THE DIALOGICS IN HART-DWORKIN DEBATE ON THE CONCEPT OF LAW*

Abstract

One of the critical problems in philosophy of law for two decades is the clash between Hart's views and those of his former student and successor as Professor of Jurisprudence at Oxford University, Ronald Dworkin. Hart is a positivist whose account of law, or 'what the law is' is always potentially different from 'what the law ought to be'. Other positivists include Jeremy Bentham, John Austin, Hans Kelsen, Joseph Raz, and a host of others. In his Essays in Jurisprudence and Philosophy, Hart brings out a number of ways the expression 'legal positivism' has been used. He discerns five tenets or contentions 'legal positivism' has assumed in contemporary jurisprudence. With this, he arrives at the conclusion that law is basically a system of rule; a union of primary and secondary rules. The opposite contention of natural lawyers appeared easily dismissed by reference to professional practice. When lawyers give information about the law, or apply the law, they often complain about its contents; they show no readiness to trace its validity back to a moral basis. If asked to justify an assertion about the law, they cite authority, not reason; precedents and statutes, not treatises about justice or the good life. Dworkin does not challenge the conventional positivist assumptions about the decision of legal questions in clear cases by the application of valid rules. In 'Taking Rights Seriously', Dworkin arrives at three important conclusions about the nature of law. First, law is not solely comprised of rules. The logic of adjudication in 'hard cases'—that is, cases about which informed people can reasonably disagree—leads him to the conviction that rules are part of the law. But in hard cases, he argues, judges are guided to their decisions by standards which are not rules. Secondly, no line can be drawn between law and morality because the non-rule standards which judges employ in order to determine 'what the law is' in hard cases include principles embedded in the community's morality. Thirdly, judges do not legislate because reasons never run out and there is never a middle ground. He insists that there must be a right answer to virtually any questions of law. It is clear Dworkin has developed a distinctive system that transcends, and bridges the gap between naturalism and legal positivism; thereby integrating law into a branch of political morality. How then are we to adjudicate between Hart and Dworkin on these issues? It is the position of this work that principles are not propositions describing rights as Dworkin upholds. Rather, principles are relatively general norms which are conceived of as 'rationalizing' rules or sets of rules'. A legal principle, in the view of the person putting it forward as a principle, explains and justifies existing legal rules. It authorizes any new ruling which it would also explain and justify. This study examines Hart-Dworkin debate and draws a response.

Keywords: Dialogical process, Hart, Dworkin, Law, Morality, Legal philosophy

1. Introduction

The Hart-Dworkin debate, which revolves around the concept of law, looms large in legal literature. The discussion, no doubt, has attracted divergent reactions from scholars who either defend Hart against Dworkin, or defend Dworkin against Hart's supporters.[1] In a study on analytic jurisprudence, Leiter makes a case for the need to move discussion in legal philosophy away from this so-called 'Hart/Dworkin debate.'[2] He insists that 'on the particulars of the Hart/Dworkin debate, there has been a clear victor.'[3] In all indication, the Hart/ Dworkin debate

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[1] R. Dworkin, '*The Model of Rules* 1,' reprinted in *Taking Rights Seriously* (Cambridge: MA: Harvard University Press, 1977), 6

[2] B. Leiter, '*Beyond the Hart-Dworkin Debate*' Retrieved on line from http://www.academia.edu/26976016/ Between_rules_and_principles_Hart_and_Dworkin_on_obligation. Accessed on 5/5/2020.

[3] Loc. Cit.

appears to be largely exaggerated on both sides. The liberal ideology that underlines both theories develops into a largely harmonious position with only a narrow, though substantive band of disagreement. Some have argued that the important differences between them regard the scope of law's relationship to morality, and not the coherence or necessity of such a relationship. To us, both Hart and Dworkin complement each other in their approach. Both maintain that any legal system must reflect a minimum systemic morality. Thus, as Dworkin though, suggests that this morality often develops into a substantive, albeit restricted, element of the law, Hart seeks to restrict this moral content to strictly procedural issues. In what follows, we shall argue that this debate develops in a dialogical process. This dialogics, which signals a form of complementarity rather than contrariety, is evidenced in the manner in which both treated among others the concept of obligation and discretion in law.

To start with, the highlight of Hart's jurisprudential theorizing is to explain how law, when it is not understood as a system of commands which forces compliance, but rather a system of duty-imposing rules, creates genuine obligations, respected and counted upon by individuals in a community without the threat of force, and which have different characteristics as those of moral obligations.[4] In other words, Hart concerns himself with how rules can create obligations when there is threat of punishment and failure to comply with what the law says, and which do not appeal to moral standards. In that case, he asks if we are to feel bound to comply at all. In *The Concept of Law*, Hart would go on to argue that we, indeed, feel bound to comply with the obligations set out by duty-imposing rules because we ultimately accept them. We accept them not because of any other reason than because we see them as valid legal rules, and therefore, they are valid because they arise from an agreed set of criteria for recognition. Hart also would say that in accepting those criteria of recognition, moreover, we take on an 'internal point of view' in regards to how we act on such rules in a community. By consequence, these rules take on what Hart describes as 'rule-dependent notions of obligation or duty.'[5] Hence for the external point of view, in comparison, this (law abiding) behaviour can only present itself as 'observable regularities of conduct.'[6] This is a highlight of the importance that the notion of obligation plays for Hart's project in setting out a model of rules based on social behaviour.

2. Obligation Generally

Obligation generally in law is ambiguously complex;[7] yet it plays a central role in understanding jurisprudence in a positivistic sense, as well as how legal rules make us act in compliance or defiance. The question usually asked include: Are obligations 'restrictions', 'duties', 'rules', 'standards of behaviour'? In which way are they 'binding' on us? Why do we accept that rules carry authority to an extent that we voluntarily comply to follow them? In other words, what is an obligation? In the legal fabric that makes up the social context in which we live, we take on obligations in all kinds of manners. Growing up and entering adulthood entail new obligations, just as entering into contracts (such as marriage or property acquisition) with others. Even by making a promise to my friend (that I will help her paint her house), I create an obligation for myself and bestow my friend a right in the process. Consequently, through my voluntary action, normative conditions are changed.

3. Hart on Obligation Specifically

The strength of Hart's position is that he formulates a theory that explains how obligations change dynamically and are acquired. That was something John Austin's more static legal theory could not account for (he believes that individuals were born with obligations). Austin holds that a person has an obligation when he or she is subject to a coercive command issued by somebody with authority' that is' somebody who is in the position to carry out a punishment should the person fail to act on the obligation (e.g. a gunman threatening to shoot if money is not handed over). Hart would reject Austin's view that to stand under an obligation was to be subject to coercive command issued by a person of authority who has the means to carry out a punishment should the required act not be carried out. Hart rejects Austin's idea in the sense that to have obligation and to be obliged are two different things all together. Unfortunately, Austin collapses the two senses; seeing obligation n moral senses. For Hart, to be obliged involves statements about beliefs and motives which an action is done (e.g. harm when the money is not handed over.)

On the other hand, statement that someone has obligation, for example to tell the truth, Hart says, is independent of beliefs and motives. Instead, the statement carries the implication that a person actually carried out the action.

[4] N. Lacey, *The Nightmare and The Noble Dream*, (Oxford: Oxford University Press, 2004), p. 228
[5] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 89
[6] Loc. Cit.
[7] R. Dworkin, '*The Model of Rules*,' from Feinberg, Joel and Gross, Hyman, *Philosophy of Law* (Third Edition). (Belmont, California: Wadsworth Publishing Company, 1986), 14

Hart sees these statements as having psychological implication, while for Austin; they are simply predictions that something unfavorable would happen to one who fails to comply with the directive or what is said, which thus incurs punishment. The problem with this predicative view or interpretation of obligation is that the incurred punishment is a justification for applying the sanction or rule when the command is not obeyed. Following this reason, the gun man situation does not work since it does not furnish us with the correct interpretation of having obligation outside the predicative interpretation of it. This further indicates that on this sense, if the fear of punishment is removed, we would not have reason to act on obligation. Therefore, a social context in which the rightful sense of obligation would be needed to be able to properly understand the nature of obligation which is psychologically more complex than just responding to a command backed up by threat is necessary. This indicates that to have obligation, we do not act from fear but on the simple reason that we ought to do so. As Bix rightly understands this interpretation, he writes:

> From Hart's perspective, the problem with Austin's approach to law, and indeed with most empirical approaches, was that that approaches was unable to distinguish pre power from institutions and rules accepted by the community, unable to distinguish order of a terrorist from a legal system.[8]

In all, what it means is that whereas Austin saw rule as command, Hart with his focus on how rule and habit of behaviour function in a social context, distinguished between two classes of rules as duty or obligation imposing and power-conferring rules. As the first type are primary and governing behaviour (as in criminal law) and are accepted by the community, the second is secondary since it applies to the system itself, (as in constitutional and private laws). The second contains rules of adjudication, recognition and change.[9] These rules allow for the identification, application and alteration of the primary rules. Hart, going by the habitual behaviour, says these rules can be expressed predicatively as well as normatively. Thus, a behaviour can be forced and obligatory; as being obligatory to do something (hand over your money), or/and being obliged to do another (pay your tax). For Hart, then, rules impose obligation 'when the general demand for obedience or conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.' [10]

Again, Hart's account for the normative nature of obligation in the sense that they confer what ought to be done, are morally loaded. In other words, rules that convey obligation are moral in character, e.g. those that trigger shame, guilt and remorse. They are put into play through social pressure for their compliance. Such rules exemplify a primitive type of rule, Hart says.[11] Their obligation requires personal sacrifice. Social pressure works as chains binding those who have obligations so that they are not free to do what they want. This is simply to ensure the survival of the group. It can take on three classifications as specific obligation, general obligation and special obligation. At the end, Hart's conclusion is that legal rules and moral rules are similar in the sense that whether a person consents to them or not, they are binding. And this binding nature or character is expressed through social pressure to conform. Compliance is not met with praise but with a minimum requirement. Again, a person is bound not for a specific period of time or occasion but throughout the person's entire life.

Though moral and legal rules are related, they differ in some specific and significant aspects and forms. Moral rules are considered more important than legal rules because they are maintained even in the face of severely restricting individual behaviour. Secondly, legal rules can be deliberately changed. Moral rule cannot. Again, there is a sense of voluntariness in the face of oral offence. This aspect is not counted in the face of committing legal offence. That is to say that if the actor claims ignorance or that the action is unintentional, the penalty still applies. It cannot be said that he is not responsible for his action. On the other hand, moral pressure to conform takes a different form than the legal pressure in that it calls on a demand of morality to comply. On this aforementioned detail, Hart says whereas moral obligation is a generally accepted rule, legal obligation is simply a valid rule. In other words, rules require their validity from their source as an institutionalized system of social recognition that identifies the rules in accordance with an agreed set of criteria for their recognition.[12] But in contrast, moral rules are seen as valid because of their content (e.g. it is generally accepted that killing is bad in most communities because it endangers the lives of the members of the community.)

[8] B. H. Bix, *Jurisprudence, Theory and Context* (*London:* Sweet & Maxwell, 2015), 19
[9] Loc. Cit.
[10] H. L. A. Hart, *The Concept of Law*, 86
[11] Loc. Cit.

[12] N. Lacey, *The Nightmare and The Noble Dream,* 25

4. On Dworkin's Concept of Obligation

In chapter two of his work, *Taking Rights Seriously* (entitled The Models of Rules 1), Dworkin, like Hart, exemplifies the notion of obligation. Though he does not think obligation can be adequately analyzed from a social context where members accept that agreed-upon rules set standards of conduct, he believes that this can be done from the context of judges deliberating on hard cases with the help of principles and policies. For him, this is the venue where a model of rule 'truer to the sophiscation and complexity of our practices' should steer towards.[13] Dworkin says officials, lawyers and judges make decisions of legal obligation, and in many cases, they must appeal to principles and policies in deciding the outcome, because the law, or the rules, are not readily at hand. On that same note, Dworkin would argue that principles and policies are as binding as rules, thus rejecting Hart's model of law as a system of rules and with it the notion of judicial discretion and the rule of recognition, because they function just as well as standards for officials of a community, in controlling of their decisions of legal right and obligation.[14]

For Hart, the vast majority of rules in a legal system belong to the category of primary rules, and their validity comes from the fact that they derive from the secondary rules. Any primary rule that can be shown to derive from a rule of the secondary type is valid. The secondary rules constitute the foundation of a legal system; they are the 'rules of recognition' and they are 'used for the identification of primary rules of obligation. It is this situation which deserves, if anything does, to be called the foundation of a legal system.[15] Thus, the rule of recognition is the ultimate rule in a legal system, but 'in the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule.'[16] For the most part it is in fact not stated at all, but its existence is shown in the way particular rules are identified. What about the validity of the rule of recognition itself? Hart says the acceptance of the rule of recognition implies recognition of its validity. The fact that it is used to validate primary rules implies the acceptance of its own validity within in the legal system. It is on this basis that Hart's description of obligation centers.

It is obvious we are dealing with two approaches to obligation, each with a different focus. Whereas Hart take a descriptive sociological approach, in which he highlights the communal context of rule creation, Dworkin takes obligation into the court room, and looks at how viable Hart's theory of obligation is when judges face particularly tough cases. However, the merit of Dworkin's position rests on whether we can accept this reason for rejecting Hart's approach. As for him, evident in the Model of Rules, though we think there is a platform upon which to formulate legal claims and demands, our understanding of legal rights and duties are fragile and not easily to be explained. Could this be as a result of law's attachment to morality or so? Are there reasons to meet up with moral and legal obligations? Dworkin thinks both Austin and other positivists of his caliber have failed to give a convincing presentation of the concept of obligation. And in showing us where they have gone wrong, Dworkin's view complements that of other positivists.

It is true Hart attaches valid legal rules to obligation, in the sense that where there is no such rule there is no obligation. Obligation, he says, has two sources. They are accepted by the community who take the rule as standard of conduct, and they are valid in the sense that they are enacted in conformity with a secondary rule; in other words, a rule of recognition that grants the rules their status. However, the rule of recognition cannot in itself be valid because it is an ultimate rule that cannot be tested on a more fundamental rule. It rests and falls on its acceptance by the community. To see how it works, officials of a community must be observed. For Dworkin, when judges reason in hard case about legal rules and obligation, they make use of standards that are not rules but operate differently as principles and policies. Principles and polices differ.

When policies set out goals to be reached by improving economic, political or a social feature of the community, principles are standards that do not advance a political goal but are requirements for justice, fairness or some other dimension of morality (e.g. no man may profit from his own wrong). He goes on to distinguish legal principles from legal rules; arguing that although both point to a particular decision about legal obligation in particular circumstances, they differ in the character of the direction they give. Rules are applicable in all-or-nothing fashion. If the facts a rule says something about are given, then the rule is valid (accepted) or it is not, thus it contributes nothing to the decision at hand. Principles however, do not set out legal consequences that follow automatically when the conditions provided are met. In other words, principles do not necessitate a particular decision. Judges

[13] D. Dworkin, *Taking Rights Seriously*, (Oxford: Clarendon Press, 1987),45
[14] Ibid., 38
[15] Ibid., 14
[16] Loc. Cit.

simply take them into account when and if they are relevant while deliberating out one outcome with another. Again, principles have dimensions of weight or importance, something rules do not have.

Dworkin shows us how principles play essential part in judgement about legal rights and obligations. Hart believes a rule guides the judge to his or her decision and Dworkin claims the rule does not exist before the case is decided. The judge appeals to principles as a justification for adopting or applying a new rule. Principles are binding as law, Dworkin says because the must be taken into account by judges and lawyers who make decisions of legal obligation. Dworkin show also that Hart's discretion is not valid. Like other theorists, he argues that only where there is accountability can we meaningfully speak of discretion in choice. Accountability, not the existence of standards, is the identifying feature of contexts in which discretion is 'at home.'[17] In other words, this argument holds that the notion of discretion arises when some people are attempting to exercise power in a political context and other people are prepared, at least on occasion, to challenge these attempts. As long as some people are accountable to others, the problem of discretion will remain; for it is choice in the context of power relationships that is the essence of discretion. Although no political society can do without power relationships, our uneasiness about the exercise of power even in the context of law means that we will always have ambivalent feelings about the existence and exercise of discretion.[18]

5. On Judicial Discretion Revisited

Discretionary choices are sometimes, but not always, made in contexts in which there are fairly specific criteria or standards that we can use to judge the soundness of the choice; recall Dworkin's 'strong sense' of discretion and the type of discretion Rosenberg calls 'primary'—that by definition exists when there are no such standards. This absence of standards does not immunize a decision or the person who made it from criticism, including the criticism that the discretion has been abused. To distill the essence of this discussion of various types of discretion, we may say that discretion is 'at home' in contexts in which people who are accountable in some way to others can expect to be subjected to criticism for the choices they make. Judges, by definition, make choices for which they are accountable. So, of course, do other public officials, including legislators. According to the analysis thus far presented, it makes sense to say that all these officials exercise discretion. Nevertheless, the situation of the legislator seems different from that of the judge. Although the legislator is accountable to the persons who elected him, his range of choice is so great that it seems odd to describe legislative choices as discretionary.

Identifying the difference between legislative choice and judicial choice is a difficult matter, and one that has received much critical attention. It is suggested that the distinction does not necessarily lie in the range of choice that is available to the decision maker. There are many legislative decisions that seem obvious and foreordained, just as there are many judicial decisions that are impossible to predict and that will be difficult to make. The difference between legislative and judicial choice lies rather in the range of criteria that are available to the decision maker for the making of his choices. No official has a totally unconstrained range of criteria of choice. The range of criteria to which different public officials may properly resort is dictated partly by the role played by each official and partly by societal expectations. One can argue that judicial choices, no matter how difficult, must be made on the basis of a circumscribed set of criteria, whereas legislative choice may be based on a much more extended range of criteria. It might, for example, be unobjectionable for a legislator to take his fourteen-year-old daughter's advice about how to vote on an issue, but intolerable for a judge to decide a difficult case on the same basis. We must not forget also that law exists for humans. It is on this ground that what Sidney says becomes relevant:

> The kinds of questions one naturally raises about law and even some questions within law are intimately related to questions philosophers have discussed in their professional capacity. The ends of law, the relation of law to justice, the role of law in preserving order, insuring stability in human transactions, and furthering human welfare are themes that raise ethical issues as profound as they are complex.[19]

To this end, law is not neutral to morality and social values. There is an intrinsic value for which law exists. Those who are custodians of law in the society are therefore obliged to see that the purpose for which law exists in the society is achieved. It is on this account that Fuller insists on the inner morality of law.[20] Fuller believes that there is an inner-morality of law that insists that there is a right way of doing things. He thinks there are important elements Hart and the positivists generally have missed in their rule theories of law and even on judicial discretion.

[17] Ibid., 57
[18] Loc. Cit.
[19] Sidney in Lyon David, *Principles, Positivism and Legal Theory*, 65
[20] L. Fuller, *The Morality of Law* (Yale: Yale University Press), 8

Fuller believes that law is fundamentally related to morality. This is derived from the purpose for which purposive activity such as law is established. Therefore, judgements about human affairs are not purely built on emotion or individual opinions. Fuller further accepts that Hart's distinction between power conferring and duty-imposing rules is useful but he points out that this distinction can be misapplied if these sets of rules are exclusive.[21] In addition, the distinction between them, as Hart's rule of recognition purports, in Fuller's judgement, presupposes that the power of the law-making organ, to which power is conferred, cannot be revoked. This belief is expressed in the following lines:

> But Hart seems to read into this characterization the further notion that the rule cannot contain any express or tacit provision to the effect that the authority it confers can be withdrawn for abuses of it. To one concerned to discourage tendencies toward anarchy something can be said for this and Hobbes in fact had a great deal to say for it. But Hart seems to consider that he is dealing with a necessity of logical thinking. If one is intent on preserving a sharp distinction between rules imposing duties and rules conferring powers, there are reasons for being unhappy about any suggestion that it may be possible to withdraw the lawmaking authority once it has been conferred by the rule of recognition.[22]

For Fuller, then, the lawgivers have also to account to the citizens for their work. Criticizing Hart's analysis, he alleges that 'every step in the analysis seems almost as if it were designed to exclude the notion of rightful expectation on the part of the citizens which could be violated by the lawgiver.'[23] Certainly, there are standards of legality, which every legal system adopts but to define and achieve legality, Fuller thinks that the element of purpose is important. The concept of purpose assures one of the standard against which we ought to assess legal ideal. Here is Fuller's comment where the element of articulate purpose, as an ideal for achieving the highest good for man, is not integrated into legality:

> If law is simply a manifested fact of authority or social power, then, though we can still talk about the substantive justice or injustice of particular enactments, we can no longer talk about the degree to which a legal system as a whole achieves the idea of legality; if we are consistent with our premises we cannot, for example, assert that the legal system of Country X achieves a greater measure of legality than that of country Y. We can talk about contradictions in the law, but we have no standard for defining what a contradiction is. We may bemoan some kinds of retroactive laws, but we cannot even explain what would be wrong with a system of laws that were wholly retroactive. If we observe that the power of law normally expresses itself in the application of general rules, we can think of no better explanation for this than to say that the supreme legal power can hardly afford to post a subordinate at every street corner to tell people what to do.[24]

Purpose builds on a particular vision and this, for Fuller, bespeaks a standard of excellence. Fuller insists: 'The view I am criticizing sees the reality of law in the fact of an established lawmaking authority. What this authority determines to be law is law. There is in this determination no question of degree; one cannot apply to it the adjective 'successful' or 'unsuccessful'.'[25] The rule of recognition, in Hart's understanding, according to Fuller, means that anything called law by accredited lawgiver counts as law; it does not present any specific guideline for authority that should be expressed through 'a tacit reciprocity.'[26] In that case, Fuller remarks 'the plight of the citizen is in some ways worse than that of a gunman's victim.'[27] Purpose implies intelligibility, which in turn argues for a right way of achieving that purpose. Fuller thus insists that a legal system derives its ultimate support from a 'sense of its being right', and 'this sense deriving as it does from tacit expectations and acceptance simply cannot be expressed in such terms as obligations and capacities.'[28] Therefore, to preserve the integrity of law at the point of enforcement, Fuller holds, there is need to make judges follow the law. And this can be 'done safely and effectively' if 'able and honest men' are chosen as 'judges and to invest their office with a degree of independence that will make them secure against outside influences.'[29]

[21] Loc. Cit.
[22] Ibid., 76
[23] Ibid., 55
[24] Loc. Cit.
[25] Ibid., 74
[26] Loc. Cit.
[27] Ibid., 75
[28] Loc. Cit.
[29] Ibid., 77

The foregoing analysis shows that the values of a society have a 'fiduciary grounding' in the personal backing given to them by men who, moved as they are by moral and intellectual passions, perceive and uphold these values with universal intent within a convivial order'.[30] Quite clearly, however, the embodiment of justice in laws and in judicial decisions is both necessarily incomplete and yet also achieved in part by more or less skillful judicial assessment.

> These skillful feats, supported by moral and intellectual passions with universal intent, are accredited by and subject to the superintendency of the convivial order within which they are achieved and whose very basis is in turn precisely this same passions.[31]

Hence, both Hart and Dworkin are right, but incomplete, in their interpretations of 'the law.' Hart is correct that law is legitimated by appeal to secondary rules and a 'rule of recognition.' Yet, as Dworkin rightly argued, some decisions regarding the nature of 'the law' can only be settled by appeal to principles (not reducible to rules) within jurisprudence. It certainly appears that 'principles' in fact play a role in some judges` arriving at decisions, interpreting their reasoning, and justifying their claims. At the same time, we now can account for why Dworkin was unable to identify all such principles, as well as why some legal principles remain unnoticed or undiscovered until a judge is forced to rule on a 'hard case.' Important legal principles implicit within the legal framework of legislation, judicial interpretation, etc., are present only tacitly. The principles are present and operative within the jurisprudential community, a community of universal intent. In certain 'hard cases,' one or more members of the community are forced (by the incompleteness of explicit case law) to render a decision which requires the application of the tacitly held principle. Under these conditions, that which is 'tacit' becomes the object of focal awareness. Accordingly, the 'right legal principle,' thus discovered, was present all along.

6. Fuller's Reading of Hart and Hart's Response

Hart's distinction between power conferring and duty-imposing rules sounds useful to Fuller though he points out that this distinction can be misapplied if these sets of rules are exclusive.[32] Again, Fuller admits that the distinction presupposes that the power of the law-making organ, to which power is conferred, cannot be revoked. It is important to note that Fuller makes us aware of the fact that the reason for requiring official actions is efficacy. Reciprocity between the giver of the rules and the subjects is fairness. If you give me rules to comply with, you should also comply. Hart does not bring out this idea in *The Concept of Law*. He takes it for granted that people who accept the law obey it, without asking their lawgivers to play their own part. But to say this, Hart would indicate, is not to say that he forgets the element of purpose in his book. He claims that his aims to 'present improved ways of describing and a clearer view of the legal system within which these purposes are pursued.'[32] In any case, Fuller would want Hart to specify which purpose ought to be worthy of pursuing by human beings that will show the fullest excellence and realization of aspects of human existence. Hart thinks that Fuller is not specific on what he means by a 'sense of being right' of the legal system. However, hart would point out that his own clarificatory task does not exclude a sense of being right. A sense of being right, in Hart's admission, would be reasonable way of ordering society by rules. The Concept of Law attempts to set a basis for the salient features of the legal system. As for not placing a check on official powers, which Fuller believes Hart forgets, Hart responds:

> There is, however, nothing in my theory, which leads to this result. There is, for me, no logical restriction on the content of the rule of recognition: so far as 'logic' goes it could provide explicitly or implicitly that the criteria determining validity of subordinate laws should cease to be regarded as such if the laws identified in accordance with them proved to be morally objectionable.[33]

Note that the adverb 'morally' used in the preceding statement should not be understood to refer solely to the justice that should be observed in the administration of the rules. In the Hartian view, it is morally objectionable not to treat like cases alike in the administration of procedural justice: certain laws remain morally iniquitous; but what Hart does not accept is the denial of legality to valid laws on the grounds that they are morally objectionable. Valid laws, for Hart, remain valid until they are repealed. The question of morality, for Hart, is not co-extensive with the issue of validity of law. Let us allow that no rule be understood or applied without reference to its purpose. Does this justify Fuller's claim that a reference to this purpose implies morality? In other words, are Fuller's principles of legality essentially moral principles? Given that some compliance to the inner morality of law is necessary for law to work, it is also possible that no amount of compliance guarantees that the system has

[30] Loc. Cit.
[31] Ibid., 78
[32] H. L. A. Hart, *Essays in Jurisprudence and Philosophy,* (Oxford: Oxford University Press, 1983), 358
[33] Ibid., 361

moral worth. In the light of this weakness, which haunts Fuller's presentation J. W. Harris criticizes Fuller, saying: 'evil laws would be no less evil merely because they were general, well publicized, prospective, clear, consistent, capable of performance, permanent and strictly upheld.'[34] One can apply all the principles of Fuller's legality without reference to morality. On one hand, one can publish clear laws that are ethically neutral or iniquitous, and one the other hand, vague laws can have some 'morally good substantive aim[35]' replies Hart. Although the rule of law shares certain characteristics with managerial rules, it should not be reduced to such rules. Efficiency in the managerial structure can be indifferent to principles of morality.[36] No wonder Hart insists that purpose should be clarified within a certain legal structure since law cannot be reduced to one ideal purpose; after all, good men will enact good laws and wicked men will enact wicked laws. So not only does Hart resist Fuller's understanding of purpose but also his merging of morality with law.

When Fuller defines law as a purposive activity built on eight criteria which he calls the 'inner morality of law; he obscures, as Hart rightly points out, the difference between efficiency in pursuing any kind of purposive activity and morality. Thus, as Hart claims Fuller's principles of inner morality are better understood as the principles of good craftsmanship, which every conscious legislator, for example, will possess.[37] As a purposive activity, law can certify all the criteria of legality and still not be moral.[38] Obviously, Fuller does not discriminate between efficiency in the pursuit of a purpose and the moral worth of that purpose or pursuit. However, one can still say that this does not exonerate Hart from the charges that the end of human law goes beyond clarificatory or functional analysis. He should have specified the purpose to which his book aspires in the light of the specific human good which law is to procure.

Recall that in *The Concept of Law*, Hart claims to describe law as positive fact used as an instrument of social control. He refrains from saying what aim of law or social control should be the ideal on moral grounds. What kind of legal order or ideal is worthy of human beings living in society? Are there some laws or social controls that are not worthy of man? What kind of moral ideals must a positive order mirror in the pursuit of human good? These are some of the relevant questions Hart avowedly refused to address. Fuller's merit is that he attempts to attach moral content to rules by their virtue of being aimed at a purpose—that of governing human conduct. His intention is indeed good—to underline that such an activity should be a worthwhile thing capable of realizing some moral good for man; that a legal state must have a sense of being 'right' deriving from tacit expectations and capacities. This cannot simply be expressed in terms of obligations and capacities. I think this 'moral expectation' is worth noting, though Fuller confuses issues in presenting it. It is not enough, as Hart does, to keep the element of purpose 'open,' claiming to describe merely a legal structure within which purpose are pursued. Perhaps, Fuller wants to say that there is something worthy of human beings in every legal structure no matter how one purport to describe them without any commitment to a specified moral idea. However, Hart might respond that the type of purpose, which Fuller asks from his method of analysis, is beyond the scope of such analysis, since his chosen-aim is to give a descriptive analysis or an independent account of a legal system. Given this then, he does not need to prescribe a moral basis for law.

Hart, in his reply to Dworkin, is interested in what law is and not in what the law ought to be. He claims that what law is could be elucidated in a non-reductionist way without leaning it on morality. He argues that law and morality need to be separated. Law needs an independent tribunal, that is, a moral scrutiny, for the assessment of its activity. Commenting on this, Neil MacCormick writes: 'The point is to make sure that it is always open to the theorist and the ordinary person to retain a critical moral stance in the face of the law which is. The positivist thesis makes it morally incumbent upon everyone to reject the assumption that the existence of any law can ever itself settles the question of what is the morally right way to act.'[39]

7. Moral Rights, Evil Law and Equal Concern

As Dworkin believes that judges should and do decide cases on the basis of rights, it is important we know what rights are and what kind people have. Rights, Dworkin maintains, normally trump utility; that is, rights cannot be overridden whenever society might be better off were that done.[40] Were judges to use policy arguments, rights might be overridden by the utility of policy goals. Moreover, it is central to Dworkin's theory that the legal rights

[34] J. W. Harris, *Legal Philosophies,* 32
[35] H. L. A. Hart, *Essays in Jurisprudence and Philosophy,* 352
[36] Ibid., 350-352
[37] Ibid., 347
[38] Ibid., 350

[39] N. MacCormick, *H. L. A. Hart* (London: Edward Arnold Limited, 1981), 25
[40] R. Dworkin, *Taking Rights Seriously,* 190-192

judges enforce are derived from political morality and remain a subclass of moral rights. Hart criticized both Dworkin's general view of the basis of rights and his claim that legal rights are moral ones. According to Dworkin, the fundamental moral principle for explaining and justifying political rights is that people have a right to equal concern and respect from government.[41] Dworkin denies, in particular, the idea that people have a general right to liberty.[42] This claim follows from his conception that rights trumps over utility. If people had a right to liberty of all actions, then practically all laws would infringe it. Dworkin's example is making a street one-way, which limits people's liberty to go the other way. In effect, he distinguishes liberty-rights from claim-rights; adding that only claim rights trump utility. On that note, Dworkin suggests again that equal concern and respect can justify some rights as a constraint on utilitarian calculations. He arrived at this by distinguishing between personal and external preferences.[43] According to him, personal preferences refer to goods and opportunities for oneself while external preferences are for other people having or not having goods and opportunities. In Dworkin's calculation, if the government passed laws on utilitarian grounds, that is, to maximize preference satisfaction, then external preferences could produce a denial of equal concern and respect. But if many citizens had racist or homophobic external preferences, then laws satisfying them would deny equal concern and respect to members of minorities. The result would therefore be that if utilitarian arguments are used, then external preferences must be omitted. One might then recognize rights to particular liberties to protect equal concern and respect if it is likely specific external preferences in a given community would unavoidably affect utilitarian reasoning.[44]

Hart is not in agreement with Dworkin; hence he has three main criticism of his theory. First and foremost, Hart does not think any modern theories of rights are adequate. No wonder he argues that what moral rights people have will depend on the state of the society[45] meaning that as rights are justified to prevent external preferences affecting utilitarian calculations, they depend on the external preferences prevalent in the society. Ironically, Hart says that as people become more tolerant in the sense of having fewer external preferences, fewer rights will be justified. Thus such rights would provide no protection against a tyranny that did not purport to promote the general welfare or to use utilitarian arguments. Again, external preferences do not violate equal concern and respect in any uncontroversial sense, but Dworkin takes equal concern to be uncontroversial.[46] Hart's argument is fairly complex and will only be outlined. Bayles writes:

(1) Counting external preferences is not the denial of equal concern in the sense of giving some people tow votes
(2) If a person has an external preference favoring some group, for example, shelters for the homeless, not to consider that preferences would deny the person equal concern. Her 'vote' for shelters would not be counted.
(3) There is no other procedural defect when negative external preferences are involved. The objection is not based on denial of equal concern but on denial of a substantive good.
(4) In voting, a majority is not saying a minority is inferior, but that it is too few in number. The procedural fairness of democracy and utilitarian calculations, alas, does not guarantee fair outcomes
(5) Sometimes a majority's restriction of a minority might be inspired by a concern for the minority. Laws designed to prevent people acting immorally or harming themselves are based on a concern for the moral or physical well-being of the minority
(6) Finally, elsewhere Dworkin recognizes that there are alternative conceptions of equal concern and respect; consequently, he cannot content that his view rests on an uncontroversial and accepted principle (EJP, 219 n.42).[47]

Third, Hart suggests that Dworkin's principal mistake is to treat denials of freedom as denials of equal concern.[48] Rather, the objection has to do with the content of the judgements—the denial of liberty.[49] Equal concern would be fulfilled even if people were equally denied liberty. What is crucial, Hart maintains, is that some liberties 'are

[41] Ibid., 180-183, 272-278; R. Dworkin, *Law's Empire* (Cambridge: Beklnap Press, Harvard University Press, 1978), 222, 296
[42] R. Dworkin, *Taking Rights Seriously*, 267-269
[43] Ibid., 234-236, 275-276
[44] Ibid., 277
[45] H. L. A. Hart, *Essays on Jurisprudence and Philosophy,* 213-314
[46] Ibid., 214-219; R. Dworkin, *Taking Rights Seriously*, 272-273; R. Dworkin, *Law's Empire,* 296
[47] M. D. Bayles, *Hart's Legal Philosophy: An Examination,182*
[48] H. L. A. Hart, *Essays on Jurisprudence and Philosophy,*217
[49] Loc. Cit.

too precious' to let the majority easily limit them.[50] One must consider the value of particular liberties as against increases in utility. This last point reflects Hart's views that rights are concerned with liberty and must be based on elements of individual well-being.

Dworkin replies vigorously to Hart's criticisms. Hart, he claims, exhibits 'a comprehensive misunderstanding' of his views, although Dworkin admits that his earlier statement would encourage such misunderstanding.[51] Apparently, Dworkin does not think that all external preferences should be omitted from utilitarian calculations, only those based on moral preferences about people's worth or how they should live.[52] Some 'nonmoral' external preferences function similarly to moral ones and should be excluded. For example, if some people think that John should have twice as much as other people, this is similar to thinking that John should have two votes. Thus, there is in effect a double counting. Point by point, Dworkin also responds almost to Hart's criticism of external preferences as not violating equal concern.[53] He contends that Hart seems to think results or outcomes indicate lack of equal concern, but it is in the premises for reaching such results—the counting of moral preferences—that do so. Dworkin accepts as appropriate Hart's fourth point, that a minority is too few, but only if the majority's position is not based on moral preferences. But to Hart's second point (about favorable external preferences), Dworkin responds that the issue is not whether people should work for justice but rather the test for what is just. That test, he says, should exclude moral preferences.

As to Hart's first and third points (about voting) together, Dworkin also replies[54] adding that he is considering rights as relative to a political morality and not to a society. This means that he is considering what rights might be required as part of a political morality that includes utilitarian considerations. Dworkin does not think ultimately hat such a morality is correct. In such a framework, he says, rights are only needed as defenses as against claims that some law will promote the general welfare. Plausibly too, such rights will rest on equality, an abstract right to equal concern and respect. Hart, however, appeals to a fundamental interest theory of rights—an interest in certain liberties. But such a view, Dworkin notes, would have trouble defending a right to view pornography in private, for it is implausible that a fundamental interest is involved. As he suggests, if Dworkin is only considering what rights a (partially) utilitarian theory should recognize, then he is not committed to the views described. Nonetheless, he does implausible suggest that if people have certain rights on a utilitarian theory, they would have them on any other theory.[55] Thus, he seems to be committed to those rights if not to the reasons for them in a utilitarian framework. Still, if Dworkin is now only claiming that utilitarian calculations should disregard moral preferences, then his point is not new. After all, Mill has noted that in considering the weight to be assigned pleasures, one should consider people's preferences 'irrespective of any feeling of moral obligation to prefer' a pleasure.[56] Thus, pleasures in the lesser goods of others, based on a moral judgement of their inferiority, would be excluded. However, the exclusion of moral preferences will not do the work Dworkin thinks it will. People might think homosexuals are immoral, or they simple might not like them as some people do not like others because of their taste in art. The same law might be justified on either basis. This difficulty probably accounts for Dworkin frequently shifting between moral preferences and negative ones (for example, between 'moral preferences' and 'others do not like them').[57]

Dworkin's account of the test of political justice he condemns is confused. Suppose many people have moral reasons for sheltering the homeless. 'I condemn,' Dworkin writes, 'a political process that assumes that the fact that people have such reasons is itself part of the case in political morality for what they favor.'[58] This statement confuses the reasons citizens might have for their preferences with those a government or legislator might have for enacting legislation satisfying the citizens' preferences. Citizens cannot cogently argue that they think shelters for the homeless are morally justified because most citizens so think. However, a legislator might plausibly argue that the government should provide shelters because most people think it morally justifiable to do so. If Dworkin is condemning the legislator's reason, then his point is certainly debatable. He is contending that a legislator

[50] Ibid., 221
[51] Ibid., 220
[52] R. Dworkin, *Harm to Others*. Vol. 1 of *The Moral Limits of the Criminal Law*. (New York: Oxford University Press, 1984), 282
[53]Ibid., 283-284, 288
[54] Ibid., 286-287

[55] Ibid., 289-290
[56] R. Dworkin, *Taking Rights Seriously*, 273
[57] J. S. Mill, *Utilitarianism: With Critical Essays*. Edited by Samuel Gorovitz. Original ed. 1863 (New York: Bobbs-Merill Co, 1971), 19
[58] R. Dworkin, *Harm to Others*, 287

should support shelters for the same moral reasons the citizens have, which sounds plausible. But, implausibly, the legislator cannot consider relevant the fact that most of her constituents share these moral beliefs. If, however, the citizens do not base their preferences on a moral belief, only a benevolent desire to help the needy, then a legislator can consider how many have that desire.

To conclude, Hart's criticism of what Dworkin's point seemed to him and others to be are generally sound. If Dworkin's were what he later claimed, the Hart missed the target. Dworkin's later claims are not noteworthy. Mill recognized that moral preferences must be excluded from utilitarian calculation. Dworkin's view that a legislator should not consider how many constituents morally support a measure but may consider how many do so on a utilitarian ground is implausible. If Dworkin is only endorsing those rights, he has not committed himself to any view of rights. He has not shown why a fundamental interest theory is wrong, nor has he derived rights from an abstract right to equal concern and respect. Of course, this is not to say he has not done so elsewhere, even in the rest of the paper in which he originally replies to Hart.[59]

8. Wicked Legal System

The last dispute between Hart and Dworkin concerns whether legal rights are a species of moral rights. Dworkin maintains that legal and moral rights are, at least, species of the same genus and 'creatures of morality.'[60] Hart denies this.[61] He believes that the difficulties with Dworkin's view become most clear in considering the old chestnut in the natural law versus positivism debate, evil laws, such as Nazi laws. Dworkin admits that in a wicked legal system even the law identified by the best or soundest theory might be quite evil.[62] This creates a problem for a judge. The law as given by the soundest theory conflicts with critical political morality. Sometimes, Dworkin maintains, a judge might be justified in lying about what the law is. That is, the judge might be justified in not awarding a party that to which she thinks the law actually entitles the party. Hart's major objection to Dworkin's view is that it either surrenders the claim that legal rights are species of moral rights or becomes a triviality that does not tell against positivism.[63] If a legal system has evil statues and decisions that must be explained by the soundest theory, the one can only say that the soundest theory is the least objectionable of unacceptable views that fit the evil law. This, claims, Hart contends, cannot provide even a prima facie justification for the law. It is like claiming that murdering someone is justified to some extent because it is not as bad as torturing and murdering the person. If the soundest theory does not justify all laws in all systems, one is left with the positivist claim that legal rights have a moral justification in a good system but not in a wicked one.

Dworkin, Hart says, might respond that fairness and consistency provide some reason to enforce even evil laws.[64] In clear cases, one would be treating like cases alike. In hard cases, consistent use of the implicit justifying principles would call for the same. This reasoning would provide only a prima facie moral right that could be outweighed. Hart contends that this argument does not generate even a prima facie moral reason for doing it again. Moreover, fairness and consistency do not apply to the first case arising under an evil statute. In such cases, for both Dworkin and a positivist, a legal right rests on the accepted practice of the system and no moral argument is needed. In hard cases, the principles of the system are immoral, so they cannot generate a moral right. Moreover, as the case is hard, a moral right cannot be supported by reliance on the law.

Dworkin rejoins that Hart has confused his account of how laws are identified with his reasons for thinking that they have some claim to be enforced.[65] These are two different matters. He believes that Hart is caught in a dilemma on this point.[66] If the acceptance of the system by officials gives a plaintiff some moral claim under an evil statute, then Hart cannot object to Dworkin for so holding. If the statute provides no claim, the Hart undercuts his view that the plaintiff has a legal right. Hart does not reply to this criticism, but he clearly denies the antecedent in the first horn of the dilemma. He does not believe that laws necessarily provide moral claims, even weal prima facie ones. That is the point of his denial that legal rights are a species of moral ones and the cornerstone of his positivism. That something is the law does not imply that it is even prima facie moral. The statute does provide a claim, namely, a legal one, and so supports a legal right.

[59] Ibid., 288
[60] R. Dworkin, *A Matter of Principle*. (Cambridge: Harvard University Press, 1985), Chap. 17
[61] R. Dworkin, *Harm to Others*, 256
[62] H. L. A. Hart, *Essays on Bentham: Jurisprudence and Political Theory*. (Oxford: Clarendon Press, 1982), 146-147
[63] R. Dworkin, Taking *Rights Seriously*, 326-327; 341-343
[64] H. L. A. Hart, *Essays on Bentham*, 150-151
[65] R. Dworkin, *Harm to Others*, 257-258
[66] Ibid., 259

Dworkin further explains the sense in which legal rights are moral rights.[67] Some officials in a wicked system might conclude that the system's great evil precludes it generating even a prima facie moral claim for a plaintiff under evil law. The question whether that is so is itself a moral one. If a judge decides that the plaintiff has no moral claim, then she should not hold that the plaintiff has a legal right. Instead, the concept of a legal right on the basis of evil law should be retained only for cases in which moral claims of the legal order and independent moral argument conflict.

9. Evaluation

From the foregoing analysis, it is all clear that the Hart-Dworkin debate develops as a dialogical process. The truth is that both theoretical viewpoints have one common goal: the restoration of the meaning and understanding of the concept of law. Rather than using the dialectic process that centers on conflict of opposition, Hart and Dworkin approached the issue dialogically. The feature elements of dialogues in building up a holistic legal system and framework are evident. Much of the debate about legal obligation or discretion turns on the issue of how law is made as this provides law its validity. Are judges who are engaged in deliberation discovering or finding what law says about certain cases or are they actually making new law?[68] Hart, a proponent of the former, has done much to extend the way we think about obligation from the perspective which Austin took that we are coerced into obeying what the law says to a much democratically sensitive standpoint we take on set by rules, which are set forth and accepted by the community in which we live. The distinction that Hart draws between the internal and external aspects is central here. Whereas people who take on an internal point of view will use expressions such as I had obligation to do so, suggesting a voluntary cooperation in maintaining the rules, as well as an identification of own behaviour and that of others in terms of the rules, people with an external view point, on the other hand, will rather focus on the unpleasant consequences of not complying or obeying what the rule says. To them, such expressions as I was obliged to do so or I am likely to suffer for it comes to play.[69] Thus they do not internalize the way in which rule functions as rules for most of the population in a community. The predictive theory of Austin, though recognizes the element of obligation in law, did not take into cognizance this internal aspect of rule. Hart sees it as very essential to the nature of law. Dworkin takes the latter view of how law is made, by setting the accent on how legal proceedings occur in the court room, and has reminded us of how instrumental the guidance of principle and policies are in arriving at important decisions and judgements in law. No doubt, all these encapsulate the totality of human enterprise which results as a dialogic product. The values of a society have a 'fiduciary grounding' in the personal backing given to them... by men who, moved as they are by moral and intellectual passions, perceive and uphold these values with universal intent within a convivial order. Quite clearly, however, the embodiment of justice in laws and in judicial decisions is both necessarily incomplete and yet also achieved in part my more or less skillful judicial assessment.

Humans excel in a circumstance of dialogue; differences are resolved with one accord using dialogue rather than conflict. The dialectical method thrives on a conflict of opposition. Thus the dialogical nature of human history is a development from the dialogical nature of the human person. While Hart's viewpoint is that of an external observer who refers to and tries to account for the view of participants in a legal system, Dworkin's viewpoint is that of participants, indeed a small class of participants—judges. Yet both of them want to know what law is so as to decide what to do. Thus, theirs was attempt towards building a normative theory. Though their different viewpoints however, generate different standards for a theory, an external observer wants to make the descriptive theory the best it can be; the participant wants to make the law the best it can be. Because it is a limited jurisprudence as it affects adjudication in particular legal cultures, Dworkin's view is not a rival to Hart's general theory. Reasons have not been provided to believe that a general theory like Hart's must be normative rather than descriptive. Even if moral considerations must be taken into account in legal reasoning, it does not follow that Hart's descriptive theory of the rule of recognition cannot account for this. Within a descriptive theory, laws generate legal rights but not necessarily moral ones. It has not been shown that judges do not have strong discretion.

For Dworkin's claim to the contrary to be correct, the following must be true: that there is correct theory of political morality; that no two theories of a legal practice can be equally supported; that the principles of such a theory must be capable of extension to any conceivable legal case; that there must be one correct balancing of conflicting legal principles; and that this balance of principles must determine a unique solution to a case. There

[67] Loc Cit..
[68] L. David, "*Principles, Positivism and Legal Theory*" in 87 Yale Review

[69] H. L. A. Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1961), 90

cannot be two different ways of achieving the balance, for example, by a broad substantive rule with the burden of proof on one party or by a narrow substantive rule with the burden on the other. It has certainly not been shown that all these enumerated claims are true. Dworkin does not admit that there might be tie cases. From the viewpoints of a judge, if cases without a correct answer cannot be reliably identified, they should assume that there is a correct answer. However, it has not been shown that no such tie can be identified. Even if they cannot be, whether judges should then assume that there is a correct answer is an issue of judicial ethics, of the obligations of a professional role, not of a general, descriptive legal theory of the sort Hart attempts to provide.

On a different note, Dworkin has really got an interesting point about principles and policies. One has to appreciate the roles principles, policies and other standards play in judicial decisions. Dworkin is right to insist that we cannot brush non-rule standards aside in evaluating the work of judges. Moral and political principles and other values are part of legal community whether these are made explicit or remain only implicit in the rules of the community. In a community where policies and principles are part of the legal materials, Dworkin sees the work of judges as discovering and announcing the rules, expressing the principles embedded in the rules and standards of the community and nothing more. Well, if this is how Dworkin think that judges should operate, it is also a welcome idea; although it does not seem that judges operate in this way. It is possible that judges are bringing to light in the hard cases what is implicit; it could be true that the legislator has not foreseen every situation or thought of every rule beforehand. In the preceding circumstance, judges can galvanize their interpretive mind through the inspiration of professional wisdom and make new rules. So, to that extent judges do make laws. Experience has shown this. It might be unfortunate for judges to legislate in a democratic society but as a matter of fact the impression in statutory language shows that judges are bound to legislate in some relevant circumstances. Thus, laws or rules, as Hart reminds us, might have open-texture.

It is good to demand a political responsibility from the judge just as it is demanded of a politician or any other citizen. However, to understand what the judge is doing in hard case as a political ‘game’ justified under political responsibility might not turn out to be for the best interest of the legal community. Surely, principles and policies which are part of the legal community will be reflected in the decision of the judge but he should not be expected to arrive at this through a kind of political ‘gamble’ in faithfulness to a purported kind of holistic political theory to which he is committed, or expected to commit himself. A particular political morality can propose itself as coherent but be far from being fair and morally sound. Thus, coherence might point to some sate of fairness, but it does not necessarily presuppose it. A coherent rule might be a product of some political morality. Even if a morality is political, it does not make it a good morality. A coherent morality is not necessarily a good or right morality. Coherence may still be very far from goodness or rightness.