts. To the contrary, the authors may consider that their own views on a provision's meaning should count for

---

[2] See, for example, H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) c. 7. For another middle-range position, see R.M. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).

[3] The distinction is drawn from P. Brest, "The Misconceived Quest for the Original Understanding" (1980) 60 B.U. L. Rev. 204.

little or nothing in the interpretive process and that judges should construe the text according to their own best lights.

In this essay, I am less interested in what divides these viewpoints than in what unites them. For, despite their differences, they all agree on one basic point: the meaning of a legal provision lies in the thought-processes of an identifiable group of people—be it the authors of the provision, its interpreters, or a mix of the two. In short, a legal provision has no meaning of its own. This "subjectivist" premise is often considered so obvious that it scarcely needs any justification.[4] After all, in itself a statute is just a scattering of black ink on white paper. Whatever meaning it possesses must surely lie in the minds of the people who draft it or who put it into effect.

What are we to make, then, of the claim sometimes made by judges, that a legal provision has a meaning "of its own," one that is distinct from the intentions of both its authors and interpreters? Does this claim make any sense at all? Or is it just a device for concealing subjective mental operations behind a screen of objectivity, a screen that serves to shield the exercise of judicial discretion from impertinent and critical eyes?

The issue has arisen in dramatic form in Canada, in the context of the judicial struggle to come to terms with the sweeping provisions of the *Canadian Charter of Rights and Freedoms*, enacted in 1982.[5] Consider, for example, the broad scope of section 7 of the *Charter*:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The economical wording of the provision glides over a number of difficult questions. What, for example, is the meaning of the portentous phrase "principles of fundamental justice?" The text itself gives us little guidance. However, if we consult the historical record, we find definite indications of what the federal drafters of the provision thought it meant. Typical is the statement made by B.L. Strayer, then Assistant Deputy Minister for Public Law of the Federal Department of Justice, in testimony before a parliamentary committee examining the proposed text of the *Charter*:

> Mr. Chairman, it was our belief that the words "fundamental justice" would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept

---

[4] See, for example, the discussion of skepticism in Dworkin, *supra* note 2 at 76-86.

[5] Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

> of what is called substantive due process, which would impose substantive requirements as to the policy of the law in question.[6]

According to Mr. Strayer, then, the section only forbids activities that are carried out in a procedurally unjust manner, as when a person is denied a fair hearing. It does not cover acts that are fundamentally unjust in substance so long as they are implemented "properly," as when a person is tried with immaculate procedural correctness under a vicious law.

But Mr. Strayer's viewpoint is not necessarily the end of the story. Even if it faithfully reflected the outlook of the drafters, it may not have been shared by the members of the parliamentary committee, or by the federal Parliament as a whole, or by the provincial governments that added their seals of approval. Let us, however, waive these difficulties and assume that Mr. Strayer's testimony embodies the views of a majority of the *Charter*'s authors. Does such extrinsic evidence control the section's meaning?

The question arose before the Supreme Court of Canada in the *Motor Vehicle Reference*,[7] decided several years after the *Charter* came into effect. The Court took a modulated approach. On the one hand, it held that extrinsic evidence of the intentions of the authors could properly be considered by a court in interpreting the *Charter*. But it neutralized this concession by ruling that such evidence carried little weight. Indeed, the Court departed from the views of the federal drafters and held that section 7 went beyond merely procedural matters and in some instances covered matters of substantive justice. In particular, it decided that the section prevented legislatures from imposing mandatory prison terms for "absolute liability" offences, which do not require subjective knowledge or even negligence on the part of the accused.

The Supreme Court's judgment has been sharply criticized by some commentators, who argue that it disregards the substantive intent of the *Charter*'s authors and greatly expands the judiciary's power to

---

[6] Canada, Parliament, Special Joint Committee on the Constitution of Canada (1980-81), *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 1st sess., 32d Parl., 1980-81, No. 46 (27 January 1981) at 32.

[7] *Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979*, [1985] 2 S.C.R. 486 [hereinafter *Motor Vehicle Reference*]. All references here are to the majority judgment of Lamer J., with which Dickson, C.J., Beetz, Chouinard and Le Dain, JJ. concurred. For background and discussion, see P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 1032-37 and 1283-91.

override the decisions of democratic legislatures.[8] Some of these critics adopt a strict intentionalist view of the *Charter*, holding that it means whatever the authors substantively intended it to mean, as manifest in the text and any extrinsic evidence. However, other critics take a more moderate approach. They argue that courts should follow authorial intent in matters of general import but are less constrained when it comes to matters of detail. They also suggest that the importance of authorial intent should decrease over time so as to allow the text to be adapted to new conditions and social needs.[9]

Whatever the differences among the Court's critics, they are generally united in assuming that the judges in the *Motor Vehicle Reference* substituted their personal views for those of the *Charter*'s authors. In other words, the critics tacitly subscribe to the view that the *Charter* does not have any meaning apart from what is supplied by its authors and interpreters.

Of course, this subjectivist premise is not necessarily confined to the decision's critics. A friend of the decision might concede that the judges substituted their own views for the authors' substantive intent but argue that the Court's reading of the section was desirable on policy grounds and that the *Charter*'s authors themselves envisaged that judges might properly take this sort of creative action.

What is interesting is that the Supreme Court itself seems to adopt a different attitude, one at odds with the subjectivist outlook. The judgment assumes that the expression "principles of fundamental justice" in section 7 of the *Charter* has a meaning of its own, one that is distinct from the personal views of authors and interpreters alike. As Justice Lamer states, "the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system." He goes on to explain:

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.[10]

This approach suggests that, whatever section 7 means, it is not necessarily what the authors thought it meant or, on the other hand,

---

[8] See, for example, P.J. Monahan & A. Petter, "Developments in Consitutional Law: The 1985-86 Term" (1987) 9 Supreme Court L.R. 69 at 78-102.

[9] See P.J. Monahan, *Politics and the Constitution* (Toronto: Carswell, 1987) at 74-85.

[10] *Supra* note 7 at 513.

whatever judges and officials might prefer to think it means. Interpreters have no business injecting their personal preferences into the *Charter* text. Their role is to subordinate their minds to the larger legal order, and in so doing, elicit the provision's meaning in the concrete circumstances of the case. That order is constituted by Canadian legal culture, practices and traditions, which evolve and adapt over time.

Is there any truth to this approach? Is it possible to conceive of the legal order as an autonomous or "objective" realm of meaning—a realm where the meaning of certain acts is in some sense independent of both enactor and interpreter?[11] This fundamental question will occupy our attention throughout the remainder of this essay.

However, to appreciate the question in its true light, we need to remember that it is not confined to the domain of law. It arises in many other areas of human endeavour, notably (if not exclusively) in the context of social activities that are governed by rules—such as playing a game or speaking a language. By examining the way in which the question of autonomous meaning arises in such contexts, we may hope to gain a better understanding of the way it arises in the law.

So we will begin, in the next section, with a simple example drawn from the world of chess—a rule-bound world in which the relationship between players, their intentions, and their moves gives rise to an interesting series of questions. While the example may seem at first blush somewhat remote from the issues under consideration here, we will soon see that the parallels are both close and illuminating.

A SURPRISING MOVE

Suppose that at a crucial point in an international chess match one of the players, after mulling over his next move, mutters audibly "King's Bishop to King's Knight 4" and makes a written notation of this move on a pad at his side. Unexpectedly, he then picks up his Queen rather than his King's Bishop and deposits it on the same square identified in the note. The move is lawful, but it is not the one that he initially indicated. What are we to make of this odd sequence of events?

Here it is useful to distinguish between two alternative perspectives. Someone interested in the playing of the game, whether this be the opposing player, the referee, or a chess fan, will be concerned

---

[11] I use the term "objective" to denote something that belongs to the object of thought rather than the thinking subject; in this sense, it contrasts with "subjective."

mainly with the question: what move did the player *actually make*? Did he move his Bishop, as he said he was going to do? Or did he move his Queen, as evidenced by his physical act? The game cannot continue without an answer, since it provides the essential context for future moves. We will call this perspective "participatory" because it represents the vantage point of someone actually (or imaginatively) involved in the game and interested in its progress and eventual outcome.[12]

By contrast, the biographer, psychologist, or curious observer may be interested in a different question: what move did the player *intend* to make? Did he really mean to move the Bishop but absent-mindedly pick up the Queen? Or did he intend to move the Queen from the start but make a mistaken comment and notation? Or did he, perhaps, change his mind between jotting down the note and picking up the piece? This line of inquiry is less concerned with the playing of the game than the causal relationship between the player's acts and their mental antecedents. We will call this perspective "intentionalist."

Let us start with the participatory perspective. From this vantage point, we are interested in determining which move the player actually made. But here the evidence is conflicting. The physical act performed by the player indicates that the Queen was moved. Yet the player's remark and notation both support the view that the Bishop was moved, not the Queen. Which body of evidence should be taken as establishing the true move?

In practice, the answer is quite straightforward. As far as the standard game of chess is concerned, what matters is what the player *did* with his chess piece, not what he said or wrote about his intentions. The player's move is governed by a body of rules and conventions, both tacit and articulate, which exist apart from the player's subjective intent and which he accredits and contributes to by playing the game. One of the game's basic conventions is that a move is ordinarily established by the player's physical act, transferring a chess piece from one spot on the board to another, not by what the player says or writes.[13] Moreover, the

---

[12] My account of the participatory perspective owes much to three works: M. Polanyi, *Personal Knowledge*, rev. ed. (Chicago: University of Chicago Press, 1962); K. Popper, *Objective Knowledge*, rev. ed. (Oxford: Clarendon Press, 1979); and M. Heidegger, *Being and Time*, trans. J. Macquarrie & E. Robinson (London: SCM Press, 1962). I am also indebted to Hart's analysis of the internal aspect of rules, *supra* note 2, especially at 55-56, 86-88, 96, 99-100, and 138-44; and to J. Finnis, *Natural Law and Natural Rights*(Oxford: Clarendon Press, 1980) c. 1.

[13] An exception is where a game must be adjourned prior to completion, in which case the player whose turn it is writes down the next move and puts it into a sealed envelope which is entrusted to the referee who keeps it until the game resumes, when the envelope is opened and the

rules determine which sorts of physical acts count as possible moves and they assign definite meanings to those acts. So, in the game of chess as it is currently played, there is little or no scope for "extrinsic evidence" of a player's intent—evidence beyond the physical act itself.

It could be argued, perhaps, that this attitude is explained by the player's "interpretive intent."[14] For, if the player is experienced and knows the rules and conventions of chess, he probably has the interpretive intent that his moves should be determined by his physical acts alone, without reference to extrinsic evidence of his "substantive intent." But this argument is mistaken. Even if the player were idiosyncratic and actually thought that his opponent and the referee should consult extrinsic evidence of his substantive intent, the situation would not be any different. The opponent and referee would still be justified in ignoring what the player said and wrote on his pad. The justification lies in the rules and conventions of the game and the basic understandings and purposes that inform them.

From the participatory perspective, then, the player's move is an "objective" matter, which does not depend on the player's subjective thought processes. In chess, it is strictly irrelevant what the player intended to do; what matters is the move he actually made. The autonomous status of the move is a function of the autonomy of the larger order constituted by the game's rules and conventions, both tacit and explicit.

Of course, the rules of chess are not static. If enough chess players began to insist, for example, that their moves should be determined by their written notes, the rules of the game might perhaps change. After all, the game of "chess by mail" is played this way. But the new rule would just substitute one sort of autonomous act for another. So far as the game is concerned, the meaning of a written note is as autonomous as the meaning of the physical act of moving a chess piece. In both cases, the meaning is that assigned by the rules and conventions of chess. This meaning may conceivably differ from what the player subjectively intended. Players can always make *mistaken notations*, that is, notations which fail to reflect their subjective intentions accurately, just as they may pick up the wrong chess pieces.

Would it be possible to redesign the rules of chess so as to ensure that a move is nothing other than what the player subjectively intends it to be? A moment's reflection indicates that the answer is "no." Unless we are willing to destroy the possibility of the game being played at all,

---

move is made accordingly.

[14] See *supra* discussion accompanying note 3.

we will have to allow for some privileged mode (or modes) of expressing a subjective intent. And the existence of a *privileged mode of expression* necessarily attributes to expressive acts within that mode a meaning that, in principle, can be severed from the player's subjective intent.

It would be possible, of course, to allow for more than one privileged mode of expression. For example, the rules of chess could conceivably permit reference to players' physical acts and also to their notes. But in this case we would need additional rules to resolve discrepancies between the two sources. Where the players' jotted notes do not jibe with what they did, which source should carry the day? Moreover, in the interests of certainty, there must be some limit to the kinds of evidence used to determine moves. Should a referee be allowed to consult, for example, records of players' previous practices, expert opinions on what chess players of similar calibre would normally do, or players' own testimony after the fact? These questions and the lengthy inquiries they invite go far to show why, under current practice, players' moves are determined exclusively by their physical acts.

The autonomy of chess as a participatory order of meaning gives rise to the possibility of *mistake*. Two types of mistake should be distinguished: mistakes of *expression* and mistakes of *interpretation*. For instance, in a variation on our earlier example, a clumsy or absent-minded player may pick up his Queen when he actually means to move his Bishop. However, once his hand has grasped the piece, his mistake cannot be remedied under standard international rules.[15] He must move it and live with the consequences. This is a mistake of *expression*.

But the same series of events could be viewed as giving rise to a mistake of *interpretation*. In the eyes of an inexperienced observer, the referee who insists that the player really moved his Queen is making an interpretive error, because all the extrinsic evidence (the player's written note, his exclamation of dismay on realizing his error) points to a different conclusion. And if, like the naive observer, we think that the job of the referee is to find out what the player intended subjectively, we might be inclined to agree. However, as we become more familiar with how the game is played, we realize that no mistake of interpretation has been made. The job of the referee is simply to determine the meaning of the physical move under the rules, conventions, and tacit understandings that inform the game, not to plumb the depths of the player's subjective consciousness.

---

[15] There is no remedy unless he has first warned his opponent that he is merely adjusting the position of a piece.

This is not to deny that a referee may make genuine errors of interpretation. Misled by a trick of perspective, a referee may wrongly rule that a player has touched a certain piece when in fact the player has not made physical contact with it. However, because of the relatively simple nature of the referee's task and the highly determinate nature of the act being interpreted, the possibilities for interpretive error in chess are not great. As we will see, the case is very different when the act being interpreted is a legal instrument enacted within a highly complex legal order.

It is useful at this point to pause and consider how our example looks from the perspective of someone interested mainly in the player's thought processes: the biographer, psychologist, or curious observer. Here, the question is what move the player *intended* to make, rather than what move he actually *made*.

Take the example of the biographer. There is no reason why she should limit herself to the restricted range of evidence considered by the referee and every reason for her to spread the net of her inquiries as widely as possible. What explanation did the player give after the match? Was he generally candid about these things or was he known to embroider the facts? What were the opinions of those who watched the match and knew the player well? What can we infer from the player's level of skill?

The biographer would not have to come to firm conclusions. She may think, for example, that the evidence regarding the player's intentions is so contradictory as to be inconclusive. Or she may suspect that the player was so distracted that he lacked any clearly formulated intent and acted in a semi-automatic or haphazard manner. By contrast, the referee or other active participant in the game has to reach a definite conclusion about the character of a move, otherwise the game will not be able to continue.[16]

From the intentionalist perspective, then, the referee's assumption that the player actually made a certain move may seem naive or disingenuous, given that the evidence of intent is contradictory and inconclusive. But this attitude is unwarranted, because it transfers criteria appropriate to one type of inquiry to a wholly different inquiry. Just as it would be wrong for a referee to insist to a biographer that the player "really" *intended* to move the Queen, citing the evidence of the physical act performed, so also it would be wrong for the biographer to insist to the referee that the player "really" *moved* his Bishop (or made

---

[16] It is conceivable that the rules of a game might allow for a move to be "replayed" where some doubt arises as to its meaning, but most games do not allow for this possibility.

two simultaneous moves or failed to make any definite move at all), citing the conflicting evidence about the player's thought processes.

Another observation carries us closer to the heart of the matter. Although the intentionalist inquiry is quite different from that of the participant, it tacitly depends on the participatory perspective. For the biographer's search for the player's subjective intent is structured by a participatory grasp of the rules of chess. Without such an understanding, she would have no reason to puzzle over the player's intent. There is nothing inherently surprising or contradictory about a person making a remark, then writing some notes on a pad, then moving a small object on a board. The player's subjective intention only comes into question once we know two things: first, under the rules of chess, the initial two acts have a different meaning from the final act; and, second, all three acts relate to a unified (if possibly evolving) intention formulated in light of the game's rules, which require that the player make a single move at this juncture. In short, the intentionalist inquiry into the player's state of mind necessarily presupposes the participatory perspective implicit in the playing of the game and accepts its assumptions for the purposes of the inquiry.

This conclusion reinforces an earlier observation. We have seen that the game of chess depends on the assignment of definite meanings to physical acts and treats the player's subjective state of mind as irrelevant for its purposes. It follows that the biographer has something to inquire about only because chess is an autonomous order of meaning. It is the possible discrepency between the objective meaning of a chess move and the player's subjective state of mind that gives the intentionalist inquiry its point and interest. So, for the biographer to claim, as the result of her investigations, that the player "really" moved the Bishop rather than the Queen (or "really" did not make any move at all) would be to repudiate an essential premise of her inquiry and drain it of any meaning.[17]

---

[17] Of course, the biographer's perspective is a participatory perspective in its own right, even if it is one that is distinct from that of the chess-player. The basic difference between the two perspectives lies in their governing narrative: in one case, the unfolding of a chess game and in the other the unfolding of a life. In each case, the narrative treats its subject-matter as a meaningful whole, with a beginning, a middle, and an end (perhaps still to come). In each case, it treats its subject as an autonomous order of meaning, whose significance is determined by reference to certain basic values and standards. While the narrative of the game may be embedded in the narrative of the player's life, like a play within a play, the reverse does not seem possible. On the role of narrative, see the stimulating discussion in A.C MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame, Ind.: University of Notre Dame Press, 1984) c. 15 [hereinafter *After Virtue*].

In short, the rules of chess make up what we may call a *"participatory order of meaning."* In the sense used here, a participatory order is characterized by four elements: (1) *autonomy*; (2) *impersonality*; (3) *communality;* and (4) *rightness*. We will spend a little time describing each characteristic.

First, participants in the game of chess perceive its rules and practices as an order of meaning that is external to their own minds and independent of their wills and understandings. The rules are not just what particular participants would like them to be or even what they understand them to be. Players know that it is possible to get the rules wrong, particularly in the early stages of learning the game. The rules have a life of their own. In this sense, they are experienced as *autonomous.*

Of course it is possible for a person, in an idle hour, to invent a game of solitary chess and make up rules as the person goes along, changing them at whim. Insofar as the person treats the rules merely as extensions of shifting personal preferences, the rules will not make up an autonomous order of meaning. It cannot be said that they are really rules, or that the person is playing a real game or is truly a player. However, we can also imagine a case where a person invents the rules of a game and then proceeds to play it according to those rules, treating them as an order of meaning independent of the person's will. Here, the rules can be said to be autonomous of their creator.

The distinction is quickly grasped by children, who are always inventing new games and inviting other children to play with them. These games can succeed so long as the other participants sense that the game's inventor is "playing according to the rules" and not changing them as the game goes along (usually, it is suspected, to the inventor's own advantage). If a dispute about the rules breaks out, the game's inventor may claim to have a viewpoint that has particular authority ("Hey, I should know; I made up the rules!"). However, the inventor may be surprised to find that the matter has passed into the public domain and that the other players settle the dispute by informally deciding which version of the rules is fairest or most fun or most challenging—in other words, by determining which version best serves the basic values and principles that the game tacitly embodies.

Should we say, then, that the meaning of the rules lies simply in the minds of the entire group of participants, who constitute, in the fashionable phrase, an "interpretive community?" According to this view, the rules of chess are ultimately whatever the interpretive community of chess players determine them to be. This view has a certain obvious truth, *but only from a non-participatory perspective* Its

limitation is that it fails to reflect the characteristic attitude of a participant in the game. From the vantage point of a participant, the rules of chess make up an order of meaning that is independent not only of the participant's own mind (and so *autonomous*) but also of the mind of any other person or group of persons. That is, the rules are *impersonal*. This is the second of the four characteristics mentioned earlier.

To maintain, with the interpretivist, that the meaning of the rules of chess resides simply in the interpretations of the community of chess players is to confuse the question of *what the rules mean* with the distinct question of *how those rules are produced and maintained*. For example, you can know the identity of each and every individual in a community of players and every detail of their words and actions and still fail to grasp the meaning of the game they are playing. Anyone who has spent a summer afternoon watching a cricket match for the first time will understand the point. If you were to ask some nearby spectators at the match to explain what is going on, you would consider it rude or deliberately obtuse if they replied "the meaning of the game is whatever those players out there think it is." Of course, in a sense this would be right, but only from a non-participatory perspective. What the spectators would really be telling you is that they cannot be bothered to initiate you into the mysteries of the game, as understood by a participant.

To consider briefly our third characteristic, the rules of chess are experienced by a participant as making up an intrinsically *public* or *communal* system of meaning, which is accessible to others and has a broadly social or collective significance. When we learn the rules of a game, whether by playing it or by mastering the articulate rules, we are drawn into a world of common significance and value. In fact, we may gain a certain amount of pleasure and satisfaction simply from the sense of establishing bonds with other people with whom we have otherwise little in common.[18] However, the communal nature of the activity also imports certain constraints on the possibilities of individual expression within its confines—a point that we will consider in greater detail shortly.

Finally, the rules of chess are experienced as "hanging together" and "making sense," and "fair," and so as more or less *right* in light of the purposes they embody and serve. The rules make sense not only in

---

[18] A similiar point is made in a different context in C. Taylor, "Theories of Meaning" in C. Taylor, *Human Agency and Language: Philosophical Papers 1* (Cambridge: Cambridge University Press, 1985) 248 especially at 263-66.

the abstract but also, and more importantly, as played. That is, they allow players to develop coherent patterns of play, to formulate strategies and counter-strategies and to exercise their creativity and ingenuity. As such, they allow for the creation of particularized patterns of meaning in each match. The rules of chess are also experienced as "fair," in that they ensure a level of equality between the players. In this respect, they are fairer, for instance, than the rules of some rudimentary games like tic-tac-toe, where the player who makes the first move has a decided advantage.

The rules of a communal activity like chess constrain expressive acts performed within their confines in several important ways. First, they limit the *kinds* of meaning it is possible to express within the enterprise. That is they rule out certain meanings as unattainable or irrelevant, quite apart from what the author of the act in question intended. A chess player may mean a succession of moves to illustrate Wolfe's tactics at the Siege of Quebec, or perhaps the ultimate futility of life, and the player may succeed brilliantly. But these intentions and the meanings they seek to convey count for nothing in chess, and the player's moves will be judged exclusively by the meaning assigned by the rules of the game. Of course, it is possible that the player is playing a different game with different rules—in which case it may be possible for the player to convey the meanings in question within the game's confines. But if the game is chess, as defined by its current rules and practices, these meanings are unattainable *within the game*.

Second, the rules of chess provide a framework which both directs players on how to express the various meanings that the game envisages and also enables others to interpret those meanings without reference to the players' subjective mental states. When players participate in games of chess, they subordinate their mental states to the order of the game and mold their thinking and external acts so as to conform with the rules and conventions of the game. The same holds true for referees or other participatory observers.

Now, to an observer completely unfamiliar with the rules of chess or any similar game, the significance of the physical act of moving a figurine on a checked board is open to the wildest speculation. But with a little more experience, the meaning of the act becomes plain, even though the player's larger strategy may still remain unclear. At the higher levels of the game, the rules are enforced by referees responsible for ruling on the nature of disputed moves. But it would be wrong to conclude that the move is constituted by the subjective mental state of the referee, just as it is wrong to think it is constituted by the subjective mental state of the player. A chess move has an autonomous meaning

within a participatory order of rules and practices, a meaning that is independent of the subjective intent of any particular player or observer.

THE LEGAL ORDER

While a chess move is, in some ways, very different from a complex legal instrument like a statute, the example sheds an interesting light on the processes by which a statute is drafted and interpreted. Let us return for a moment to our discussion of section 7 of the *Charter*. The problem there, you recall, arises from a possible discrepancy between the words actually used in the section and explanations furnished by the drafters. Which should be taken as determining the section's meaning?

Here again it will be helpful to distinguish between the participatory and intentionalist perspectives. The citizen, official, judge or other person concerned with the practical import of the Constitution will be interested mainly in determining what course of action the phrase "principles of fundamental justice" requires in the concrete case. This participatory concern represents the viewpoint of persons who actually or imaginatively accept the constitutional order as binding on them and whose inquiries are oriented to action within that order.

On the other hand, the historian, political scientist, or biographer may be interested in something else: what did the authors *have in mind* when they drafted and enacted section 7? Did they really want to restrict the section to procedural matters but fail to find the right words to express that intent? Or was there a division of opinion among the framers that explains the choice of the ambiguous phrase "principles of fundamental justice?" These sorts of intentionalist inquiries are less concerned with the conduct required by the section than the mental processes of the drafters and the events leading up to the choice of wording.

The participatory perspective is well represented by the Supreme Court's judgment in the *Motor Vehicle Reference* This assumes in effect that what the authors of section 7 *said* they aimed to achieve in drafting the provision is outweighed by what they actually *enacted*. The meaning of an enactment is governed by a complex matrix of rules, values, principles, and conventional meanings, both tacit and articulate, which exists apart from the subjective intentions of the authors and which the authors accredit and contribute to by acting within the constitutional order. In Canadian legal culture, the meaning of a provision is determined primarily by this public matrix of meaning and not the drafters' private intentions.

In this sense, then, an enactment has an autonomous meaning, which in principle is distinct from the drafters' subjective thoughts and intentions. The autonomy of the provision's meaning is a function of the autonomy of the overall legal order, as established by its practices, rules, vocabulary, and concepts, and at a deeper level by its fundamental values and principles.

But to say that the legal order is autonomous is not to say that it is inert, either in its interpretive or substantive rules. The interpretive rule that discourages reliance on extrinsic evidence of drafters' intent might conceivably change. If influential judges and writers started to rely increasingly on extrinsic evidence in construing constitutional provisions, a shift in interpretive practice would eventually occur. But such a shift in interpretive practice would merely supplement one mode of determining autonomous meaning with another.

Consider, for example, the statement made by Mr. Strayer before the Special Joint Committee. He said that the words "fundamental justice" in section 7 of the *Charter* would cover "procedural due process" but not "what is called substantive due process, which would impose substantive requirements as to the policy of the law in question."[19] Even if we take this statement as authoritative, our inquiries are not over. For we now have to interpret the words of the statement itself. What is "procedural" as opposed to "substantive" due process, and how do we know which category a given subject-matter belongs to? Given that the speaker did not supply comprehensive definitions of these terms (much less a detailed account of their concrete application), how do we know what they mean in practice? Should we invite the speaker to furnish an explanation of his explanation? And if this further explanation still requires interpretation (as it inevitably will), are we to be drawn down an endless corridor of inconclusive explanations, like a hall of reflecting mirrors? Or should we perhaps install the good gentleman as the permanent final arbiter of his own words?

At some point, I suggest, we will have to assign an autonomous meaning to Mr. Strayer's explanation (or to some explanation of his explanation), and that meaning will be determined by reference to our legal traditions, its concepts, practices, principles and values. So, we seem to be back where we started, except that we have now substituted Mr. Strayer's comments (which were not enacted) for the words actually used in the section. It is doubtful whether this represents an

---

[19] *Supra* note 6.

improvement. More importantly, from our perspective, it does not represent any real change.

As seen earlier, a participatory order of meaning carries with it the possibility of mistakes of *expression*. The framers of a legal provision may choose words that fail to convey the meaning they intend. For example, the phrase "principles of fundamental justice" turned out to be singularly inapt if the goal was to convey the meaning "procedural due process." Mistakes of *interpretation* may also occur. Even where the words of a text carry a fairly clear meaning, they are always liable to be misread. A misreading is a contribution to legal culture and, if backed by authority, may carry the day and bring about a permanent change in legal practice. But many misreadings, even when uttered by high authority, are quietly forgotten or explained away. Legal culture, like nature, has a way of returning through the back door.

Matters look rather different from the intentionalist perspective, as adopted by the historian, political scientist, or biographer. Here the question is not so much what section 7 of the *Charter* actually *means* in Canadian law as what the drafters subjectively *intended* it to mean. Of course, the historian has no reason to confine her inquiries to the words actually used in the constitutional text, or even to statements made in official or public contexts. She will want to extend the scope of her inquiries to include all possible sources of evidence. So, she will likely interview the major participants in the process of drafting and enactment, consult their notes, memos and diaries where available, speak to astute observors of the constitutional scene, and so on. Moreover, she does not have to reach definite conclusions as to what was intended. She may find that the drafters and enactors give such conflicting accounts of their intentions that no clear consensus emerges.

The difference between the participatory and intentionalist perspectives is a fertile ground for misunderstanding. To the historian who has sifted painstakingly through the materials leading up to the enactment of section 7, it may seem disingenuous for a court to say that the section covers matters of substance as well as procedure and wilfully blind for it to ignore or downplay the extrinsic evidence of legislative intent. But such a conclusion extends the intentionalist perspective beyond its proper bounds. By the same token, it would be wrong for a judge to insist to the historian that the drafters of the *Charter* really *intended* the section to cover substantive matters or to suggest that she should confine her inquiries to the bare words of the text.

Nevertheless, as noted earlier, there is an important link between the intentionalist and participatory perspectives. The historian's search for the drafters' intent is tacitly structured by a participatory

understanding of the legal order. In the absence of such an understanding, the question of the drafters' intent does not arise as a relevant object of inquiry. There is nothing inherently significant in the fact that certain individuals speak to one another and then write things down on paper and then say more things, and so on. The question of "drafters' intent" only comes into play when we know that the people in question are "drafting a constitution," a process that has meaning only within a certain tradition. Further, until we spot a possible discrepancy between the ordinary legal meaning of the constitutional text and the ordinary legal meaning of explanatory statements made by the drafters, no real problem arises for consideration. That is, an appreciation of the problem depends upon a participatory grasp of the legal order, the meanings it assigns to certain terms, and the drafting process as a whole.

Our findings are summarized in the following diagrams. Figures 1 and 2 represent the internal attitudes of people involved in playing and observing a chess game, and Figures 3 and 4 the attitudes of people involved in drafting and interpreting a legal provision.

Figure 1: The Player Making the Move

Rules of the Game ‹—› Projected Move —› Player's Physical Act

Figure 2: The Participatory Observer

Rules of the Game ‹—› Player's Physical Act —› Move

In the first diagram, we see that the player, immersing himself in the participatory order of the game's rules, formulates a projected move and commits himself in a physical act. Although the diagram displays this process as a sequence, all three stages may in fact be fused in a single, indivisible act. The second diagram shows that the observer, similarly immersing herself in the rules, attributes to the physical act the meaning assigned by the rules, which is the "move." It is important to note that the move is not the physical act any more than it is the subjective state of mind of the player or observer. It is an immaterial concept dependent on the rules of the game, a concept that the physical act is taken to evidence or embody.

A parallel set of diagrams may be drawn for a statutory provision:

Figure 3: The Authors

Legal Order ‹—› Projected Meaning —› Statutory Provision

Figure 4: The Interpreters

Legal Order ‹—› Statutory Provision —› Meaning

In these diagrams, we see that the authors, immersing themselves in the ongoing legal order, direct their minds to the production of autonomous meaning within that order, and in so doing, draft and enact a statutory provision. The interpreters, likewise immersing themselves within the legal order, direct their minds to the provision and assign it the concrete meaning that the order suggests in the context. Once again, it is important to realize that the legal provision is not the written provision considered in its material aspects, any more than the provision is the intentions or ideas of the authors or interpreters. It is an immaterial body of meaning within a legal culture, a body of meaning that the material enactment is taken to express.

Clearly, the parallel between the game of chess and a legal order is far from exact. The physical act of moving a chess piece has a single, highly determinate meaning assigned by the rules of chess, which make up a simple, determinate, and mainly articulate system. By contrast, a legal provision has a complex, rather indeterminate meaning assigned by the legal culture, which is itself complex and indeterminate and which has a large and important tacit component, embodied in inarticulate practices, attitudes, and expectations. These are significant differences. It is not suggested that drafting and interpreting a legal provision is in all respects identical to making and interpreting a move in chess.

Nevertheless, a legal provision, like a chess move, is governed in its meaning by an existing body of practice specific to the community in question, by the tacit and articulate understandings that make up the practice and the basic values that inform it. In principle, the legal order within which a new legal provision is enacted is autonomous and the provision has an autonomous meaning within the order. From a participatory point of view, that meaning is not constituted by the subjective intentions of those responsible for drafting and enacting the provision or by the wills of those responsible for interpreting and applying it.

Although the written law is obviously the work of an identifiable group of people, its meaning may in some cases be different from what its historical authors subjectively intended, and in any case is not tied to those intentions. As such it is often capable of growth and change. In Canadian legal culture, the role of the authors of an enactment is precisely to bring into being a text with an autonomous (and often evolving) meaning.

If the law's meaning is not found in the minds of its authors, neither is it found in the subjective intentions of its interpreters. Although in a trivial and obvious sense the interpreters are the originators of the interpretive acts they perform, their role is to instantiate the law's own meaning, not to supply their own. They may, of course, fail at their task; any success that they have will inevitably be partial. Some interpreters may, moreover, abuse their powers and employ interpretation as a cover for the imposition of subjective and partisan views. But legal interpretation is *characterized* by a process in which interpreters subordinate their wills to a participatory order of meaning. The concepts of mistake and bad faith are parasitic upon this ideal conception. Unless we believe that a task may be carried out more or less correctly and more or less in good faith, we have no basis for thinking that it can be done wrongly or in bad faith.

THE LOCAL AND THE TRANSCENDENT

I have argued, then, that the proximate source of a statute's meaning lies in the legal culture of the community. In other words, a legal culture is itself a participatory order of meaning, which vests the written law with significance at several distinct levels. Most obviously, it furnishes the practical and normative context which allows legal provisions to gain concrete meanings. At a more abstract level, it also supplies the basic concept of a "statute," which involves certain structural characteristics quite apart from a statute's specific content.

In saying that the Canadian legal culture is a "participatory order of meaning," I have in mind the four basic characteristics identified earlier: (1) *autonomy*; (2) *impersonality*; (3) *communality*; and (4) *rightness*. Since we have already discussed these, it will only be necessary to say a few words about each.

First, as participants in the legal order, we experience that order as something apart from our individual selves and in that sense as *autonomous*—that is, constituted by factors other than our own particular intentions, perceptions, ideas, emotions, drives, and so on.

Although we recognize, if we are reflective, that our experience of that order is inevitably *our* experience, we still see the object of our experience as something *other*, something to which we endeavour to bend our understanding, so that our mind in a sense fuses with a meaningful order that lies beyond it.

Second, a participant also views the legal order as *impersonal*—that is, as a meaningful order which exists apart from the subjective wills, intentions, and ideas of other individuals. By "impersonal" I do not mean "anonymous." The impersonality of the legal order lies in the fact that its meaning is severable from the will of any particular individual or group of individuals, not in the happenstance that its authors are often unknown to us. Even if we could identify with certainty the framers of a certain enactment, viewed from a participatory perspective the document would still be an impersonal element of an impersonal legal order.

Third, the legal order is also experienced as *communal* or *public*. In part, this means that it is recognized as accessible and significant not only to us as individuals but also to other participants, and indeed to our community as a whole. It also means that our encounters with that order are perceived as drawing us increasingly into a communal realm of meaning. Our experience of the legal order is unlike some wholly private experience, such as a dream or hallucination, which we later recognize as essentially personal and subjective in significance, even if similar to experiences undergone by others.

Finally, the legal order is experienced by us as in some measure *right*, even if we have reservations, perhaps profound ones, about the justice of some features of that order. The legal order does not have to be fully "right" to be a participatory order of meaning. However, its status as an order increases in proportion to its justice, and if it sank below a certain level of justice, it would cease to be a legal order at all.

The justice of a legal order is best understood as a relationship between certain transcendent values and principles and the particular context of a certain society.[20] The best evidence of the existence of these values and principles is our participatory grasp of meaning in the concrete circumstances of a specific case. While this understanding has a purely local character, it carries intimations of the transcendent. We grope toward a meaning that seems to lie both within and beyond what is immediately at hand. Our normal access to that meaning is at the level of our concrete experience, as legal practitioners immersed in a local legal culture, rather than as philosophers or mystics.

---

[20] See the illuminating treatment of this question in Finnis, *supra* note 12.

Maurice Merleau-Ponty makes a similar point in a somewhat broader context:

> So long as I keep before me the ideal of an absolute observor, of knowledge in the absence of any viewpoint, I can only see my situation as being a source of error. But once I have acknowledged that through it I am geared to all actions and all knowledge that are meaningful to me, and that it is gradually filled with everything that may *be* for me, then my contact with the social in the finitude of my situation is revealed to me as the starting point of all truth, including that of science and, since we have some idea of the truth, since we are inside truth and cannot get outside it, all that I can do is define a truth within the situation.[21]

When we reflect on our experiences as participants in the legal order, we can recall occasions when we identified the meaning of a legal provision by reference to basic values and principles which in some sense lay both within and beyond the legal order. These values and principles are at the heart of our participatory understanding of the legal order and our appraisal of its ultimate meaning and worth. I am not suggesting, however, that we should necessarily "read" transcendent meaning into the legal order on the basis of explicit philosophical or spiritual beliefs. Such an approach may reverse the proper order of reasoning and risk distorting the verity of our concrete moral and legal experience.

Acts of clear injustice have a special capacity to shock us into a recognition of the existence of transcendent values. The appalling cruelties of an Auschwitz or Buchenwald bear unintended witness to the basic rights and values that they violate. For we can have no grounds, beyond mere personal preference or social convention, for holding that such acts are unjust, unless we can discern, however imperfectly, the shape of an objectively better way of doing things. We should hold fast to our concrete sense of injustice and its tacit revelation of a transcendent order of justice, even if we do not know (and perhaps cannot know) the origins or basis of such an order or what form it ultimately takes.

It is interesting to compare this point with the reflections of Albert Einstein on the existence of order in the natural world, as expressed in a letter to Maurice Solovine on 30 March 1952:

> You find it strange that I consider the comprehensibility of the world (to the extent that we are authorized to speak of such a comprehensibility) as a miracle or as an eternal mystery. Well, *a priori* one should expect a chaotic world which cannot be grasped by the mind in any way. One could (yes *one should*) expect the world to be subjected to law only

---

[21] M. Merleau-Ponty, "Le philosophe et la sociologie" in M. Merleau-Ponty, *Éloge de la philosophie: et autres essais* (Paris: Gallimard, 1960) 112 at 136-37; quoted and translated in I. Prigogine & I. Stengers, *Order out of Chaos: Man's New Dialogue with Nature* (New York: Bantam Books, 1984) at 299.

> to the extent that we order it through our intelligence. Ordering of this kind would be like the alphabetical ordering of the words of a language. By contrast, the kind of order created by Newton's theory of gravitation, for instance, is wholly different. Even if the axioms of the theory are proposed by man, the success of such a project presupposes a high degree of ordering of the objective world, and this could not be expected *a priori*. That is the "miracle" which is being constantly reinforced as our knowledge expands.
>
> There lies the weakness of positivists and professional atheists who are elated because they feel that they have not only successfully rid the world of gods but "bared the miracles." Oddly enough, we must be satisfied to acknowledge the "miracle" without there being any legitimate way for us to approach it. I am forced to add that just to keep you from thinking that—weakened by age—I have fallen prey to the parsons.[22]

The tension between the local and the transcendent is exemplified by the Supreme Court's decision in the *Motor Vehicle Reference*.[23] The substantive point at issue there was the constitutional validity of an "absolute liability" provision which specified that a person could be convicted of driving a motor vehicle while his driver's licence was suspended even if he or she was not aware of the suspension and could not reasonably have known of it. The offence carried a minimum prison term of seven days. The Supreme Court held unanimously that the provision was constitutionally invalid for depriving a person of his or her liberty contrary to the principles of fundamental justice under section 7 of the *Charter*.

Speaking for the majority, Justice Lamer observed that the words "principles of fundamental justice" referred to principles that have been recognized by the common law and international conventions on human rights as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. He held that the words could not be given an exhaustive definition but would take on concrete meaning on a case by case basis as the courts addressed alleged violations of section 7.[24]

Justice Lamer noted that from time immemorial the legal system has harboured the principle that the innocent not be punished. This principle has been recognized as an essential element of a justice system founded upon a belief in the dignity and worth of the human person and the rule of law. It means that a person should not be found guilty of an offence unless that person has a guilty mind or is at fault. So a law that

---

[22] A. Einstein, *Letters to Solovine* trans. W. Baskin (New York: Philosophical Library, 1987) at 131-33 [typographical error corrected in text].

[23] *Supra* note 7.

[24] *Ibid.* at 504-05 and 512-13.

combines absolute liability and imprisonment violates section 7 of the *Charter*.[25]

In a separate opinion, Justice Wilson appealed to the basic principles of punishment and reasoned that it was unwarranted to attach a mandatory prison term to an absolute liability offence:

> I think the conscience of the court would be shocked and the administration of justice brought into disrepute by such an unreasonable and extravagent penalty. It is totally disproportionate to the offence and quite incompatible with the objective of a penal system. ... It is basic to any theory of punishment that the sentence imposed must bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.[26]

In her view, a mandatory prison term for an offence committed unknowingly and after the exercise of due diligence was "grossly excessive and inhumane" and was not required either to reduce the incidence of the offence or to satisfy the need for atonement. So the section under review offended the principles of fundamental justice embodied in the penal system and violated section 7 of the *Charter*.[27]

It can be seen that both Justices Lamer and Wilson ground their opinions in the basic tenets of the Canadian legal system, as these have developed historically. However, their approaches involve far more than a mechanical identification of legal rules laid down in previous decisions. For not every legal rule is a principle of fundamental justice.[28] Rather, for Justice Lamer, the process involves a determination of what is essential to uphold the dignity and worth of the individual and the rule of law. And, for Justice Wilson, it turns in the end on what shocks the conscience of the court.

To sum up, the basic character of the legal order, as experienced by a participant, lies in its *autonomy*, its *impersonality*, its *communal character*, and above all its *rightness*or *justice*. This list is not exhaustive, and the characteristics identified are not completely distinct but permeate and reinforce one another. Moreover, these characteristics are not all-or-nothing matters but exist in degrees, so that the status of a legal system, as a participatory order of meaning, is enhanced as it increasingly exemplifies them. And a legal order that fails to embody

---

[25] *Ibid.* at 514-15.

[26] *Ibid.* at 533

[27] *Ibid.* at 534.

[28] *Ibid.* at 530-31.

these characteristics to a minimal degree is not in truth a legal order at all.

According to this approach, then, the concept of law is an ideal concept, which portrays the legal order as a kind of concrete social "cosmos" devoted to justice and the common good, with links to a transcendent cosmos of basic values and principles.[29] An ideal concept is one that identifies an entity by reference to a normative ideal. For example, a machine can be understood as a machine, rather than as a mere collection of miscellaneous items, only on the assumption that it has an inner ordering principle, that its parts are related to one another so as to serve some purpose or purposes. Were it to lack any ordering principle and so serve no purpose, it could not be understood as a machine. Indeed, it could not be understood as a "whole" but only as an agglomeration of physically proximate items. By the same token, if what passes for a legal system in fact lacks any appreciable degree of rightness, then, according to the view presented here, it does not constitute a legal system at all.

To call something a "legal order" when it is incapable of securing a minimal degree of justice makes no more sense than to say that a certain object is a "clock" when it has no capacity whatever to mark the passage of time. In other words, to speak of a legal order as a legal *order* involves a tacit appraisal of its basic aptitude to serve justice and basic human values. Of course, there are simulacrums that closely resemble the "genuine article" but lack its inner ordering principle. A ceramic model of a clock may be so realistic that it momentarily fools us into thinking that it is authentic. A putative legal system may have impressive trappings—legislature, courts, police, statute books, law reports—and yet lack the ability to secure even a modicum of justice. As such, it cannot be understood as a genuine legal order.

---

[29] The idea that the social order is in some sense linked with the cosmic order is, of course, an ancient one. Werner Jaeger argues that as early as the sixth century B.C.E. the natural philosopher, Anaximander of Miletus, transferred the concept of *diké* from the social life of the city-state to the natural domain:

> This is the origin of the philosophical idea of the cosmos: for the word originally signifies the right order in a state or other community. The philosopher, by projecting the idea of a political cosmos upon the whole of nature, claims that isonomia and not pleonexia must be the leading principle not only of human life but of the nature of things; and his claim is a striking witness to the fact that in his age the new political ideal of justice and law had become the centre of all thought, the basis of existence, the real source of men's faith in the purpose and meaning of the world.

W. Jaeger, *Paideia: the Ideals of Greek Culture*, trans. G. Highet, 2d ed., vol. 1 (New York: Oxford University Press, 1945) at 110; see also at 158-61.

In speaking of a "legal order," I do not mean that the law exists in an entirely explicit form or that it is capable of being articulated in a complete or satisfactory way. Much less do I mean that the legal order, or its written portion, is determinate or yields determinate answers to specific questions arising within the order. Further, I do not mean that the legal order is static and incapable of change or that it dictates a "conservative" approach to legal matters. Finally, I do not mean that it is a self-contained set of rules or a logically isolable system, distinct from morality and notions of the common good.

To elaborate a little on these points, I suggest that, far from being articulate, much of the legal order exists only in a tacit form and in principle is largely inarticulable. That is, a participant in the order learns about it in much the same way that a person learns how to speak and write in a mother tongue: by immersion, imitation, correction, and unceasing practice, supplemented by measured doses of explicit instruction. Although it is possible, of course, to discern rules of grammar in the rushing stream of a living language, it is doubtful how far they can ever capture its inner dynamics, much less give any sense of its fluidity and subtlety. In any case, it is common experience that some sophisticated speakers and writers have only a minimal ability to articulate rules of grammar and that sophisticated grammarians and linguists can be faltering speakers and pedestrian stylists.

This observation leads to the second point. To say that the legal order is autonomous is not to suggest that the verbal formulas found in legal enactments have a determinate meaning or can give specific guidance on how to act in concrete situations. The bare knowledge that you should act in conformity with the "principles of fundamental justice," as stipulated by section 7 of the *Charter*, can no more enable you to act justly than the knowledge that you should speak a language "correctly" can equip you to choose your words aright. In both cases, the abstract formulas are practical maxims, which make little sense apart from the rich and complex practice they stand in for. They can be grasped and applied only by someone already well-versed in the practice.[30] They are not like geometrical axioms, from which a whole series of specific propositions can be deduced with the aid of logic, or like "do-it-yourself" kits, which take novices by the hand and show them exactly what to do.

These two points converge in suggesting that the legal order is not a system of abstract, articulate rules that can be grasped by reflective

---

[30] See the interesting treatment of maxims in Polanyi, *supra* note 12, especially at 30-31 and 49-65.

reason. Rather the legal order is a body of largely tacit knowledge manifested principally in the operations of practical reason in concrete situations. It is primarily knowledge of "how to act" and "what the right thing to do is" rather than knowledge that "such and such proposition is the case."

This is not to deny that practical judgments within the legal order may have a significant reflective component and are often aided by an articulate process of reasoning that involves the manipulation of abstract propositions. It is simply to maintain that, however elaborate the reasons given for reaching a decision and however impressive the logical apparatus employed, the nerve of the process lies in a sense of what is right in the concrete circumstances of the case, as seen in the broader legal culture. This viewpoint is reflected in the common law principle that the only binding part of a court judgment is what is strictly necessary to the decision; all else is merely "by the way."

As for the third point, the law is an "order" notwithstanding that it was born and nurtured in conflict and harbours disparate and antagonistic elements. A legal tradition is characterized by inner tensions, which are a main source of its ability to change and adapt. In large part, these tensions result from the fact that the law embodies and serves a variety of basic goods and values, which are equally fundamental and incommensurable.[31] Yet not all of these goods and values can be served simultaneously or to the same degree in every legal provision. Drafting a statute necessarily involves difficult choices and compromises, which are made in light of other choices and compromises already embodied in the ongoing legal order as a whole and in the living tradition it represents. So, to say that the law is an order of meaning is not to suggest that it is homogeneous or incapable of change. A tradition need not be traditional.[32]

Finally, the legal order is not a self-contained system of normative propositions identifiable by reference to some master rule or "rule of recognition," as some would have it.[33] Rather, the legal order is imbued with notions of morality and the common good, so that the question of what the legal order specifically requires or permits cannot properly be divorced from the question of what is good for the citizen

---

[31] See Finnis, *supra* note 12, c. 3-5; and I. Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) at 167-72.

[32] See MacIntyre's account of tradition in *After Virtue*, *supra* note 17, especially at 221-22; and A.C. MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, Ind.: University of Notre Dame Press, 1988), c. 18-20.

[33] This is Hart's well-known thesis in *The Concept of Law*, *supra* note 2.

and the community at large. The interpenetration of law and basic values is not a necessary evil, something to be regretted and overcome as far as possible. Basic values are the lifeblood of the law; to drain them away is the first stage of a ritual embalming.

So, reaching right decisions within the legal order does not require detachment from matters of value. To the contrary, correct decisions can only be reached within a framework of commitment to justice and basic human values, a commitment that must at times approach the passionate.