NO RIGHT TO THE REMEDY?: AN ANALYSIS OF JUDICIAL DISCRETION IN THE IMPOSITION OF EQUITABLE REMEDIES

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[*Professor Dworkin has constructed a model of common law adjudication according to which judges have a sharply circumscribed discretion. In the 'hard case', where no rule dictates the result, the common law judge is under a duty to weigh and apply legally authoritative principles to reach the right answer. It is argued here that equitable discretion can be incorporated into the Dworkinian model, that judges in equity, when deciding whether to grant or withhold equitable relief, do not exercise a discretion different in kind from that of their common law counterparts. In equity, every case is a 'hard case' and equitable 'discretionary considerations' are functionally equivalent to 'principles' in the common law.*]

A remarkable feature of the continuing jurisprudential controversy over the existence, extent and merit of judicial discretion in the adjudicative process of modern legal systems is the absence of analysis of the role played by equitable discretion in that process. Equity, with its unique armory of remedies and its distinctive approach to decision-making, is of course a pervasive, integral part of Anglo-Australian law, yet the legal thinkers who have conducted the debate on discretion have consistently developed and illustrated their theories solely by reference to common law cases drawn from areas such as contract and tort, cases of statutory interpretation, and constitutional and administrative law cases. Professor Dworkin in fact expressly excludes all justiciable matters involving the framing of equitable relief from his otherwise comprehensive theory of discretion in the courts.[1]

The aim of this paper is limited to raising the issue of equitable discretion within the context of the theoretical framework established by Dworkin and to providing a sketch for the ways in which certain questions raised by that framework can be resolved: is the judicial discretion exercised in response to a plea for equitable relief a 'weak' or 'strong' discretion? Is there a 'right answer' in such a case, which the judge has a duty to ascertain, and, if so, how is that 'right answer' determined? It will be argued that discretion in equity fits more closely into the Dworkinian model of adjudication than the traditional 'surface linguistic behaviour'[2] of equity judges and commentators would suggest. It will also be argued that this model is not unduly distorted by the incorporation into it of considerations specific to decisions in equity.

The inquiry into the decision-making process whereby equitable relief is granted or withheld also has a practical bent. The aim is to allay, at least in part,

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1 Dworkin, R., *Taking Rights Seriously* (1977) 71.

2 Dworkin, R. 'No Right Answer?' in Hacker, P. and Raz, J. (ed.), *Law, Morality And Society* (1977) 59, 71 uses the phrase to describe the way in which lawyers and judges ordinarily speak and think about the law.

the anxieties raised by the increasing presence of equitable principles and remedies in commercial life. Sir Anthony Mason has noted a 'strong resistance in this country to the exposure of commercial transactions to equitable remedies'[3] and that resistance is, in the view of the present writer, partly due to a misconception of the scope of equitable discretion. Since the 'discretionary' nature of equitable remedies alarms commercial lawyers and their clients who seek certainty and predictability in business affairs, some explication of that 'discretion' and its boundaries would be helpful.

There is, in the Dworkinian theory of judicial discretion, a critical distinction made between 'weak' discretion, which requires the exercise of judgment in the application of a legal standard, and 'strong' discretion, in the exercise of which the decision-maker can choose between two or more legally permissible outcomes and is under no duty to decide in one way or the other.[4] Judges making decisions in our highly developed legal system do not exercise 'strong' discretion even in hard cases where no settled rule or rules dictate the result. In such cases, judges take account of 'principles' which are themselves legally authoritative, which state a 'reason that argues in one direction'[5] but which do not dictate a particular result as rules do. The judges apply these principles, by assessing their relative weights in cases of conflict, to reach the legally correct result or 'right answer'. And there is always, or very nearly always, a 'right answer',[6] that is, the answer which is in accordance with authoritative principles and rules and which is 'more consistent with the theory of law that best justifies settled law'[7] than any other answer would be.

Dworkin's only express reference to the nature of decision-making in equity occurs in the following passage:

> Sometimes judges do reach that conclusion [that they have strong discretion]; for example, when passing sentences under criminal statutes that provide a maximum and minimum penalty, *or when framing equitable relief under a general equity jurisdiction*. In such cases judges believe that no one has a right to any particular decision; they identify their task as selecting the decision that is best on the whole, all things considered, and here they talk not about what they must do but about what they should do. In most hard cases, however, judges take the different posture I described. They frame their disagreement as a disagreement about what standards they are forbidden or obliged to take into account, or what relative weights they are obliged to attribute to these, on the basis of arguments like the arguments I described in the last section illustrating the theory of institutional fit . . . There is plainly not even the beginnings of a social rule that converts the discretion that requires judgment into the discretion that excludes duty.[8]

It is not entirely clear what Dworkin means by the phrase 'framing equitable relief'. It may be that he is referring only to the judicial decision as to what specific form a particular remedy is to take: for example, the wording and scope of an injunction. If so, then he must be taken to mean that the substantive decision as to whether to grant the remedy at all is, like all other judicial decisions, not discretionary in the strong sense. That is, except for the details of

[3] Mason, The Honourable Sir Anthony, 'Themes And Prospects' in Finn, P. D. (ed.) *Essays In Equity* (1985) 243.

[4] Dworkin, R., *Taking Rights Seriously* (1977) 31-32, 69. Another meaning of 'weak' discretion, that the decision will not be reviewed by a higher authority, will not be considered here.

[5] *Ibid.* 26.

[6] *Ibid.* 279-90. See also Dworkin, R., 'No Right Answer?', *supra* n. 2.

[7] Dworkin, R., *Taking Rights Seriously* (1977) 283.

[8] *Ibid.* 71. Emphasis added.

the actual order, there is a right answer in cases involving pleas for equitable relief, an answer which judges are under a duty to ascertain.

Another interpretation is available. Dworkin may mean that the substantive decision to impose or withhold equitable relief is, like the sentencing of criminals, strongly discretionary, that such decisions go beyond the exercise of judgment in the application of legal standards and do not involve a duty to decide a case in a particular way. If this interpretation is correct, then while it does not disturb or challenge the accuracy of Dworkin's theory of discretion as far as that theory goes, it does import a substantial exclusion into it and changes the way in which the theory should be read and understood. Criminal sentencing is a very restricted and self-contained area of law; the granting of equitable relief is not. Dworkin's theory becomes not an analysis of adjudication within the legal system but an analysis of common law adjudication and his remark that 'For all practical purposes, there will always be a right answer in the seamless web of our law'[9] must become, 'For all practical purposes, there will always be a right answer in the seamless web of our *common* law'.

If the proposition required by the latter interpretation, namely, that the decision to grant or withhold equitable relief is discretionary in the strong sense, is posited as the hypothesis, the first test of that hypothesis should be that of ordinary language. As the passage quoted above itself indicates, Dworkin respects what he calls 'surface linguistic behaviour',[10] that is, the way in which lawyers and judges ordinarily think and speak about the law and about their function within the legal order. That respect is occasionally even extended, in his work, to using such speech and thought patterns for the purpose of validating certain contentious propositions of legal theory:

> The 'myth' that there is one right answer in a hard case is both recalcitrant and successful. Its recalcitrance and success count as arguments that it is no myth.[11]

It is clear that equity has different 'myths' from the common law and that judges in equity often engage in a 'surface linguistic behaviour' that is considerably different from that of their common law counterparts. Judges exercising equitable jurisdiction certainly have a strong sense of discretion;[12] it is a commonplace, tirelessly repeated in equity cases and texts, that the imposition of an equitable remedy is always a matter for the discretion of the court. The nature of equitable remedies is frequently explicated by contradistinguishing them from common law remedies which are said not to be discretionary but available to a claimant as of right.[13] In equity, it is said, the plaintiff has no right to the remedy.[14] Support for Dworkin's perception that judges in equity view their

[9] Dworkin, R., *supra* n. 2, 84.

[10] Dworkin, R., *supra* n. 2.

[11] Dworkin, R., *Taking Rights Seriously* (1977) 290. It has been argued that Dworkin's 'right answer' thesis is in fact no more than a series of assertions about ordinary language. See Regan, D., 'Glosses on Dworkin: Rights, Principles and Policies' in Cohen, M. (ed.), *Ronald Dworkin & Contemporary Jurisprudence* (1984) 142.

[12] A strong sense of discretion, however, is not necessarily the same as a sense of discretion in the strong sense.

[13] Ashburner, W., *Principles Of Equity* (1902) 23; Keeton, G. W. and Sheridan, L. A., *Equity* (1969) 28, 484-5; Jordan, *Chapters On Equity In New South Wales* (6th ed. 1947) 15; Kercher, B. and Noone, M., *Remedies* (1983) 153.

[14] *Lamare v. Dixon* (1873) L.R. 6 H.L. 414, 423; Lawson, F., *Remedies Of English Law* (1972) 207.

obligation as one of 'selecting the decision that is best on the whole, all things considered'[15] can readily be found in the cases. Consider, for example, the following statement of Goulding J., made in the context of denying the equitable remedy of specific performance of a contract:

> In the end, I am satisfied that it is within the court's discretion to accede to the defendant's prayer if satisfied that it is just to do so. And, on the whole, looking at the position of both sides after the long unpredictable delay . . . I am of opinion that it is just to leave the plaintiffs to their remedy in damages if that can indeed be effective.[16]

There does not, in short, appear to be any 'myth' of a 'right answer' in cases involving pleas for equitable relief.

But if the ordinary language is pursued further, the picture of equitable discretion that emerges begins to change. Broad statements in equity cases and texts about remedial discretion are conventionally followed by further statements explaining that the discretion is not 'arbitrary or capricious'[17] and that it is to be exercised in accordance with 'fixed and settled rules',[18] 'rules which have been established by precedent',[19] 'fixed rules and principles'[20] or 'settled principles'.[21] The discretion is often described as 'judicial' in a context which makes it plain that the description refers not just to the fact that the discretion is exercised by a judge, but to the fact that it is exercised in accordance with rules.[22] Such statements are typically followed by pages, even hundreds of pages, delineating the precise circumstances in which any particular equitable remedy is likely to be granted or withheld, pages which, in short, seem to set out rules.

These rules for the guidance of a discretionary judgment are not, however, rules in the Dworkinian sense: they do not dictate a particular result. Even in those areas of equitable relief which have been so extensively litigated that a 'settled practice' of granting or withholding the relief has emerged, courts of equity reserve to themselves what appears to be a 'discretionary space' wherein they have authority to diverge from the practice.[23]

It should be noted that equitable discretion and the rules and principles which circumscribe it come into play only after the court has decided that it has jurisdiction to entertain the particular claim to equitable relief. The decision on jurisdiction is not itself a discretionary one; discretion is reserved for the decision

15 Dworkin, R., *Taking Rights Seriously* (1977) 71.

16 *Patel v. Ali* [1984] 2 W.L.R. 960, 965

17 *White v. Damon* (1802) 7 Ves. 30, 35; 32 E.R. 13.

18 *Haywood v. Cope* (1858) 25 Beav. 140, 151; 53 E.R. 589.

19 *Doherty v. Allman* (1878) 3 A.C. 709, 728-9.

20 *Lamare v. Dixon* (1873) L.R. 6 H.L. 414, 423.

21 Hanbury, H. C. and Maudsley, R. H., *Modern Equity* (1976) 32; Keeton G. W. and Sheridan, L. A., *Equity* (1969) 484-5.

22 See *e.g. Snell's Principles Of Equity* (27th ed. 1973) 575: 'The jurisdiction to grant specific performance is a judicial discretion and is exercised on well-settled principles.' See also *White v. Damon* (1802) 7 Ves. 30, 35: '[I]t is not an arbitrary, capricious discretion. It must be regulated upon grounds that will make it judicial'; *Loan Investment Corporation of Australasia v. Bonner* [1970] N.Z.L.R. 724, 746: '[F]rom the earliest times that discretion has been said to be a judicial discretion and to be hedged round and to be governed by well-settled rules for its exercise.'

23 This reserve of discretionary power can be detected even where the practice of the court is formulated as a 'rule'. See, for example, the phrase 'unobjectionable in its nature and circumstances' in the following passage from Fry, *Specific Performance Of Contracts* (2nd ed. 1881), 12: 'if the contract has been entered into by a competent party and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course and therefore of right as are damages.'

on whether or not to exercise the jurisdiction.[24] The jurisdictional decision is made on the basis of an inquiry into 'whether facts exist which would entitle the court to grant the relief claimed',[25] and only when the court has decided that it has jurisdiction does it proceed to consider whether it should exercise its discretion to grant the relief.[26] Furthermore, discretionary matters are not transformed into jurisdictional matters just because a 'settled practice' has developed whereby a court of equity usually exercises its discretion in a particular way:

> When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all . . . and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction not a denial of it.[27]

The distinction between jurisdiction and its exercise can be difficult to draw in particular cases. Where, for example, a remedy is denied the court does not always specify whether the denial is due to a lack of jurisdiction to grant the remedy or to an exercise of the court's discretion to refuse it.[28] The distinction is nevertheless an important one and is in principle always possible to make.

Where a judge in equity has jurisdiction, in the sense that no equitable rule would preclude the granting of the relief claimed, he is said to exercise discretion in deciding whether or not, in the particular circumstances of the case, to grant the claim. In other words, it seems that equitable discretion begins where the rules end, and the rules end when a court of equity determines that it has jurisdiction. It is at this stage that strong discretion, if it exists at all, must be found. But can it be said that a judge in such a case is exercising a discretion that is different *in kind* from that of his common law counterparts? It is suggested here that the decision-making process in cases involving pleas for equitable relief is analogous, if not identical, to that found in common law cases where no settled rule dictates the result. Put another way, *where an equitable remedy is claimed, every case is a hard case.*

Consider what, to put it in its least controversial form, might be called a 'coincidence' in processes of judicial reasoning. According to the Dworkinian model, where no settled rule dictates the result in a particular case, the judicial task becomes one of ascertaining the relevant principles and, through an exercise

[24] *E.g.* the statement in Ashburner, W., *Principles Of Equity* (1902) 471: 'Where the Court has jurisdiction to grant an injunction, the question whether it will or not is a question of discretion.'

[25] *Rediffusion (Hong Kong) Ltd v. Attorney-General of Hong Kong* [1970] A.C. 1136, 1155.

[26] The two distinct stages in the decision-making process can be illustrated by the case of *B.I.C.C. Plc. v. Burndy Corpn.* [1985] 2 W.L.R. 132, 145: 'There are two questions, *viz.*: has the court jurisdiction to grant Burndy relief against forfeiture by an extension of time and, if so, is it appropriate that the court should exercise that jurisdiction in Burndy's favour.' Where a deficiency of jurisdiction is found, the court will refuse even to hear argument on discretionary considerations. See for example *Sport Internationaal Bussum B.V. v. Inter-Footwear Ltd* [1984] 1 W.L.R. 776, where the issue was whether there is jurisdiction in a court of equity to relieve against forfeiture in a commercial agreement unrelated to an interest in land. The trial judge had there held that only if he had been persuaded that the jurisdiction could be invoked in such a case would he have allowed the defendant to adduce reasons why the discretion to grant relief should be exercised in his favour.

[27] *Rediffusion (Hong Kong) Ltd v. Attorney-General of Hong Kong* [1970] A.C. 1136, 1155.

[28] *E.g.* the discussion of the problem in the context of pleas for the equitable remedy of a declaration in Young, P.W. *Declaratory Orders* (2nd ed. 1984) 60.

of judgment, reaching a decision which is both generated and justified by an assessment of the relative weight and importance of those principles:

> When principles intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example) one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement and the judgment that a particular principle or policy is more important than another will often be a controversial one.[29]

Save for those rare and exceptional cases where the competing principles are perfectly balanced against each other, one principle or set of principles will always outweigh the other in importance and therefore fill what might otherwise be considered to be a discretionary space.

There are recognised classes of 'discretionary considerations',[30] that is, classes of circumstances such as hardship to the defendant or the conduct of the plaintiff, which cannot be taken into account by a judge making a decision at common law but which must be taken into account in proceedings in equity. These 'considerations' are, it is suggested, functionally equivalent to Dworkin's principles. Like principles, they come into play only where no settled rule dictates the result, they state a 'reason that argues in one direction',[31] they are weighed against each other by the judge hearing the case and their relative importance is assessed. Dworkin's description of a principle as a 'consideration inclining in one direction or another'[32] seems to fit precisely with the so-called 'discretionary considerations'. Both lead to a judicial exercise of judgment which resolves conflict in the absence of clear rules, without resorting to extra-legal standards, and which is directed toward finding the 'right answer', that is the answer which the parties are entitled to have. As a matter of ordinary language, it is not in fact uncommon to find judges in cases involving pleas for equitable relief stating, after weighing and balancing the relevant discretionary considerations, that a party to the proceedings is, or is not, *entitled* to the relief.[33]

This interpretation of the nature of equitable discretion can be illustrated by a comparison of the function of the discretionary consideration of 'clean hands' in a case where specific performance of a contract is claimed with the function of 'principle' in one of Dworkin's quintessentially 'hard' cases, that of *Riggs v. Palmer*.[34] In that case, a man who was the heir under his grandfather's will murdered his grandfather and argued that, despite his crime, he was legally entitled to take the testamentary benefit. The relevant statute was silent on the issue and, in the absence of any clear legal rule dictating the result, the court relied on the 'principle' that no one shall be permitted to take advantage of his own wrong and denied the claimant the benefit. Consider then a case where a

[29] Dworkin, R., *Taking Rights Seriously* (1977) 26.

[30] A comprehensive list of these considerations can be found in Tilbury, M., Noone, M., and Kercher, B., *Remedies: Commentary and Materials* (1983) 353, 400: (i) unfairness and hardship; (ii) lack of mutuality; (iii) would require court supervision; (iv) unclean hands; (v) laches; (vi) readiness and willingness of the plaintiff to perform; (vii) public interest; (viii) others — a) would require committing an illegal act; b) grant would be futile; c) impossible for the defendant to perform.

[31] Dworkin, R., *Taking Rights Seriously* (1977) 26.

[32] *Ibid.* 26.

[33] *E.g. X v. Y and others* [1988] 2 All E.R. 648, 661; *York Bros (Trading) Pty Ltd v. Commissioner of Main Roads* [1983] 1 N.S.W.L.R. 391, 402.

[34] 115 N.Y. 506; 22 N.E. 188 (1889); Dworkin, R., *Taking Rights Seriously* (1977) 23ff.

plaintiff who is claiming specific performance of a contract has himself breached his obligations under the contract. The court of equity, in deciding whether to exercise its jurisdiction to grant the remedy, will take into account the discretionary consideration which is usually cast in the form of a maxim, 'he who comes into a court of equity must come with clean hands'. That consideration will not dictate the result; it will incline the court in one direction; its relative importance will be assessed; it would be strange to view it as an extra-legal standard. In short, it seems to function in much the same way as the 'principle' in the *Riggs* case.

In each case, the decision had to be made in the absence of a settled rule. In *Riggs*, the absence of a rule was fortuitous. It happened that no rule had developed within the legal system in which the problem arose. In the equity case, the absence of a rule was structural — there are not and cannot be rules in cases involving equitable relief. But that difference in the reason for the absence of a settled rule does not, it is suggested, invalidate the conclusion as to the coincidence in adjudicative method in both cases.

Conclusion

It has been argued that in equity as in the common law there is no necessary link between an absence of settled rules and a judicial discretion that excludes a duty to decide in one way or the other and that discretionary considerations in cases involving pleas for equitable relief function in the same way as principles at common law. If it is true that judges in 'hard cases' at common law do not legislate to fill the 'open spaces of the law'[35] because what positivists think of as 'open spaces' are in fact filled with legally binding principles, then that is also true of judges in equity, at least in the kind of equitable cases under consideration here.

The perceived effect on commercial certainty of equitable discretion in the imposition of remedies was adverted to earlier in this paper and Goff L.J. has recently pointed out that the mere fact that an equitable jurisdiction may be exercised at a judge's discretion is productive of uncertainty, doubt and dispute.[36] It is true that certainty and predictability can be and probably have to be as elusive in cases involving pleas for equitable relief as they are in hard cases at common law. It is suggested, however, that the interpretation of the nature of equitable discretion proposed in this paper holds possibilities for a different and more positive view of that discretion. If it is perceived that judges in equity are not basing decisions on extra-legal standards, that they are striving to determine the 'right answer' to claims for equitable relief, the current resistance to the presence of equity in commercial life may decrease.

[35] The phrase was used by Mr. Justice Cardozo in *The Nature Of The Judicial Process* (1921) 113.
[36] *Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatoriana* [1983] Q.B. 529, 541.