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NOTES ON RONALD DWORKIN'S THEORY OF LAW

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Introduction

Ronald Dworkin has based his theory of law on his on-going critique of positivist theories of law, especially the theory developed by Hart in "The Concept of Law", as Dworkin believed that Hart's theory was the "ruling theory of law".[1] Over the years, however, Dworkin's theory has evolved in the course of his response to critiques of his work or alternatively due to the fact that positivists in response to his criticisms, adapted the theory of positivism. From the 1960's onwards, this evolution of the anti-positivist theory can arguably be said to have occurred in three phases. Although it is possible to look at Dworkin's theory in various ways, this particular note will take the approach of understanding how these three phases of development in his theory evolved and changed while enriching his interpretive theory all the time focusing on his developing critiques on Hart's work.

1. Dworkin's vs. The Major Schools of Thought in Jurisprudence

Dworkin's original critique of Hart's model of rules in "The Concept of Law" revolved around the role of 'rules and principles' in law among other issues such as the role of customs as well as the problems of judicial discretion and retrospection. It is clear that Dworkin found Hart's theory to be "under inclusive".[2] This is due to the fact that, as per Dworkin, Hart fails to take into account concepts beyond rules and thus his "positivism is a model of and for a system of rules, and its central notion of a single fundamental test for law…forces us to miss the roles of...standards which are not rules."[3] In other words, by limiting the scope of law to only rules that can be identified by the rule of recognition, Hart fails to consider the role of the existing body of

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[1] Ronald Dworkin, "The Models of Rules I" 35 University of Chicago Law Review l 4 (1967-1968)

[2] James Donato "Dworkin and Subjectivity in Legal Interpretation" 40 Stanford L aw Review 1517 (1987-88)

[3] Penner, Schiff and Nobles, "Jurisprudence and Legal Theory: Commentary and Materials", Butterworths, Lexis Nexis, 2002, p. 337-338

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customs (for example the royal assent and other prerogative powers in the British legal system[4]) in law, as well as concepts such as 'principles' that can influence judicial decision making.

While rejecting Hart's 'ruling theory of law', Dworkin also rejects the reasoning of Natural Law theorists that there are predetermined, absolute and metaphysical moral principles which determine the moral standards upon which the validity of all human laws are based. He is also opposed to the view that there is necessarily a close link between justice and the law which Natural Law advocates. Dworkin rejects such a proposition based on the concept that the fact of law is such that its validity must not be derived from the justice it can deliver or the injustice. It is therefore possible to observe that Dworkin's place in jurisprudence is one where he is neither a natural lawyer, nor is it possible to say he is a legal positivist as he theoretically rejects some of the most common and basic views of Natural Law theories while also being very critical about the positivists. His theory thus provides students of jurisprudence a theoretical forum for a middle ground between the two theories.

2. The Third Way…

Phase I

One of Dworkin's primary concerns in the first phase of the development of his theory was to distinguish principles from rules as his theory hinged on the fact that Hart had only considered rules and thus the master rule of recognition could not identify principles. He does this by saying that "rules are applicable in an all-or-nothing fashion"[5] or rather a rule is either valid or invalid unlike principles, which do not apply to cases quite so starkly. Principles have 'weight and dimension'. Thus a principle may be taken into account while deciding a case but will survive as a principle even when it is overridden as in cases of adverse possession where the principle of "no man shall profit from his wrong" is overridden but not invalidated. This distinction between rules and principles introduces Dworkin's most consistent criticism of the conventionalist[6] view of law.

According to Dworkin, positivists maintain that in certain 'hard cases' where there is no pre-existing rule that governs the outcome of the case, the judges have a 'strong discretion' to adjudicate and make new law. If this strong discretion existed, it would mean that the new law would act

[4] *Ibid*
[5] *Supra* note 2
[6] Dworkin tends to call the positivists "conventionalists"

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retrospectively and the parties would be bound by a law that did not exist before their case as an unelected body of judges would be making the rules to fit the case and this would be undemocratic.[7] Therefore, Dworkin rejected the concept of 'strong' judicial discretion[8] and with the distinction between rules and principles in hand, indicated that when adjudicating in hard cases, the judges invoke a legal principle[9] and decide the outcome of the case accordingly. This distinguishes his concept of judicial reasoning from the positivist concept as the positivists would argue that legal rules are distinct from moral rules, whereas Dworkin is actually blurring the division between the two as principles can incorporate ideas of fairness, justice and morality.

Raz presented several counter-arguments against Dworkin's theory although he accepted Dworkin's opinion concerning the issue of customs by modifying Hart's 'rule of recognition.'[10] Raz, by using Dworkin's arguments against him, states that "principles presuppose,...direct and guide (judicial discretion)."[11] Raz also maintains that Dworkin has misunderstood the rule of recognition in that not only does (this rule) not recognise implicit law (principles) it also does not identify explicit law either. Thus the whole concept of principle is not an issue.[12] In response to these arguments in the second and third phases of the theory's evolution, Dworkin modified and enriched some aspects of his critique while modifying other aspects from the first phase.

Despite these criticisms, it is out of this discussion that Dworkin's "one right answer" thesis arose. Dworkin asserts that the law clearly cannot be made up of rules only but also other standards. These include standards such as policies, principles and the like. While these other standards are important and are as effective as rules in the legislative as well as executive processes, they differ in character from rules. However, rules, policies and principles together act as what Dworkin calls the "moral fabric"[13] of a society which protects interests which members of a society regard as valuable interests

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[7] James Allan, "Legal Interpretation and the Separation of Law and Morality: A Moral Sceptic's Attack on Dworkin", 26 Anglo. Am. Law Review 405 (1997)

[8] Although he did concede that they had weak discretion in deciding how to approach the question and what law to use.

[9] Which can be regarded as 'legal' due to its substantive, moral and political content

[10] *Supra* note 3, p. 360

[11] As per Raz, supra note 3, p. 358

[12] *Ibid*, p. 421

[13] *Ibid*

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which can be specified in terms of rights such as the rights to life, liberty and human dignity.[14]

For Dworkin, these rights and other rights valuable to specific societies are particular to each society and objectively demonstrate a certain type of 'morality' which can be empirically determined to indicate what is important to the society and therefore should be protected by the law. This therefore is the argument which he uses to argue that morality does and should have some place in the law particularly when determining disputes in the courts.

It was also in this discussion that Dworkin's distinction between rules and principles was first discussed. For Dworkin, in a case where a rule applies, it does so in an "all or nothing" method fully resolving the dispute in line with the rule which has neither weight nor dimension and is valid because it is the law. However, where a rule does not apply and therefore a principle must apply, a principle is not as conclusive as a rule. This is due to the fact that where a case has to be resolved by the application of a principle, several competing and contradictory valid principles may be applied, as a result of which the judge must weigh the principles against each other and apply the one which the judge chooses as being the best 'fit' for a certain case based on the full weight and dimension of the various principles.

Phase II

In the second phase (i.e. in the 1970's), Dworkin reformulated and elaborated his original *'rules and principle*' attack on positivism in his *'rights thesis*' but he excluded the arguments distinguishing rules from principles on grounds of weight and validity as well as his attack on Hart's rule of recognition. In his formulated theory based on the 'rights thesis' in which he discussed arguments of principle, he indicates that these arguments of principles are propositions of political morality, affirming the existence of rights of citizens in a system of law which can also be described as a "seamless web of principles."[15] He explains that if an issue already has not been covered by a rule, the judge in the case cannot exercise a Hartian mode of discretion and create new law, but must give effect to what is implicit in the society's moral fabric which is developed in the society within which the law and the legal system operate. It follows, therefore, that the judge, like the super-human judge Hercules (that Dworkin creates), must take into account the "totality of laws (so legal sources have to be looked at), institutions, moral standards, and goals of

[14] J.G.Riddall, "Jurisprudence" Lexis Nexis U. K, Butterworths, 2nd ed 1999
[15] *Ibid*

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society"[16] and interpret all this in their best political moral light to achieve the appropriate 'fit' which will settle the question with the single right answer. This holistic approach to law is a further insistence by Dworkin that a judge cannot have a strong discretion[17] which seems to be the most consistent concept throughout the evolution of the theory and is partly carried over to the third phase as well.

Raz criticized this theory as Dworkin distinguishes between source and non-source laws in which he accords a separate/private place to legal sources which can be identified by Hart's rule of recognition as Dworkin did not offer any rule of his own. Raz points out that Dworkin's theory, while refuting positivism is basing some (and arguably some of the most crucial) of its features on positivism which is contradictory.

Despite the above-mentioned critiques to Dworkin's theory, Dworkin at this point had managed to add to his ever growing literature on the "one right answer."[18] In this part of the discussion, Dworkin postulated the concept of the super-judge Hercules; and the limits of judicial discretion were further discussed in the light of this conceptual judge.

As established above, Dworkin's argument depends on the fact that where a dispute arises and needs to be adjudicated, a judge has a series of tools by which he or she can adjudicate among which are the principles for the 'hard cases.' Dworkin clarifies that there are various ways of resolving a dispute; there is also the right answer in each case with regards to the question: *who has the right to win?* To answer this question, the judge will have to search through the moral fabric and decide how to apply the law in the best way possible. It is in this part of his theory where Dworkin explains the hypothetical judge's (Hercules') role in his theory. Hercules, as a super-judge with great abilities of analysis, deduction and adjudication would be able to justify the use of principles in 'hard cases' by constructing the best theory of law possible. Such analysis will indicate that the law is a seamless web of legal rules, legal principles and other legal standards and using this best theory the judge would render a correct decision and justify it.[19] For Dworkin, it follows therefore that even in 'hard cases' judges do not have quasi-legislative discretion,[20] rather they may have a weak form of discretion

[16] *Ibid*, p. 95
[17] Supra note 3
[18] *Ibid*
[19] *Supra* note 14
[20] *Ibid*

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which allows them to decide how and which rules or principles to apply[21] but only if it is the right answer (as far as it can be justified).

He illustrates this somewhat hypothetical discussion on how to resolve hard cases in the case of Riggs v Palmer (1899).[22] In this case, the question that arose was whether a murderer could inherit from his victim in a legal system where the testamentary succession clearly indicated that a beneficiary named in a will would always be entitled to inherit. In the absence of other rules, the court in the United States decided to apply the legal principle that no one should benefit from their wrongful actions and denied the murderer the inheritance. For Dworkin, what this case demonstrated was that where an existing rule was clearly going to result in the wrong answer, the court used a principle to reach at the right answer which had the same level of legal validity as if the rule was used instead.

Phase III

In the third phase of Dworkin's long and illustrious career, Hercules' holism is considered further under the general idea of 'constructive interpretation'. Here Dworkin claims that all law is interpretive.[23] In this phase, Dworkin first attempts to give lesser importance to source-based law. Secondly Dworkin attempts to clarify and organize his ideas with some departure from the second phase. It is at the third phase that Dworkin develops a coherent theory explaining what judges do, (which is not filling "gaps"[24] through the exercise of discretion), but by undertaking a process of 'interpretation'[25] in hard cases (as easy cases do not truly need interpretation-looking at the statute will be enough as it applies without problems).

To do this, Dworkin sets out three stages; Firstly, the judge (or lawyer) has to *know the data* (pre-interpretive stage), secondly the judge must *evaluate it* and advance it in its best possible light (interpretive stage) and then thirdly, legal questions can be *settled* as there will be one right answer or the best answer which fits as discussed above. The pre-interpretive stage therefore can constrain discretion, as the judge will have to take into account texts and other relevant materials such as earlier cases. So, Dworkin draws on an analogy of the chain novel to explain this incremental historical constraint on later judges (although the first judge has no such constraint). Even though

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[21] J.W. Harris, "Legal Philosophies" Lexis Nexis, Butterworths, 2nd ed. 2003
[22] *Supra* note 3, p. 338
[23] *Supra* note 21
[24] This is a positivist view and the word gap is most commonly used by Raz while Hart uses the word penumbra
[25] This is the aesthetic hypothesis; -*supra* note 3, p. 386

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there is some constraint, the judge retains the ability to evaluate and interpret the law in a manner which he/she feels fits with the previous judgments while balancing it against 'coherence' or the relevant moral substantive standards of the society such as social goals as well as principles of justice[26] to come up with the single right answer or the best answer.

However, most aspects of Dworkin's efforts at this stage have been criticised by Raz, Fish, Finnis and Marmor. Fish criticises Dworkin's literary theory for two reasons. The first is that Dworkin, by excluding the first judge/novelist from the constraint, seems to be suggesting that the first judge is free to decide however he likes whereas Fish shows that they are all constrained. By making the first judge free to judge as he likes (as a judge does in the legal realist tradition/theory) and the latter ones constrained by self-evident history[27] (strict constructionism- a positivist exercise), Dworkin seems to be committed to both of the views he tries to criticise simultaneously. The second part of Fish's critique indicates that even though Dworkin argues against the positivist theory concerning simple cases by pointing out the existence of controversial simple cases (such as in the case of the will in *Riggs v Palmer*[28] in his earlier theory), he tries to use the distinction between simple and hard cases in the 'chain novel' theory and so, his whole theory becomes dependant on a positivist analysis of what is an easy case or a hard one.

Another criticism of Dworkin's work emerges from Marmor. His critique explains the inadequacy of Dworkin's proposal that a judge has to balance the 'fit' and moral/political value to find the right answer as the two stages of the interpretive test are not independent enough from each other to provide the friction that Dworkin needs for the theory to work. This dependence occurs as 'fit' itself is shaped by dimensions of personal morality.[29]

This concept that the right answer would emerge from the balance between 'fit' and 'coherence' has also been criticised by Finnis, who points out that the values that are being compared and balanced are incommensurable. Thus a single right answer cannot be determined scientifically on the basis of the comparison between the two values as this would mean that judges would have to choose which value was more important to them and this is a form of discretion.[30] A further criticism by Finnis is that, while some aspects of legal practice are interpretive, not all aspects of legal practice are. For example,

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[26] *Supra* note 3, p. 393
[27] *Ibid,* p. 397
[28] *Ibid*, p. 338
[29] *Ibid*, p. 404
[30] *Ibid*, p. 405

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legislation which is a significant part of legal practise cannot really be seen merely as an interpretive action.[31]

Finally, Raz criticises Dworkin's ideas about 'coherence' but points out that Dworkin has made concessions in view of the rule of recognition as well as with regard to the unique right answer which ultimately always leads to the conclusion that judges have discretion. Raz criticises the 'coherence' concept as it requires the judges to consider all the sources of law as well as make a judgment that is in line with the morality of the system. In so called 'evil' systems such as South Africa during apartheid, where the injustice was pervasive in the source law, as well as the general ideology of the system, the idea of coherence would mean that the courts would have to make judgments which were also unjust. On the other hand, Raz finds that Dworkin has made a concession to a Hartian rule of recognition in his idea of 'fit' due to the fact that so called legal sources make the law and to identify these, a rule of recognition is necessary.[32] Ultimately, however, Raz points out that Dworkin's most consistent claim about courts not having discretion "has been whittled down"[33] in the chain-novel metaphor as judges not only interpret the past sources but also have a creative role in deciding the cases.

Conclusion

In conclusion, over the years, Dworkin's initial critique of positivism has been modified (almost beyond recognition) and has changed a great deal. However, the greatest change has occurred due to his adoption of the "interpretive" theory of law as this phase of the theory has proved to be completely different from the first two phases in that Dworkin has inadvertently accepted a great deal of positivism in his critique of positivism, thus (in part) defying the purpose of this critique. However, the theories he has formulated are no less important in the study of jurisprudence even if they have ultimately not been as helpful to Dworkin in criticising positivism as one would expect. This is so because his approach involves a more mixed approach to legal theory. Neither major school of Jurisprudence (Natural Law and Positivism) is completely correct. Nor are these schools completely incorrect, and in effect, it is possible to try to reject some parts of the theories while blending other parts to have a more holistic approach in jurisprudence itself. ■

[31] *Ibid*, p. 418
[32] *Ibid*, p. 425
[33] *Ibid*, p. 423

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