

# Positivism A Model Of For System Of Rules

“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 important standards that are rules.” explains Dworkin on his attack on positivism. It is argued, by Dworkin, that both legal positivism and natural law theories are in reality searching for an answer to the question ‘what is law?’ a fundamental question and challenge towards the debate and critique of the natural lawyer and positivist.

However Dworkin directs towards another issue, a more specific question of understanding law, gained by asking ‘how do judges find the law’ . This directs attention towards ‘hard cases’ , a theory provided by legal positivism. It is explained by Dworkin that judges make use of standards that do not function as a system of rules, as opposed to what Hart would argue, but operate differently as other sorts of standards . Hart, a positivist theorist, would argue that in the majority of cases rules will be clear, however, at some point, they will become indeterminate and unclear . This is because they have what Hart calls, an ‘open texture’, and a defect inherent in any use of language . This ‘open texture’, as explained by Hart, refers to a particular area of law that is left open for the exercise of discretion by the courts and judges in rendering ‘initially vague standards’ . Dworkin explains that there is not just one standard, but in fact two other standards operative in our system, namely policies and principles.

He distinguishes between these two to explain that policies attempt to ‘secure the community goal’ where as principles ‘justify political decisions’ by showing that the decision respects or secures some individual or group right. This goal is set out to generally improve the community. In nature principles, unlike Harts rules, can be applied or not applied without affecting there existence, a court will draw on these standards in order to reach a decision on the ‘hard case’ .

With this submission, it is in disrepute with Hart’s notion of the ‘Rule of Recognition’. For instance, officials in Nazi Germany obeyed Hitler’s commands as law, only out of fear. Dworkin compares both Harts and John Austin’s theory to say that there would be no difference between a group of people accepting a rule of recognition and simply falling into a self-conscious pattern of obedience out of fear . Dworkin continues to explain that if acceptance requires more than obedience, then there was no law in Nazi Germany. He thus believes that it is inadequate, notably as there is no rule of recognition that distinguishes between legal and moral principles. Therefore Hart’s theory does not capture how lawyers find law and therefore lacks a justificatory force.

It is explained, furthermore, that if two rules conflict, both cannot survive one must be incorrect. Principles are different; they do not apply to all or nothing but apply together as they have weight, thus balances for the person’s rights . It is important to note that the word ‘principle’ is not used in the sense that it requires compliance with a standard

regardless of the consequences , Dworkin uses it to mean 'propositions that describe rights' .

His challenge continues; the idea to separate law and morality is incorrect, not so far that law should be based purely on morality . For instance, the infamous case of *Donoghue v Stevenson* , the biblical 'principle' not to harm your neighbour effectively becomes a legal principle, therefore morality is inherent in law. Lord Atkin has constructively developed a principle, the neighbour principle, to be applied in future arising situations .

Furthermore, the case of *Riggs v Palmer* forms the basis of Dworkin's illustration on how legal principles work where the judges 'found' and applied an equitable principle that an individual should not benefit from his crime . Here the decision was formed organically and was not created in a particular way. Dworkin argues that this decision demonstrates that in addition to rules, the law includes principles . The answer was already inherent in society, a substantial belief by Dworkin, that there is a right answer to every legal question, thus not acting retrospectively opposed to what Hart believed that there is no law covering a particular gap or situation . According to Dworkin, there in fact lie principles. Hart would state that judges must use their discretion in deciding whether a particular case comes within a rule or not, by way of statutory interpretation .

Hart continues to explain that there is no possibility of treating the question raised by the various cases as if there were only one right answer, a solid belief by Dworkin that there is a right answer . However, Dworkin argues against this approach which allows for a judge to make a policy decision not based on law in 'hard cases'. He argues that by Hart seeing law solely based on a system of rules; he fails to take account of general principles . In contrast, Dworkin challenges that the judge does not revert to a policy and act as a law maker; instead the judge applies legal principles to bring about a correct right answer based on law.

Dworkin's article, *Hard Cases*, continues to say that judges must apply a principle of, what he calls 'articulate consistency' in determining the applicability of statutes and precedents to controversial cases . He uses the word 'consistency' to refer to the application of the principle relied upon, not the application of the rule. There was no rule in *Riggs v Palmer* , only a principle that a person should not benefit from their crime . Besides Dworkin sees the law as a seamless web in which there is always a uniquely right answer and strongly rejects Hart's view that there are 'penumbral areas of doubt' within which a judge can exercise free discretion . This is opposed to Dworkin's strong belief that judges do not have a wide discretion when the rules seem to run out .

This directs attention towards the fictional judge developed by Dworkin, Hercules J. He is a judge with superhuman skill, learning, patience and acumen used to illustrate an idealistic process, fundamentally essential to his construction . This judge is expected to construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and is intended to point the way to the

correct legal answer . He will decide on a theory of law which best coheres with his community. Arguably, for that reason, Hercules is deciding cases in the light of what already exists. Dworkin says that we can assume that Hercules accepts most of the settled rules of his jurisdiction, laying down the characteristics of law.

Nonetheless, with an absence of statutory footing in place, the appropriate and just outcome exists before the case arose within the society. Hercules is not breaking new ground, as some positivists would suggest, he is merely looking at the totality of the objectives on which it is based. However, Hercules is criticised on the grounds that he is a mythical being, no judge can behave in this Utopian style , thus perhaps lacking ecological validity . Some have gone so far as to label him a fraud, an assumption that he has discovered the right answer to a hard case, arrogantly assuming his conception of the law is correct. However in *Laws Empire*, based on theoretical disagreements in law, Dworkin responds explaining that Hercules does not pretend that he has found the 'right' answer but he has only discovered what it should be, a significant difference to his terminology .

This then brings light to Dworkin's 'one right answer' theory, which must not be assumed by this rather assumptive statement. As already briefly explored, it is the proposition that there is only one single uniquely 'right' answer to all legal questions . He agrees that through judicial precedent, judges agree that earlier decisions have a particular gravitational force . A judge will rarely have the independence to be inconsistent with this notion by the fact that they acknowledge that they are bound by a hierarchy of previous judicial decisions . When a judge defines this precedent, only the arguments of principle are taken into account to justify that principle .

Furthermore, in the light of this point, Dworkin continues his argument with the analogy of a chess game; perhaps not the most enthused of illustrations. In the course of the game one player is significantly distracted by the other player (named Tal) persistently smiling. Though this act may not be in breach of the 'chess rule book', Dworkin would argue that on an analysis of what the game of chess essentially entails, similar to how a judge should decide a hard case; psychological intimidation would have been deemed against the nature of the game .

The referee ought to find the one answer that best fits with the general practice of chess. Additionally, leading to another of Dworkin's challenges, the rule already existing prior to the game, it does not act retrospectively. This term retrospection relates to that in hard cases judges have discretion to decide the outcome, making new law, consequently it acts retrospectively, and a defect in Dworkin's conventionalist view of law . However in the light of Dworkin's view, a party claiming injustice through retrospection is in fact bound by a law that was already available to anyone, if sought in the proper way. The decision merely gave effect to this existential law.

It must now be considered where Dworkin himself fits in with either positivism or natural law. Officially, he is contemporary legal positivism's harshest critic. It is verified from the

above analysis and chapter one in *Laws Empire* that he is not a positivist in the sense that where the law seems to run out, the judge creates a new fitting law, termed as conventionalism, a strong rejection by Dworkin .

His connection with the 'right answer theory' may be said to tie with morality, if the right answer is the best fit, it is the best morally fit answer, it would not be the best fit answer, if it was immoral thus coinciding with natural law . Like Fuller, Dworkin accepts that moral reasoning is an integral part of legal reasoning therefore morality is part of the law, though in Dworkin's view it is not necessarily connected. Both theories argue that lawyers follow criteria that are not entirely factual but to some extent moral for deciding what propositions of law are true .

Continuing this exploration, Dworkin believes that the law and adjudication ought to comply with certain standards, notably those embodied in the phrase 'Law as Integrity', one of the three rival theories of law which Dworkin constructs and challenges , again he seems to lean more towards natural law. However, Dworkin makes his position clear that he does not believe in higher principles above and outside the law, as an everlasting sovereign power. Instead he believes that justice has a merit in its own right.

On this basis Dworkin believes that adjudication ought to operate in compliance with the standards, and in his view not to the principles of God but to what is right. He does not link morality with the validity of law, this does not concern him. Thus he may rather be placed as a jurist who explores the nature of both illustrating an ideal form for this process of adjudication . He has merely shown that a sensible account of law would have a place for principles as well as rules .

This leads to further analysis, focussing now to the theory of 'Law as Integrity', a theory showing our legal practice at its best light . Dworkin, though his term remains illusive, claims that it offers a plan for adjudication which points judges to use 'integrity' as a method for deciding cases. The theory explains that propositions of law are true if they follow the principles of justice, fairness and 'procedural due process' which provide the best constructive interpretation of the community's legal practice . As already seen Hercules acts with integrity and may be said to be a constructive interpreter of the laws written before him . Integrity insists that legal claims are interpretive judgements and consequently rejects the question whether judges find or invent law .

This method essentially would instruct a judge to identify legal rights and duties, on an assumption that they are created by one author representing a community expressing a 'coherent conception of justice and fairness' . Dworkin argues that with this one author or separate entity, the judges can assume that the law is structured on coherent principles . The judge, following integrity, would look for a principle that, according to Dworkin, 'fits and justifies' a complex part of the legal practice. This, in essence, would provide consistency of principle that integrity requires . Therefore a society adopts

integrity in order to justify its moral authority to assume and organise control of coercive force .

However positivism does not require judges to justify their decisions. In this way, positivism does not consider the law as being separate and independent. Instead the positivist would see the law as comprising a set of 'discrete' decisions, enabling a judge to exercise his discretion to amend it, contrary to what Dworkin argues .

Dworkin explains that the consistency that would be provided from integrity would entitle people to a coherent and ethical extension of past decisions. Positivism would deny this on the basis that it denies consistency in principle as a judicial virtue for ambiguous statutes and unclear precedents to try to achieve consistency , a point which is emphasised by Hercules. Furthermore Dworkin believes that an adoption of an approach, whereby a judge 'ought' to operate in the society Dworkin thinks 'ought' to exist , would protect against prejudice, dishonesty, and corruption whilst promoting participation in democracy . However not all judges will come to the same conclusion. Even though they were seeking the correct answer, many may find a different route and therefore end in a different place. Dworkin responds, an answer obtained by way of integrity does not produce objectively 'right' answers and believes that by external scepticism rejects this view. On application of this, an extension on our analysis of hard cases, a judge is not to assume that he is just making a decision on the point of law, he must ask whether it could form part of a 'coherent theory justifying the network as a whole ' .

Concluding, Dworkin is the leading critic of positivism, and in particular, Harts own version of it. Dworkin believes that the law never runs out and that the answer is always there readily available if the matter is sought properly. He disagrees with Hart as he insists that at the point of where the law is incomplete, judges must use their discretion to reach a solution, a new law to fill in that gap . His right answer theory attacks this largely on the basis that there are standards other than rules operative in our society. He challenges natural law as a particularly unpersuasive theory, an extreme theory that insists that law is dependant on morality and identical to justice , as explored in this essay, Dworkin differs as he does not link morality with the validity of law. He is unconvinced with an everlasting sovereign and believes that justice has a merit in its own right. He is not a natural lawyer nor a positivist but rather a jurist, challenging and illustrating an ideal form for this process of adjudication .

“That is...what law is for us: for the people we want to be and the community we aim to have.”