RONALD DWORKIN'S CONCEPTUALIZATION OF LAW AND THE REFUTATION OF LEGAL POSITIVISM

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Abstract
There have always been disagreements among philosophers on the right conceptualization of law, especially in relation to morality. While the separation thesis of the legal positivists tends to make strong waves, Ronald Dworkin's conceptualization of law as integrity, presents a strong opposition to the said thesis. This study employs analytic and hermeneutic methods to expose the major claims of Dworkin's conceptualization of law and its refutation of legal positivism. Legal positivism first and foremost strives to understand what the law is. It is a theory about the nature of law, and not about the obligation to obey it. The question of whether there is an obligation to obey the law is a separate kind of question, in philosophical jurisprudence, introduced by Dworkin, one which is quite obviously moral. To what extent will the Dworkinian position be proven as true forms the major problem of this study. This study thus provides a theoretical forum for a middle ground between natural law theory and legal positivism. It finds that holding firmly to the positivists' principle of law as "what it posits" would warrant us to hold a crime as acceptable in the face of this principle.
Keywords: Law, positivism, naturalism, integrity of law, interpretivism, judicial discretion.

Introduction
The question of law has always been a major part of the many positive realities of the modern state. As a matter of fact, the emergence of the political society, as it were, necessarily brought about the emergence of law. It is law that distinguishes the civilized society from the pre-civilized society. Without law, men would return to the primitive condition of the state of nature, picture-able in the debased level of the Hobbesian state. This work intends to examine the socio-political realities in terms of Ronald Dworkin's conceptualization of law as integrity and its absolute refutation of Legal Positivism. The study seeks to provide answer to the quest for good social order within the purview of law. Similarly, it hopes to be a good sequel to the post Ronald Dworkin's conceptualization of law in a contemporary society.
As its general objectives, this study seeks to:

- show that morality does and should have some place in the law
- evaluate the claim that legal rules are not distinct from moral rules
- distinguish principles from rules
- understand the role of principle and other legal standards in law
- re-examine principles as propositions of political morality, affirming the existence of rights of citizens in a system of law
- substantiate Dworkin's claim that in interpreting the law judges must take into account the totality of laws, institutions, moral standards, and goals of society
- give substance to the view that morality fundamentally determines legal content and
- advocate for a moral reading of the Constitution.

While this research is designed to find out the significance of Dworkin's legal philosophy to contemporary societies, it is pertinent to note that analytical jurisprudence first and foremost strives to understand what the law is. It is a theory about the nature of law, and not about the obligation to obey it. The question of whether there is an obligation to obey the law is a separate

kind of question introduced by Ronald Dworkin, and one which is quite obviously moral. This theory thus provides students of jurisprudence a theoretical forum for a middle ground between natural law theory and legal positivism.

Dworkin remarks that law is an interpretative concept and as such every conclusion about what the law is in a given case is a result of interpretation, and interpretation is essentially an attempt to present its object in the best possible light and necessarily involves evaluative considerations. Indeed, every conclusion about what the law is, necessarily involves evaluative considerations and any theory about the nature of law is an interpretation of a social practice. Similarly, any interpretation of the law is basically an interpretation of the legal practice. Thus, both legal theorists and judges are engaged in an interpretation of a social practice which, in turn, purports to present the practice in its best light.

He argues that morality does and should have some place in the law particularly when determining disputes in the courts, and 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. Emphasizing the supremacy of law, Dworkin noted that all are equal under the law when the law governs us on a single, integrated vision of principles. As such, every person is entitled to equal concern and respect in the design of the structure of society. In order to sustain the society, therefore, judges should interpret the law in terms of consistent moral principles, especially those of justice and fairness.

In addition to uncovering the nuances of Dworkin's views, this study also endeavours to say something about the nature of law itself. Put differently, this is a work both about theoretical interpretation and about our practices of legal system today. We live in a time and place characterized by hard questions concerning both the morality and the efficacy of our legal institutions and practice.

Moreover, the study is a novel addition to an ongoing debate (about how to offer justification for legal institutions) that is furthered through theoretical consideration. Again, this study has implications for policy decisions on a state and national levels. Future works in the area of law and philosophical jurisprudence can benefit from the conclusions presented here whether that work produces a more nuanced, academic understanding of the subject or influences the policy makings that affect jurisprudence in a society.

This study presents a comparative analysis of the positions of analytical jurisprudence on legal positivism and Dworkin's legal interpretivism in search for an appropriate fashion in which law as integrity can be established in contemporary societies. These theories are discussed in the socio-politico-moral context viz-a-viz increasing quest to alter the status-quo to restore the declining dreams and resuscitate the intention of man in leaving the state of nature to form a civil society and enliven the dying hope of those who are victims of judicial inconsistencies in our societies. Also, a review of some "hard cases" occasioned by Dworkinian interpretivism are made in view of finding an option for a better socio-political-moral order. The missing link between analytical jurisprudence and legal positivism is provided by reference to Dworkin's concept of law as integrity.

The Problem in Perspective

There is a global wind of justice blowing across the world. Crime is being committed and perpetrated in all part of the society including theft, sexual assaults, murder, electoral and exam

malpractices, fraud and other corrupt practices. The occurrence of these crimes distorts peace and harmony in the society and inflicts untold harm on the victim from whom the criminal benefits. Therefore, there exists the need to provide an approach that is relevant for the establishment of justice and societal order once tempered with by offenders in the contemporary society which makes itself significant and relevant to our time. Surely this approach for the establishment of justice can be no other thing than law in concomitant with moral values of the society.

Indeed, a civil society can be no better than the pre-civilized society without law and order to guide and direct behaviours. So, it seems that no law exists for its own sake but for the good of the society in which it exists. Laws are, therefore, made in order to preserve social values, which for Dworkin culminates in the societal moral values. The legal positivists, however, disagree with this position. For the legal positivists, there is no logically necessary connection between law and morality. This is because, in this view, the content of law is determined by what is socially recognized. For this reason, neither the tests of legal validity nor the norms they recognize as valid need have any morally respectable character to qualify as law.[1] Rather, there simply need to be a significant degree of factual social consensus on the criteria of legal validity. Dworkin rejects this conception of law as he insists that morality is a fundamental determinant of which norms are law.[2]

One would then wonder what law is all about? Is law independent of moral concerns? And in a situation where the existing law fails to prescribe a guide for a particular problem, what should the judge do?

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. For Dworkin, however, if this strong discretion existed, it would imply a new law and it would mean that the new law would act 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.[3] Therefore, Dworkin rejects the concept of strong judicial discretion, instead, he makes a distinction between rules and principles, arguing that when adjudicating in hard cases, the judge invokes a legal principle (which can be regarded as legal due to its substantive, moral and political content) and decides the outcome of the case accordingly. This distinguishes Dworkin's 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.

For Dworkin, rather than seeing law and morality as autonomous domains we might treat law not as separate but as a department of morality. He understands political theory as part of morality more generally understood. In his formulated theory based on the right 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. He explains that if an issue already has not been covered by a law, 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 Hercules (that Dworkin creates), must take into account the totality of laws, institutions, moral standards,

and goals of society 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.

In Dworkin's view, 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. Hence, he concludes that even in a hard case, where rules do not provide definitive guidance, there is a single preexisting right answer.

Legal Positivism and the Separation Thesis

There are many versions or interpretations of legal positivism. Perhaps, the most popular interpretation would be the separation thesis. According to H.L.A Hart, an English contemporary legal positivist, separation thesis is the essence of philosophical jurisprudence.[4] The main point or essence of this thesis is that, the law and morality are conceptually distinct.[5] Hart says that there is no logically necessary connection between law and morality. He explains that to classify all laws as moral commands is to oversimplify the relation between law and morality. He also explains that to conceptualize all laws as moral commands is to impose a misleading appearance of uniformity on different kinds of laws and on different kinds of social functions which laws may perform. He argues that to describe all laws as moral orders is to mischaracterize the purpose and function of some laws and is to misunderstand their content, mode of origin, and range of application.[6]

Similarly, for John Austin, another English legal theorist, the law must be entirely free of moral notions.[7] However, Austin thinks that the specific content of the law considers not only an inquiry into its existence, but also a separate inquiry into its merit or demerit. This implies that the laws can, and do at least sometimes, reproduce or satisfy certain demands of morality.[8] Hart agrees with Austin.[9] He explains that Austin did not actually say that the norms of moral law and the precepts of the natural law did not have any influence in the promulgation of rules and regulations. In addition to this, he also says that Austin did not imply that positive law is non-moral. For legal positivism, therefore, a person may argue that positive law must conform to moral and natural law but to say that positive law is null and void simply because it is conflicting with the moral and natural law is foolish and absurd.[10]

Ronald Dworkin's Refutation of Legal Positivism as Background to His Conceptualization of Law

Dworkin's theory of law is a very complex challenge to analytical jurisprudence in general and legal positivism in particular. The challenge is both substantive and methodological. In substance, Dworkin aims to undermine the positivist insight that a clear distinction exists between law and morality. At the methodological level, Dworkin strives to undermine the traditional distinction between an analysis of the concept of law and the interpretation of what the law is in particular.[11]

The pertinent question arising from the ongoing is, what facts, in general, determine the norms that a legal system has? Legal positivists have traditionally said that what fundamentally makes a legal proposition true is some social fact(s).[12] For example, Hart has it that the social acceptance among officials of a common set of criteria for identifying law (what he famously calls a rule of recognition) is at the foundation of a legal system in that all others of its legal rules are law in virtue of satisfying these accepted criteria. Put differently, what the law is, depends on what is conventionally recognized.

Since the content of law is determined by what is, in fact, socially recognized, neither the tests of legal validity nor the norms they recognize as valid need have any morally respectable character to qualify as law.[13] Rather, there simply need to be a significant degree of factual social consensus on the criteria of legal validity. Dworkin rejects this kind of picture of legal content. On his view, the answer to legal questions does partly depend on existing legal practice. However, that practice need not have consensus at its base, and morality is a fundamental determinant of which norms are law.[14]

The legal positivists believe that sanctions and incentives are attached to a legal norm. This, for them, is what distinguishes a legal norm from other social norms. Waluchow states:

> If the law is not considered as positive or jussive, then it becomes the same or similar with the other social norms. It is because of the positive and jussive characteristic of the law that the members of the society are obliged to conduct themselves in the manner prescribed, authorized, or permitted by the legal norm. There is no need for further deliberation amongst the members of the society. They should observe and obey the legal norms, if not, they must suffer the consequences. These norms of conduct bring about peace and order within the society.[15]

This may have been the best defense yet for the positivist theory of the conceptual independence of law from moral and natural laws. The law, as the positivists conceive it, has three essential attributes,[16] namely the conscious formulation, generality, and authoritativeness. As a conscious exercise of authority, the rule or norm is different or separate from morals. A specific rule or norm of human conduct must be articulated before there would be an actual law of any kind. *Conscious formulation as an element, distinguishes a rule or norm of positive law from a rule or norm of morality*. In the case of morality, consensus is not a necessary requirement for the validity of a norm. Also, there may be no cause of action to enforce performance of it. However, when they are voluntarily done they cannot be undone anymore even on the allegation that their performance was without legal consideration.

Dworkin himself purports that positivism is committed to four central claims:[17] First, Model of rules – a legal system is a set of rules. Second, Rule of recognition and the separation of law and morals – valid legal rules are distinguished from spurious legal rules and from moral rules and etiquette by a master rule, the rule of recognition. The rule of recognition sets out specific non-contentful criteria for legality. Third, Discretion – the set of valid legal rules is all there is to "the law." If a case is not clearly covered by rules, whether due to vagueness, conflicting rules, or a gap, the case is not covered by "the law." The judge must exercise his discretion, creating new law and applying it retroactively to the case at hand. In hard cases, judges exercise discretion because there is no preexisting right to enforce. Fourth, Legal obligation – citizens have obligations and duties only when their cases are covered by valid rules.

Dworkin calls these criteria "tests of pedigree" or the manner in which they were adopted or developed. Dworkin generally uses the term "pedigree" to mean a historical or morally neutral test. For Dworkin, morality is a fundamental determinant of which norms are law. Dworkin attempts to establish four propositions that form the foundation of his jurisprudence.[18] First, rules are distinguishable from principles. Second, judges use principles (in addition to rules). Third, principles are part of the law. Fourth, the positivists' master rule, the rule of recognition, cannot validate principles as law.

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"[19] or rather a rule is either valid or invalid, unlike principles, which do not apply to cases quite so strictly. For Dworkin, 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. Therefore, this distinction between rules and principles introduces Dworkin's most consistent disagreement with the conventionalist (that is, positivist's) view of law.

Judge's Discretion viz-a-vis Legal Principles

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.[20] For Dworkin, however, if this strong discretion existed, it would mean that the new law would act 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.[21] Therefore, Dworkin rejects the concept of strong judicial discretion and with the distinction between rules and principles in hand, indicated that when adjudicating in hard cases, the judge invokes a legal principle (which can be regarded as legal due to its substantive, moral and political content) and decides the outcome of the case accordingly. This distinguishes Dworkin's 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.

It is out of this discussion that Dworkin's "one right answer" thesis arose.[22] 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 act as what Dworkin calls the "moral fabric" of a society which protects interests which members of a society regard as valuable interests which can be specified in terms of rights such as the right to life, liberty and human dignity.[23]

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 Dworkin uses to argue that morality does and should have some place in the law particularly when determining disputes in the courts.

Law as Integrity

Given the foregoing, the conceptualization of law as integrity is a central point in Dworkin. It is majorly on how this integrity can be realized that Dworkin disagrees with the positivists. While, for Hart and other positivists, integrity lies in the realization that law is essentially distinct from moral concerns, for Dworkin, the reverse is the case. Integrity of law can only be established by its moral inclination. The integrity of law lies in the understanding that morality does and should have some place in the law particularly when determining disputes in the courts since laws are meant to protect social values such as justice, equal treatment, etc.

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.[20] Dworkin explains the hypothetical judge's 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.

Philosophical jurisprudence in Dworkin, to a far extent, hinges on an evaluative discourse of how to resolve hard cases. In the case of Riggs v Palmer which Dworkin highlights, 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.[21] 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.

Evaluation and Recommendation

Dworkin holds that the best interpretation of legal practice is a conception of law that he calls law as integrity. One of the tenets of law as integrity is this: rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification. Implicit principles determine which rights and responsibilities flow from given past decisions. For this reason, "Law as integrity is, all things considered, the best interpretation of what lawyers, law teachers, and judges actually do and much of what they say."[77]

Law as integrity asks [judges] to continue interpreting the same material that it claims to have successfully interpreted itself. It offers itself as continuous with-the initial part of the more detailed interpretations it recommends. When Hercules, the ideal judge, is asked to decide a case under a statute, "he will ask himself which reading of the act…shows the political history including and surrounding that statute in the better light."[78] Again, law as integrity requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole.

Similarly, Dworkin's theory of adjudication, the rights thesis, is designed to avoid retroactive application of law. Dworkin names his theory so that it wears its major claim on its face: judicial decisions enforce preexisting (political) rights. The rights thesis is able to avoid retroactivity because it asserts the controversial right answer thesis: there are always legally authoritative standards (for example, principles) that recommend single right answers in hard cases. This claim allows Dworkin to deny the positivist doctrine of discretion that leads to the charge of retroactivity, which itself leads to the further charge that enforcing judicial decisions in hard cases has not been justified.

Dworkin's primary concerns 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" or rather a rule is either valid or invalid, unlike principles, which do not apply to cases quite so strictly. For Dworkin, however, 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.

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 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.[79] Therefore, Dworkin rejects the concept of judicial discretion and with the distinction between rules and principles, indicated that when adjudicating in hard cases, the judge invoke a legal principle (which can be regarded as legal due to its substantive, moral and political content) and decide the outcome of the case accordingly. This distinguishes Dworkin's concept of judicial reasoning form 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.

For Dworkin, 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 Dworkin uses to argue that morality does and should have some place in the law particularly when determining disputes in the courts.

It is against this background that this paper argues that the bed rock of any democratic society is an independent and credible judiciary whose mandate is to give the people their constitutional rights through a fair and constructive interpretation of the constitution in adjudication of cases. This research also calls for a review of the Nigeria Constitution, for any law unable to present the people in their best possible light lacks dignity and integrity. The study observes that judges and legal scholars can gain a better understanding of certain rules by conducting a constructive interpretation of them; in other words, by looking for the best interpretation of those rules, bearing in mind the dimensions of 'fit' and 'justification.'

Dworkin considers the principle of equal concern and respect as the leading notion that rules should always have to comply with. This principle can be seen as the foundation of all legal rules. The legal scholar should therefore keep this notion in mind when interpreting a certain legal practice. Also, when interpreting the relevant rules, the legal scholar must bear in mind the conception of law as integrity. This not only indicates that law has to be seen as a consistent and coherent set of rules, but also implies that the interpreter has to view legal rules against the background of the current legal system so that the interpretation fits with the principles implied in the existing legal system. Dworkin offers us an uplifting image of law. He challenges us to renew our faith in the law by recasting the lenses through which we view the role of law and legal practice. Indeed, interpretation and application of law irrespective of morality is the foundation of social injustice often experienced in the courts of law. In Dworkin's words, "We live in and by the law; it makes us what we are."

This paper recommends that policy makers should re-examine the constitution in the light of Dworkin's ideal of integrity which can be made manifest in the judge's evaluation and interpretation of laws and legal principles in terms moral values. The bed rock of any democratic society is an independent and credible judiciary whose mandate is to give the people their constitutional rights through a fair and constructive interpretation of the constitution in adjudication of cases. Hence, legal practitioners should avoid the application of laws and legal principles to cases in the sense of "what the posits" independently of just moral grounds. For, as Dworkin rightly asserts, some moral principles we hold are often wrong, even to the extent that certain crimes are acceptable on their bases.

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