CHAPTER ONE

INTRODUCTION

1.1 Background of Study

The complexity inherent in the nature of law, scholars say, is responsible for theproblems of definitionusually faced by menwho are professionally concerned either to teach or practice law, and in some cases, to administer it as judges. It is also responsible for the variety of conflicting theories that areabout the nature of law, which makes it difficult to reach a consensus on what law is. Some lawyers have argued that this complexity is not featured in the practice of law as it is found in the academic discussion of law. The truth, according to Harris, is

> listen to a professor of law being interviewed on radio or television about the law on some controversial aspect of industrial relations or racial discrimination, we may find it difficult to draw a line dividing those sentences in which he says what the law is, from those in which he says what it ought to be. "The act says…and it's clear that Parliament must have intended…after all, the reactions of the TUC make it plain how absurd it would be if any other view were taken…so my answer to your question is, yes, the law does require that…'[1]

Hart recognizes this fact when heobserves thatfew questions concerning human society have been asked with such persistence, and answered by serious thinkers in many, diverse, strange and even paradoxical ways as the question "What is law?[2]

Incidentally, effortsso far made by scholars and men of the legal profession to resolve this matter, notwithstanding their different and diverse perspectives, have not yielded sufficient result; hence further attempt is required.Kant, one recalls, once said rightly that this problem cannot be solved using the empirical viewpoint. For him, the answer must be sought from the metaphysical perspective, andit requires an a priori and not an a posteriori approach. But not all are prepared to accept Kant's claim. It is obvioust hat Kant consents to the naturalist's stream of thought, regarding law and its nature.

Natural law theorists generally assert that there is order inherent in the nature of things in the universe. This order is both descriptive and prescriptive. Descriptively, it describes the way objects normally behave or react uniformly all over the world under certain conditions. It also describes certain uniformities in the universe. Example of such order is Kepler's law of planetary

motion which describes how planets do actually move, and not how they should move.Prescriptively, on the other hand, it dictates how entities should behave. Like an order or a command emanating from a competent legislative authority, this kind of law regulates human behaviour; prescribing how things should be done or how men should behave. This kind of natural law is only applicable to human beings because it presupposes rationality and freedom, and human beings are the only free, rational beings in the universe. In other words, only human beings can be said to be subject to law in its prescriptive sense. Only human beings can be said to be governed by law, and it can only be intended for human beings.

When human beings become subject to law in its prescriptive sense, they do not cease to be free beings, for law does not remove man's freedom. This means that they are still free and can therefore choose to disobey the law. Thus, law in its prescriptive sense can be disobeyed; some people may choose to obey it while others may choose to disobey it.

It is in this prescriptive sense that natural law inclines an entity to perfection inherent in its nature. Man's true nature is to live in accordance with the law of reason. Law of reason is an expression that man lives a true moral life. Thus, natural law theoristscontend that the concept of law necessarily includes a moral element. A rule, they argued, however aggressively it might be enforced, could not truly be law unless it satisfied a moral test of acceptability.

The Aristotelian Thomistic tradition held that law is a dictate of practical reason. No doubt, Aquinas defined law as an ordinance of reason promulgated by one who has care for the community whileBlackstone insists law was not what legislatures said or judges thought, but law as it ought to be.[3]

Positivism brought about a wind of change in the direction of human reasoning. As "a philosophical system recognizing only that which can be scientifically verified or which is capable of logical or mathematical proof, and therefore rejecting metaphysics and theism,"[4] legal positivism is an approach to the question of law, which claims that law is characteristically created and posited by the authority of the society who provides its sole source of validity. One scholar has it that "It is the theory that laws and their operation derive validity from the fact of having been enacted by authority or of deriving logically from existing decisions, rather than from any moral considerations (e.g. that a rule is unjust)."[5]

Legal positivists include Jeremy Bentham, John Austin, Hans Kelsen, Hart, 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. According to him,

1) The contention that laws are commands of human beings; (held by Bentham and Austin)
2) The contention that there is no necessary connection between law and morals or law as it is and law as it ought to be (held by Austin, Bentham and Kelsen);
3) The contention that the analysis (or study of the meaning) of legal concepts is a) worth pursuing and b) to be distinguished from historical inquiries into the cause or origins of law, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, ‘functions,’ or otherwise (held by Austin and Kelsen);
4) The contention that a legal system is a ‘closed logical system’ in which correct legal decisions can be deduced by logical means from predetermined rules without reference to social aims, policies, moral standards (not held by Kelsen); and
5) The contention that moral judgement cannot be established or defended, as statements of fact can, by rational argument, evidence, or proof (‘non-cognitivism’ in ethics)(held by Kelsen and Hume).[6]

With this, it is obvious that positivism is not a homogenous school because the members do not have exactly the same concept of law. They stress different aspects of law and conceive law somewhat differently. In Hart’s judgment, Bentham and Austin held the views expressed in (1), (2), and (3), but did not hold the views held in (4) and (5). Hans Kelsen held (2), (3), and (5). Hart appreciates the views of Austin and Kelsen, while insisting that their views are reductionistic.

Aware of this reductionism that legal positivists generally feel uncomfortable about the views of the natural law theorists, Ronald Dworkin, once Hart’s former student and successor as Professor of Jurisprudence at Oxford University, does not accept the view of legal positivists as represented by Hart. Dworkinrather accuses the positivists, notably Hart, for failing to give a satisfactory account of law, precisely because it adopts the empirical approach to the study of law.

Arguing that legal positivism fails to accommodate the concepts of natural justice and natural right within its theory, given its empirical approach and its rejection of the concept of natural law, Dworkin inquires to know how there could be natural justice or natural rights

without natural law.In Chapters 2 and 3 of his work: *Taking Rights Seriously*,Dworkin's purpose is made clear enough:

> I want to make a general attack on positivism, and I shall use H.L.A. Hart's version as a target, when a particular target is needed."[7] His strategy is also manifest: "My strategy will be organized around the fact that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases […] they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards. Positivism, I shall argue, is a model of and for a system of rules […which] forces us to miss the important roles of these standards that are not rules.[7]

Consequently, Dworkin insists that there is much more to the concept of law than the rules in a legal system. With his idea about legal principles, which he claims judges know better,Dworkin argues that judges know very well that cases are not always disposed of by the mere application of a legal rule. For where the application of a legal rule would conflict with any principle of natural (law) justice, Dworkin says, the legal rule in question has to give way to the principle of natural justice.

This contra position of Dworkin against those of the positivists of Hart and his kind has given rise to what is popularly known and referred to as Hart-Dworkin debate in the Anglo-American legal philosophy for the past four decades. This debate has attracted a lot ofbooks and articles which either defends Hart against Dworkin's objections or Dworkin against Hart's defenders.[8]It is this background that makes this work necessary as it investigates on the core issues around which the whole discussion is organized.

1.2 Statement of Problem

The judge makes judgement in human affairs. There is a claimthat he reasonsabout it. Not many are ready to accept such claim; hence the question: does reason actually play a role in judicial adjudication? Opinions are divided on this as each theorist argues from a particular point of view.As one author says,a theory of legal reasoning requires and is required by a theory of law. Since any account of legal reasoning makes presuppositions about the nature of law, theories about the nature of law can be tested out in terms of their implications in relation to legal reasoning.

It isthus basic to examine which theory of law has the correct answer about law and adjudication. Natural lawyers argue that there is a universal law discoverable by reason to which human laws should approximate. The positivists contend that law is simply a posited fact in society, which validity derives from the authority that posits it. Legal realists, though, sub-group within legal positivism; urge that we seek what law is among the lawyers and in what obtains in courts. Indeed, there is lawyers' ethics specifying which claim about law is right and correct. The problem therefore is: What is the ground for a possible ethical sound lawyeringsince law embodies the story of the people in the socio-legal order among other human phenomena?And specifically, how are we to adjudicate over Hart's view and that ofhis student Ronald Dworkin?

1.3 Purpose of Study

In this work, the aim is not to take side in this controversy between Hart's views and that of his student, Ronald Dworkin. Interestingly, and in a more preliminary manner, the work seeks to present the basic subject matter of the discussion by identifying the core issues around which the Hart-Dworkin dialogue is organized. The study therefore, examines, at some length, the main argumentative strategies employed by the duo to advance their causes.

In all, the aim is toclarify some of the fundamental misunderstandings of the ordinary people regarding the way lawyers and courts reason and adjudicate over legal problems. It assesses how the judge can make a distinction between good and bad, more sound and less sound, relevant and irrelevant, acceptable and unacceptable arguments in relation to philosophical, economic, and sociological issues and legal disputation in particular.

1.4 Scope of Study

The work is limited in two forms. Firstly, it is narrowed to Hart and Dworkin's legal philosophies. Secondly, it is restricted to the extent that though both Hart and Dworkin are contemporary legal jurists, and have written very extensively on many other topics in law, constitutional, criminal and international, this present work is an examination of their legal theories generally and particularly as it borders on such core issues like legal obligation, justice, law and morality, judicial discretion, legal reasoning and rights.

1.5 Significance of Study

The significance of the work is seen in the fact that it is by laying bare the basic structure of the debate that we will be able not only to explain why the jurisprudential community has been fixated on this controversy, but also to determine the most profitable direction for the debate to advance in the future.Secondly, the work is an attempt in philosophy to address some issues bordering on legal judgements in human concerns. Thus as a philosophical analysis, it is addressed both to philosophers of law; practicing lawyers and juristswho make judgements in human affairs while considering some of the problems they usually encounter especially in their efforts to make right decisions and judgements in human matters.

The work further serves as source of information to those of them who are professionally concerned either to teach or practice law, and in some cases, to administer it as judges.

1.6 Method of Study

The study applied the dialogic method. This means that, applying the four stages of the dialogic method: thesis, enthesis, prothesis and synthesis, the study achieved progressive integration of results in the chapters of the work.

Thus, chapter one surveys the background of the work; t situating it within the natural law tradition. Chapter two reviews some literatures preceding the core issue treated in the work such as works by Bentham, Austin,Holmes, Kelsen, Fuller,and Raz. Hart's line of thought was equally reviewed and Dworkin, who, reacting to Hart's position, insists on some kind of political morality in law. Chapter three and four presents the core thesis underlying Hart and Dworkin's legal theories respectively while chapter five examines the dialogics of their legal methods. Chapter six is an evaluation and conclusion of the entire work.

In all, the materials for the dissertation were collected primarily from works by Hart and Dworkin themselves and secondarily from other related literature, periodicals, and resource reports, which were all instrumental in the reading, analysis and interpretation of the legal theories of Hart and Dworkin.

1.7 Definition of Terms

1.7.1 Legal Method

The word 'legal' according to the Marrian Webster's dictionary "is something relating to law…or conforming to rules or law; where 'law' is a set of rules enforced through a set of institutions."[9]A legal method is therefore the understanding and the use of professional procedures and technique in interpreting case law, and statutes, etc. It is the way law operates in the society and how lawyers, judges and legislatures think and do things according to the law so as to achieve their objectives in the society.

1.7.2 Dialogics

The dialogic process stands in contrast to a dialectic process (proposed by G. W. F. Hegel).In a dialectic process describing the interaction and resolution between multipleparadigms or ideologies, one putative solution establishes primacy over the others. The goal of a dialectic process is to merge point and counterpoint (thesis and antithesis) into a compromise or other state of agreement via conflict and tension (synthesis). It is a synthesis that evolves from the opposition between thesis and antithesis. Examples of dialectic process can be found in Plato's Republic.

On the other hand,in a dialogic process, various approaches coexist and are comparatively existential and relativistic in their interaction. Here, each ideology can hold more salience in particular circumstances. Changes can be made within these ideologies if a strategy does not have the desired effect. These two distinctions are observed in studies of personal identity, national identity and group identity. Sociologist Richard Sennett has stated that the distinction between dialogic and dialectic is fundamental to understanding human communication. Sennett says that dialectic deals with the explicit meaning of statements, and tends to lead to closure and resolution. Whereas dialogic processes, especially those involved with regular spoken conversation, involve a type of listening that attends to the implicit intentions behind the speaker's actual words.Unlike a dialectic process, dialogics often do not lead to closure and remain unresolved. Compared to dialectics, a dialogic exchange can be less competitive, and more suitable for facilitating cooperation.[10]

Bakhtin contrasts the dialogic and the "monologic" work of literature. The dialogic work carries on a continual dialogue with other works of literature and other authors. It does not

merely answer, correct, silence, or extend a previous work, but informs and is continually informed by the previous work.[11] Dialogic literature is in communication with multiple works. This is not merely a matter of influence, for the dialogue extends in both directions, and the previous work of literature is as altered by the dialogue as the present one is. The term 'dialogic' does not only apply to literature. For Bakhtin, all language—indeed, all thought—appears as dialogical. This means that everything anybody ever says always exists in response to things that have been said before and in anticipation of things that will be said in response. In other words, we do not speak in a vacuum. All language (and the ideas which language contains and communicates) is dynamic, relational and engaged in a process of endless redescriptions of the world.

Odimegwu conceives ofdialogics as a process of evolving a new meaning or reality out of an existing one by means of rejoining and conjoining. It is both a method of understanding and a way of being. It is ontological in the sense that what is realized is being. It could be epistemological giving rise to a new meaning, bringing new knowledge into being by the open conjunctures of marriage. In a dialogic process, new ideas are developed from existing ones by means of communicative interaction, relationship and involvement rather than counteraction, disagreement or refutation."[12] The aim is to arrive at a certain unity of meaning by way of integrating the new sense in the on-going knowledge for better coherence and inclusive meaningfulness. Comparing dialectics and dialogics, he further writes:

> As a method of philosophizing, dialectics progresses by division and selection, conflict and opposition while dialogics a process of communing comprehension adopting the attitude of involvement and integration. Dialectics adopts the disposition of exclusive inclusion or inclusive exclusion while the perennial orientation of dialogics is inclusive inclusion of all aspects of the matter or discourse. Furthermore, while dialectics progresses in three stages of thesis, antithesis and synthesis, dialogics progresses in four stages of thesis, enthesis, prothesis and synthesis. Dialogics, therefore, presents philosophy not as a dialectical game but as a dialogical involvement that operates by an integrating inter-inclusivity characterized by holistic openness to truth and being[13]

1.7.3 Discretion

Discretion is the power or right to decide or act according to one's own judgment. It is a freedom of judgment or choice.That is to say that discretion is freedomorauthoritytomakejudgmentsandactasonedeemsfit.

End Notes

1.H. L. A. Hart, *The Concept of Law*, (London: Oxford University Press, 1971), P. 1

2.T. Aquinas., *Summa Theologica,* First Complete American Edition in three volumes. Literally trans. by Fathers of the English Dominican Province (New York: Benziger Brothers, Inc. 1947) 1-11, q.90, a.2

3. W. J Jone, *Positivism: definition.* Retrieved on linefromhttps://en.wikipedia.org/wiki/Positivism

4. Loc. Cit.

5. H. L. A. Hart, "*Positivism and the Separation of Law and Morals*" in *Harvard Law Review,*vol. 71, No. 4, 1958 p. 601

6.R. Dworkin, *Taking Rights Seriously* (New Impression with a reply to Critics) (London: Gerald Duckworth & Co. Ltd, 1977), 22

7.R. Dworkin, "*The Model of Rules I*," reprinted in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 12

8. *Oxford Advanced Learner's Dictionary*, The New 7th edition

9.I. Odimegwu, "*A Dialogic Reading of Contemporary African Philosophy"* in *Discourse in African Philosophy; Celebrating the Genus of J. Obi Oguejiofor*. Edited by Ike Odimegwu et al. (Nigeria: Fab Anieh Nig. Ltd, 2015), 74-87

10.Ibid.,74-87

11. Mikhail Bakhtin, The Dialogic Imagination, ed. Michael Holquist, London: University of Texas Press, 1981, 2.

12.I. Odimegwu, Loc. Cit. 74-78

13.Ibid.

CHAPTER TWO

LITERATURE REVIEW

This aspect of the work basically indicates and traces the development of the gap intended to be filled in the course of this work. It is undoubtedlyclear that Hart and Dworkin are at par over what constitutes the nature of law; how law is related to morality and the extent to which it can be said that the judge legislates.

The origin of this problem is traceable to man's awareness of the existence of law of nature, which is as old as man's sense of right and wrong, good and evil, justice and injustice. The awareness of this law is universal but all people do not express it in the same way. Hence its modes of expression differ from one culture to another. While one culture expresses it in abstract philosophical terms, another culture may express it in simple terms as part of their ethico-cultural awareness of right and wrong, good and evil, justice and injustice. While one age or culture emphasizes the obligations or prohibitions of this law, another age or culture may emphasize the other side of the coin, that is, the rights conferred on man by this law.

It is on this backdrop that the exponents of this law, especially the Greek, maintain that the law of nature is a law of Reason, that is, a law that accords with the rule of reason and is discoverable by reason. Its fundamental (primary) principles are self-evident to reason while others (the secondary principles) are deducible from the primary principles. The most basic of these principles is that good should be done while evil should be avoided.[1]

There are two sides to this law namely, the obligations or prohibitions that it imposes on all human beings (both rulers and the ruled), and the rights (popularly known as "natural rights or simply as "human rights), which it confers on all human beings.[2] In the Ancient and mediaeval periods, emphasis was placed on the obligations or prohibitions of this law,while in the modern and contemporary periods, emphasis shifted from the prohibitions derived from it to the rights ("natural rights", "human rights") derived from it.

Thus, all the exponents of this law, notwithstanding their differences and period, believe that nature intends man to behave in certain ways and to do certain things. And its corollary of this is that nature does not intend man, or more accurately, nature forbids man to do certain things or behave in certain ways. In fact, this is the origin of the law of nature.

Unfortunately, not all are prepared to accept this law as it is; hence there are objections raised against it especially since the end of the eighteenth century up to the present century. The strongest opponents are the legal positivists who defend the autonomy and self-sufficiency of positive law. They reject the idea of natural law as a higher or superior law to which positive law is subordinate. Positive law, they maintain, is the only law that exists—"there is no law but positive law".

It is on this ground thatBentham and Austin both conceive law as essentially a command backed by force. For Bentham, law is basically a command issued by a sovereign to his subordinates or by a superior to his inferiors, who owe him allegiance. In fact, law is

> an assemblage of signs declarative of a volition conceived or adopted by the sovereign a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power; such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should, upon occasion, be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.[3]

As a command addressed to persons, law covers a certain range of acts. That means that the sovereign expresses his will in various ways in the laws regarding aspects of conducts. The manner in which this is made known is called expression.

By "sovereign" Bentham means "any person or assemblage of persons to whose will a whole political community" owes loyalty and obedience. Thus, Bentham sees lawprincipallyas the command of the sovereign, backed by sanction to act as coercive or alluring motives for compliance. This command need not come directly from the sovereign himself; it can come from those subordinate to the sovereign but empowered by him to issue such commands. Bentham writes:

> Taking this definition for the standard, it matters not whether the expression of the will in question…were by his immediate conception or only by adoption…A will or a mandate may be said to belong to a sovereign in the way of conception when it was he himself who issued it and first issued it, in the words or other signs in which it stands expressed: it may be said to belong to him by adoption when the person from whom it immediately emanates is not the sovereign himself…but some other person: insomuch that all the concern which he to whom it belongs by adoption has in the matter is the being known to entertain a will that in case such

> or such another person should have expressed or should come to have expressed a will concerning the act in question such will should be observed and looked upon as his.[4]

Bentham even extends this to any lawful order given by any lawful authority, such as a master or a father, a guardian, a husband, a general or a judge. All these are to be regarded as laws. He writes: "The master, the father, the husband, the guardian, is all the mandates of the sovereign: if not then neither are those of the general nor of the judge."[5]

Having equated law with command or order coming from a legitimate authority, Bentham came to have an extremely loose and wide notion of law. Even the command of a husband is law, that of a master to his servant or that of a father to his son is also law. All these are, according to Bentham, indirectly, orders of the sovereign "by adoption" in so far as they are not contrary to the will of the sovereign. This is far from what is generally understood by the word "law", and such an impoverishment of the concept of law comes from Bentham's equating it with "command". Bentham's "command" theory of law was popularized by his disciple, John Austin.

Like Bentham his master, Austin also conceives law essentially in terms of command backed by sanction. Law, for Austin is the command of a sovereign enforced by sanction. The purpose of the sanction is to enforce obedience by the threat of evil consequences for disobedience. The evil consequences therefore are there to coerce those subjects to the law into compliance with the law. "The evil which will probably be incurred in case a command be disobeyed or …in case a duty be broken, is frequently called a sanction or an enforcement or obedience."[6] It is only a person or body of persons who make law and this is a sovereign.

Austin conceives sovereignty in a Hobbesian way as one who is obeyed by all while he owes obedience to no one. The command of a sovereign is law. Since law is essentially the command of the sovereign, it follows that only positive law can be law.

This concept of law excludes natural law, international law, customary law and constitutional law. Indeed, Austin speaks of "positive laws or laws strictly so called", meaning that in the strict sense of the word, only positive laws are laws. Natural law, international law, customary law and constitutional law are not commands of a sovereign, and so they are not, according to Austin's definition of law, laws in the proper sense of the word. He writes:

> Positive laws or laws strictly so called, are established directly or immediately by authors of three kinds: by monarchs, or sovereign bodies as supreme political superiors: by men in a state of subjection; as subordinate political superiors: by subjects or private persons, in pursuance of legal rights. But every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number…to a person or persons in a state of subjection to its author.[7]

Austin does not mean, of course, that every command of a sovereign is law. He distinguishes between "general commands" and "particular commands" and says that only the former are laws. A general command is a rule, and when it comes from a sovereign and is accompanied with a threatened punishment that will be inflicted on anybody who disobeys it then it is a law. He writes:

> Now where it obliges generally to acts or forbearance of a class, a command is a law or rule. But where it obliges to a specific act or forbearance, or to acts or forbearances which it determines specifically or individually, a command is occasional or particular.[8]

Like Bentham, Austin does not restrict this command (which is law) to that which comes directly from the sovereign. The general commands of subordinate political authorities or superiors, in as much as they have the blessing of the sovereign, and it is his will that they be obeyed, are also laws. By his will that such commands be obeyed, and by his readiness to punish those who disobey them, the sovereign has, as it were, appropriated them as his own, and they are therefore laws. The same applies to the commands of previous sovereigns (previous regimes). If it is the wish of the current sovereign that the commands of his predecessor continues to be obeyed, he has by this very fact appropriated these commands as his own, and so they continue to be laws. Hence Austin speaks of "direct or circuitous" commands, the former being those commands that come directly from the sovereign while the latter are those from his subordinates or those from his predecessor, but with his approval in either case.

From this Bentham-Austinian concept of law, it follows that the sovereign himself is above the law of the land. He is himself not bound by any law, since he is the ultimate source of all laws in the land. This sovereign of Bentham and Austin is evidently the "mortal god" of Hobbes, and their concept of law is obviously Hobbesian. 'Law", Hobbes tells us, "is not

counselbut command, nor (is it) the command of any man to any man, but only of him whose command is addressed to one formally obliged to obey him."[9]

Apart from making the sovereign a "mortal god", and placing him above the law, the command theory of law has other serious defects. It so narrows the concept of law that it excludes some categories of universally accepted laws, such as constitutional law, international law, customary law, and what Hart calls "power-conferring laws", that is, laws that confer on people the power to exercise certain functions.[10] What gives law its obligatory force, according to this theory, is the threat of punishment for its violation, but is respect for authority and moral consciousness not more solid foundations of obligation than the fear of punishment?

Austin sternly rejects Blackstone's contention that any law that is in conflict with natural law is null and void. For him, law is law whether or not it conflicts with natural law. Whether law is moral or immoral has nothing to do with its validity. He writes:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law which actually exists is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is as simple and glaring that it seems idle to insist upon it. But simple as it is, when enunciated in abstract expressions the enunciation of instances in which it has been forgotten would fill a volume.[11]

Thus, "The laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original…The meaning of this passage of Blackstone, if it has a meaning, seems rather to be that no law which conflicts with the Divine law is obligatory or binding. In other words, that no human law which conflicts with the Divine law is a law".[12]

One of Austin's disciples, Amos, credited him with having "delivered law from the dead body of morality that still clung to it."[13] Thus, Austin is credited with having 'saved' law from the claws of morality. He is also credited with having successfully brought about the recognition of the truth that the law of a state is not an ideal law, but something which actually exists; in other words, that the law of a state should be seen for what it, *de facto*, is; i.e., as it actually exists and not as it ought to be.[14]

One may wonder if Austin has actually ‘saved’ law from morality. A lot of questions come to mind: Is it possible actually to ‘save; that is, separate law from morality? Has Austin truly succeeded in separating the concept of ‘ought’ from law? Has he succeeded in stopping the human mind from the inquiry as to what law ought to be as distinct from what it actually is in any given instance? Can anybody ever stop the human mind from distinguishing between what a thing ought to be and what it actually is or from asking what a thing is and what it ought to be?

Kelsen does not think Bentham or Austin got it right as he differs from their command theory. In his *Pure Theory of Law*, Kelsen declares his aim is to ‘purify’ the concept of law from the political, moral, psychological and metaphysical considerations, and from all value judgements. According to him, legal studies should be ‘freed’ from all these extra-legal considerations which are not part of law. On that ground, Kelsen aims at an objective science of law devoid of subjective and moral elements, of approval or disapproval, justice or injustice. He insists that none of these should enter into the study of law as an objective science. Hence, any inquiry into the ‘motive’ of the legislator should be excluded from the study of law. The pure theory of law, Kelsen says, is, of course, only concerned with positive law.

In this manner, Kelsen parts ways with Bentham and Austin in making sanction an essential part of the concept of law. Kelsen maintains that sanctions is itself stipulated by law, which means that law is (at least logically) prior to sanction and can be separated from it. Sanction is something attached to the violation of law and is stipulated by law itself. But “Law is the primary norm, which stipulates the sanction.”[15]

Primarily and essentially, Kelsen understands law in terms of norm, and not in terms of command, like Bentham and Austin did. By norm, Kelsen means something, which ought to be or ought to happen, especially that a human being ought to behave in a specific way.” Kelsen insists that “norm is that meaning of an act which a certain behaviour is commanded, permitted or authorized.”[16] Law is fundamentally a norm, commanding, prohibiting, permitting, or authorizing certain behaviour.

Between a moral norm and a legal norm, Kelsen says, there is need to make a distinction.While a moral norm does not stipulate sanction, a legal norm does stipulate sanction. Also Kelsen distinguishes between the ways these norms are generally framed. Moral norm, for example, stipulates that nobody ought to perform action X. And legal norm stipulates that if anybody performs action X, such and such punishment shall be inflicted on him. That means if

action X is performed, it follows then punishment Y ought to be inflicted. This is similar to the physical laws of nature, which stipulates, for example, that if X is present, then Y follows.

Kelsen made further distinction between legal norm and the physical laws of nature. In the latter case, if X is present without Y following, it means that the law (the physical law of nature) is invalid. This shows that the validity of a physical law of nature depends on the effect really following the cause as stipulated. Where it does not follow then the law is invalid.

But concerning the validity of a legal norm, however, Kelsen argues that it does not depend on the stipulated sanction actually following the action. This is true because even if the officer charged with applying the sanction fails to do so, this failure on his part would not invalidate the law.

Based on this, Kelsen insists that the relation between the breach of the law and its sanction is better expressed using the word “ought” rather than the word “shall”. In that case, it is better to say, for example: If anybody performs action X, then punishment Y ought to be inflicted on him (rather than saying shall be inflicted on him). This is because it is a duty of the law officer to inflict this punishment. He may fail to carry out this duty. But the relation between the breach of the law and the punishment stipulated for such a breach is not automatic; hence it is not like the cause and effect relationship of the physical laws of nature.[17]

In Kelsen’s judgement, law derives its validity from the fact that it is within a valid legal system. This is to say that the validity of a particular norm derives from another norm within the same legal system. The validity of this other norm derives from another. And this continues. But what it all means is that “the norm which confers upon an act the meaning of legality or illegality is itself created by an act which in turn receives its legal character from yet another norm.”[18] Thus each norm within a legal system is validated by another norm within the system.

What about the validity of the system itself? One may ask. From where does the entire system itself derive its validity? Kelsen answers that the system itself is validated upon the basic norm. But what is this basic norm and where does it come from?

Kelsen’s theory of basic norm shows that the basic norm is the ultimate source and criterion of validity of the whole legal system. It is not part of the legal system itself, nor is it created by any legal procedure, but it is “the basis or the foundation of legal validity in a positive legal system.” To say that the basic norm is not created in a legal procedure by a law-creating organ means that it is not, as a positive legal norm is, valid because it is presupposed to be valid;

and it is presupposed to be valid because without this presupposition no human act could be interpreted as a legal, especially as norm-creating act."[19] In that sense, the basic norm is only a presupposition, a mental construction, a fiction, or in other words, a hypothetical norm which owes its validity to no other norm beyond itself.

One wonders whether this metaphysical entity postulated to validate positive legal system is consistent with the legal positivist stand that a positive legal system is self-validating, without reference to any ideal law or superior law outside the system. Has Kelsen not, by his theory of the basic norm, traced the ultimate criterion of validity beyond the positive legal system? Kelsen is, in other words, saying that the ultimate ground of validity of any positive system lies beyond the positive system itself, and it is of metaphysical nature.

As a legal positivist, Kelsen would not be prepared to call this his metaphysical entity "natural law". In any case, he has, perhaps, only indirectly admitted that positivism is unable to account for the ultimate validity and binding force of law, that positivism can only give a superficial account of law without getting at the root of the problem, and that to get at the root of the problem one has to go beyond positivism.

Oliver Wendel Holmes belongs to the school of American legal realism. To understand law, according to the realist, one has to go to the courts. One has to understand how courts operate, and look at what lawyers are actually doing, and not what lawyers say they do.Thus, legal realism takes a "realist" view of law and insists on de-mythologizing or "de-mystifying" law. It is like saying: "Let's be realistic, there is nothing mystical about law; why is it shrouded with myth or mystery? We must see law for what it really is in terms of its practical function in society. Law is not an abstract entity in the Platonic world of ideas." Writing in his *The Common Law*, Holmes asserts:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation.[20]

On this backdrop,Holmes deplores the confusion between law and morality. Why should law be fused with morality? He insists on their separation if we are to understand law. Again, he writes: “When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding law.”[21]

Holmes thinks the best way to view law is from the standpoint of an immoral man who cares only for the consequences which such knowledge enables him to predict.[22] This position leads Holmes to seeing law only in terms of sanction. Law is for him essentially a systematized prediction, that is, prediction as to what will happen to a person if he performs certain actions or if he does certain things. Law enables us to predict the kind of punishment that will be inflicted on a person who does certain thing. “The object of our study” says Holmes, referring to law “is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”[23] To say that a person has a legal duty to do anything means, according to Holmes, to predict that if he fails to do it, “he will be made to suffer in this or that way by judgement of the court.”[24]

In his bid to separate law from morality, Holmes removes the notion of obligation from the concept of law which then becomes nothing other than a system of prediction or prophecy as to what will happen to a person if he does or fails to do certain things. “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”[25] What a way to impoverish the concept of law! For Holmes, there is of course nothing like natural justice in his theory. Law in his theory does not impose any obligation on man. The sense of legal duty or legal obligation is out. This is certainly unacceptable, law is much more than Holmes makes it to appear. Sanction cannot be the essence of law as Holmes implies. Sanction is a punishment for failure to fulfil the obligation which law imposes, and so it cannot be the essence of law.

Unlike Holmes, Karl Olivecrona sees law not as a command coming from a sovereign (as Bentham and Austin see it), but as a system of imperatives which stand on their own. Law has such a powerful grip on the minds of people that it becomes a reality in their minds. It is this psychological effect it has on the minds of the people that constitute the essence of law rather than the process by which it is passed or the authority from which it emanates. Thus, Olivecrona keeps the sovereign at the background and sees law as essentially a psychological phenomenon. Thus, a given law, for example, has two aspects, namely, the idea of an action which is being

prohibited or enjoined, as the case may be, and the imperative in relation to that action (i.e., to refrain from that action or to perform it, as the case may be). To this effect Olivecrona says:

> In reality, the law of a country consists of an immense mass of ideas concerning human behaviour accumulated during centuries through the contributions of innumerable collaborators. These ideas have been expressed in imperative form by their originators, especially through formal legislation, and are being preserved in the same form in books of law. The ideas are again and again revived in human minds, accompanied by the imperative expression: 'This line of conduct shall be taken' or something else to the same effect.[26]

By this, Olivecrona sees law in terms of cause and effect, that is, the effect it has in the minds of the people once they internalize it. Law is something that is internalized by the people and once this is done, it stays in their minds. For example, an action that is prohibited by law is internalized by the people as an idea, plus the fact that it is prohibited. These two things come to register vividly in the minds of the people: a vivid idea of the action in question, and its prohibition or disapproval. At the beginning, sanction may be necessary to enforce compliance with the new law, but as time goes on the idea of the action comes to stay (when it has been internalized) in the minds of the people, marked by its prohibition. It comes to be seen by the people as a prohibited (forbidden) action.

At this stage, sanction will no longer be necessary since the imprint of prohibition now accompanies the idea of the action each time it appears in the minds of the people. Olivecrona contends that this is the origin of the sense of morality; that morality originates from law. In other words, Olivecrona argues that it is the internalization of law that leads to the sense of morality.

If this theory of Olivecrona that law precedes morality is true, it would mean people lack sense of morality before laws or legal rules are made and internalized by the people. In that case why are certain actions prohibited by law? Is it not because such actions are morally wrong? Contrary to Olivecrona, we maintain that morality is prior to law and it is what gives rise to law; for law is meant to protect morality, which constitutes the foundation of society. If people were allowed to violate moral principles anyhow, society would not exist. Hence laws are made to enforce compliance with the moral principles and prevent their violation in order to ensure the survival of the society. The unchecked violation of moral principles by the people is a serious

threat to the survival of the society. To protect itself from imminent collapse the society has to make laws to enforce compliance with the moral principles and prevent their violation.

All these seem to pave way for H.L.A. Hart who came and did a number of things. First, he disclosed his position with regard to natural law. Second, he condemned the command theory of Bentham and Austin. And thirdly, he presented his own theory of law.

On natural law, Hartdoes not wish to deny the existence of natural law, though not prepared to accept it in its classical form, with its theocratic metaphysical setting. Instead, Hart thinks it is not necessary to insert the natural law doctrine within such a metaphysical framework. He writes:

> Natural law has…not always been associated with belief in Divine Governor or Lawgiver of the universe, and even where it has been, its characteristic tenets have not been logically dependent on that belief.[27]

In his view, the concept of nature underlying this doctrine in its classical form is now outdated and “antithetical to the general conception of nature which constitutes the framework of modern secular thought.”[28] The fact that this doctrine has persisted even till the present day is, according to Hart, due to the fact that it is not really dependent on this outdated concept of nature or the theocratic metaphysics with which it is generally associated. When it is stripped of these outdated concepts of nature and the theocratic metaphysics, the natural law doctrine will be seen to contain some truths which are important for both law and morality.

> Despite a terminology and much metaphysics, which few would now accept, it contains certain elementary truths of importance for the understanding of both morality and law.[29]

These truths can be divorced from the traditional natural law metaphysical setting. The essence of the natural law doctrine can, in other words, be stated simply without inserting it into the metaphysical framework in which we find it in its classical form. This consists in certain fundamental principles of human conduct which are universally recognized, and which are based on certain truths about human beings. These truths constitute the core of the natural law doctrine. Hart calls them “the minimum content of natural law.” They are necessary for the survival of the human societies, for they underline law and morality. His words:

> In the absence of this content, men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of cooperation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible.[30]

There is thus a close connection between these truths and the content of law and morality, and they are important for the understanding of law and morality. There are five such truths or truisms: "human vulnerability, approximate equality, limited altruism, limited resources, and limited understanding and strength of will."

On the command theory of Bentham and Austin, Hart parts ways with them on the ground that their theory of law did not account for all kinds of law. For not all laws are commands. "There is much, even in the simplest legal system, that is distorted if presented as a command."[31] Furthermore, Hart points out that there is no essential difference between law as it is presented by the early legal positivists, Bentham and Austin, and the threat of a gunman. If law is essentially a command backed by force or threat of evil consequences, as we are told by Bentham and Austin, then there is not much difference between law and the command of a gunman since both are commands backed by threats of evil consequences in case of failure to comply. In both cases, the aim is to enforce compliance with the command. Hart insists:

> The only difference is that in the case of a legal system, the gunman says it to a large number of people who are accustomed to the racket and habitually surrenders to it.[32]

Hart feels it is misleading to classify "laws which confer powers on private individuals to make wills, contracts, or marriages, and laws which give powers to officials, e.g., to a judge to try a case, to a minister to make rules…"as commands.[33]Besides, these power-conferring laws lack sanction, and the argument that the non-validity or the nullity of these things constitute the sanction of these laws, is untenable. He continues:

> Nullity may not be an 'evil' to the person who failed to satisfy some condition required for legal validity. A judge may have no material interest in, and may be indifferent to, the validity of his order.[34]

At this point, Hart presents his concept of law. Law, for Hart, is essentially a system of rules, and a legal system is the union of primary and secondary rules. Social rules grow out of

habit while legal rules in turn grow out of social rules. The process is this: First, there is a social habit which is uniformity in behaviour among a social group. At this stage, each member of the group simply behaves in accordance with the habit in a rather unreflecting manner, without thinking that everybody in the social group ought to behave that way. Failure to conform to the habit, at this stage, attracts no criticism from the members of the social group.

Gradually, Hart says, the habit develops into a social rule. This happens when the habit comes to be considered as a standard of behaviour to which all members of the group ought to conform, and failure to conform to it on the part of any member of the group attracts criticism. This consciousness that it is a standard of behaviour to which all members must conform, is what Hart calls the internal aspect" of a social rule, which is lacking in a social habit. In the case of a habit, each member simply behaves in a way that others also in fact do. Again, he says:

> By contrast, if a social rule is to exit some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an 'internal' aspect in addition to the external aspect which it shares with social habit and which consists in the regular uniform behaviour which an observer could record.[35]

At this stage, there is a critical reflective attitude to certain patterns of behaviour as a common standard. This is accompanied by demands for conformity, and this expresses itself in criticism whenever any member of the group fails to conform. The normative terminology of "ought", "must", "should", "right", and "wrong" come into use among the group.

For Hart, social rules become legal rules when they become part of a legal system, and the group passes from pre-legal society to legal society. It is at this stage that we have law in the proper sense of the word. What is a legal system? It is the union of two kinds of rules, namely, primary and secondary rules. Hart writes:

> Under rules of one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may introduce new rules of primary type, extinguish or modify old ones, or in other ways determine their incidence or control their operations. Rules of the fist type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes, rules of the second type provide

> for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.[36]

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."[37]

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."[38] 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 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 the legal system. He contends:

> A person who seriously asserts the validity of some given rule of law, say a particular statute, himself makes use of a rule of recognition which he accepts as appropriate for identifying the law. secondly, it is the case that this rule of recognition, in terms of which he assesses the validity of a particular statute, is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system. If the truth of this presupposition were doubted, it could be established by reference to actual practice: to the way in which courts identify what is to count as law and to the general acceptance of or acquiescence in the identification.[39]

What Hart is actually saying is that the validity of the rule of recognition is "assumed" and that this can be shown by reference to actual practice in courts. Hart warns us not to confuse the question of the validity of the rule of recognition with the question of its existence. That it really exists is a matter of fact which any observer can verify for himself. Its validity is presupposed by the very fact of the acceptance of its existence.

Thus, the latter implies the former. Once rules of recognition have been accepted and used to identify or validate other rules then their existence is no longer in question and the fact that they are used to validate other rules presupposes their own validity.

> Once their existence has been established as a fact we should only confuse matters by affirming or denying that they were valid or by saying that 'we assumed' but could not show their validity.[40]

Hart suggests that anyone in doubt about the validity of the rules of recognition in a legal system should refer to courts and law officials of the system. Their actual practice would confirm their validity, no other demonstration is needed. It

> is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct.[41]

Hart's version of positivism in law has attracted a lot of comments. He has been described as a "sophisticated positivist" who has presented a sophisticatedversion of legal positivism.[42] Yet, even this sophiscated version of legal positivism, though, indisputably a remarkable improvement on those of Austin and Kelsen, still betrays the inherent weakness of legal positivism.

His ultimate criterion of validity in a legal system, i.e., the rule of recognition is itself valid by the mere fact that it is accepted and used as a criterion of validity, and the people acquiesce to its use. It could be an unjust or evil rule, but so long as people acquiesce to it, accept it and it is used by law officials, it is valid.

Lon Fuller differs from Hart. He argues that the purpose for which law exists cannot be coalesced under rules alone. This is because "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.[43]

To this end, Fuller does not think law is neutral to morality and social values. Besides mere rules to be applied, there are intrinsic values for which law exists and these serve as standards upon which the validity of law could be ascertained. Those who are custodians of law in the society, Fuller claims, are therefore obliged to see that these other standards are achieved in the society.[44]

Fuller further argues that this purposefulness of law serves as the inner-morality of law which insists that there is a right way of doing things. He also thinks that there are important elements Hart and the positivists generally have missed in their rule theories of law. The morality of law, he says, is derived from the purpose for which purposive activity such as law is established.[45] Therefore judgements about human affairs are not purely built on emotion or individual opinions.

Hetherefore, claims that "the inner morality of law is the principles of natural law."[46] According to Fuller, human activity should not solely be evaluated from the point of view of social fact but against the background of the purpose it seeks to accomplish. Law, he says, is certainly a system of rules, but the element of purpose should criticize the rule that one wants to enact. Thus, there is a purpose in enacting a rule and using it to guide action.

Although, Fuller accepts that Hart's distinction between power conferring and duty-imposing rules is useful, he points out that this distinction can be misapplied if these sets of rules are exclusive.[47] 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.[48]

On this backdrop, Fuller proposes eight criteria that should help in the successful promulgation of law: (law must be general; they must be promulgated; they must not be retroactive; laws should not enact the impossible; they must be consistent through time; and there should be congruence between official action and declared rules).[49] These eight principles are incorporated into law as the 'inner morality of law.' In this light, Fuller defines law as the "enterprise of subjecting human conduct to the governance of rules," for a legal system is a product of a purposive effort.[50]

Fuller further believes that law necessarily fulfills certain moral requirements. These moral requirements are the inner morality of law as articulated in the eight desiderata. The inner morality of law requires an attitude of moral commitment on the part of the content of law and those who apply it.[51] He further thinks that 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.[52]

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.[53]

Thus 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.[54] Purpose builds on a particular vision and this, for Fuller, bespeaks a standard of excellence. Against this background, he 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'."[55]

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." In that case, Fuller remarks "the plight of the citizen is in some ways worse than that of a gunman's victim."[56]

Purpose implies intelligibility, which in turn argues for a right way of achieving that purpose. Thus, Fuller alludes 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."[57]

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."

John Finnis was not also comfortable with Hart's theory. He reminds us that the claim between law and morality is not about whether or not there is a connection between them; or whether the content of law and morality overlaps, but whether the overlapping is a matter of necessity. In his opinion, Finnis insists that one does not make 'is-statements' about the world. Rather one begins one's moral reason from what is self-evidently good for the moral world.[58] This means the grasping of moral statements of one's internal nature.

Finnis also claims that it is possible to know what is to be known about humans from inside rather than from outside. One can grasp self-evident goods for human flourishing; i.e. basic goods. This reasoning is not that of inference or discourse but from one's position of reason. This is an internal point of view. One can only argue from one's own internal point of view about what the central view of human good is. Thus Finnis discusses seven basic goods, which can be grasped by any one of age of reason, namely: life, knowledge, truth, aesthetic experience, friendship, practical reasonableness and religion (one's relationship to the cosmos and God).[59]

Practical reasonableness is reason of being able to bring one's intelligence to bear on human choice—on practical choices, on shaping one's character. It is through the process of practical reasonableness that we know of any of the basic goods. Practical reasonableness will require one to form judgement about ways one wishes to pursue one's goods. Thus it imposes some methodological ways in the active pursuit of goods. The methodological requirements of

practical reasonableness are: a coherent plan of life; no arbitrary preference among values; no commitment; the limited relevance of consequence: efficiency within reason; respect for every basic value in every act; the requirement of common good; and following one's conscience.

One cannot pursue one's human flourishing and ignore those of others. Such ruling out of arbitrary preferences will give ideas about legal systems. It will rule out some things from the basic content of legal systems. Here then a link is necessarily established between law and morality, for the basic goods and the methodological requirement together provide the criterion for distinguishing ways of acting that are morally right or wrong. The basic goods summarize the principles of natural law. Natural law, Finnis insists, is a "set of principles of practical reasonabless of ordering human community"; hence it could, without loss of meaning, be spoken of as 'natural right,' 'intrinsic morality,' 'natural reason, or right reason in action."[60]

Finnis talks about co-ordination problems. They are an aspect of game theory to model the way people make choice (there are more than one person playing). The choice each makes does not matter so far as everyone can co-ordinate with everyone else. Evidently, practical reasonableness ensures that we need a system of rules to co-ordinate. There are human goods (such as education, health, social amenities, etc.) that can solely be secured through human institutions and coordination of all. Therefore, according to Finnis, the basic goods and their methodological requirements are aspects of natural law principle that should necessarily form part of the legal code.

In the same vein, Joseph Raz substantially agrees with Hart's search for an independent account of a legal system. Raz, however, alleges that there are functions of law, which cannot be taken care of by Hart's explanation of law. He claims to distinguish social functions of law from the question of classifying legal norms into distinct normative types. Raz acknowledges that Hart recognizes types of norm by discriminating between primary rules and secondary rules which he correlated with duty-imposing rules and power conferring rules respectively. Raz also asserts that this correlation, which Hart makes, obscures the distinction between normative types and social functions of law. Hence, Raz sees some rough spots in Hart's analysis.

To redeem this rough spots, Raz argues further that the social functions of the law are "intended or actual social consequences of the law."[61] The issue of the function of law is thus "different from the question of classifying norms into distinct normative types."[62] Also the

classification of law into normative types has to do with "the logical implications of a statement stating that norm."[63]

In Raz's final assessment, Hart's distinction between primary and secondary rules clearly emphasizes the normative types of rules. But the function of law (as may be drawn from both primary and secondary rules) stresses the fulfillment secured when laws are applied and obeyed.[64]

It is Raz's belief that the social functions of the law are the intended or actual social consequences of the law. He claims that the issue of function of law is different from the question of classifying norms into distinct normative types[65]; hence he divides social function of the law into direct and indirect functions. Direct function of the law, Raz says, are those the fulfilment of which is secured by the law being obeyed and applied. It is further sub-divided under the primary and secondary functions.

Primary functions include: preventing undesirable behaviour; securing desirable behaviour; providing facilities for private arrangements between individuals; providing of services and redistribution of goods; and settling unregulated disputes. Also secondary functions have to do with the operation of the legal system itself. They provide for its desirability, efficacy, and smooth and uninterrupted operation. Secondary functions are of two kinds namely: the determination of procedures for changing law and the regulation of the operation of law-applying organs.

Indirect functions are those the fulfilment of which consists in attitudes, feelings, opinions, and modes of behaviour which are not obedience to laws or the application of laws, but which result from the knowledge of the existence of the laws or from compliance with the application of the laws.[66] Raz claims that Hart paid special attention to second primary functions—that of providing facilities for private arrangements, as well as the secondary legal functions. On his part, Raz thinks that both duty imposing rules and power conferring rules, each in its own class, have to do with all of these social functions, be they direct or indirect. Again, the simplified picture of one to one correlation between types of rules and types of functions, according to Raz, further obscures the fact that legal systems perform two more primary functions: those of providing services and settling unregulated disputes.

The point Raz is making, however, is quite correct in claiming that Hart does not make a clear distinction between normative types and functions of law. Hart correlates primary rules

solely with primary functions (duty-imposing) and secondary rules with secondary functions (power-conferring rules). Hart states that secondary rules remedy the defects of primary rules. And in his presentation, primary rules can only be duty-imposing and not power-conferring, so also secondary rules are not duty- imposing.

Raz holds that both primary and secondary rules can be each in its own sphere duty-imposing and power-conferring because they come into being through some specified criterion. Officials will have to give effect to such demands on their office. The character of primary and secondary rules as both duty imposing and power conferring hinges on their social function.[67]

It sounds reasonable to suppose that Raz has given a more detailed elaboration of the social functions of law. In any case, it does not appear that these functions could not be fitted in or are not contained in what Hart has already presented. One does not have to carve out a separate heading to say that part of the function of law is to settle disputes or regulate disputes before one knows that it is the kind of thing the judiciary does both in deciding simple, hard and vague cases. Hart knows that the judiciary settles cases and in some of the cases where the law's provisions are vague that the judge may be applying, clarifying and, in some sense, making law.

Furthermore, the rule of recognition which Hart sees as power conferring can also be duty imposing. For example, the rule of recognition that 'what the Queen enacts in Parliament is law' is power conferring. On the other hand, what the Queen enacted in the past is duty imposing, for one cannot say that it is power conferring because you cannot confer power in the past, as we have pointed out already. The rule of recognition must be addressed to someone. But to whom is it addressed?

Ordinary citizens may know of the existence of the rule of recognition and use it but Hart would not think that special attention demanded by the rule of recognition is to be asked from ordinary citizens. It is likely that it is addressed to the officials who must respect and give official effect to the demands of the rule of recognition as ultimate test of validity and official action.[68] Against this background, Raz sustains that,

> Since the rule of recognition is a customary rule, it must be interpreted as duty-imposing. Besides, all the legal powers of officials are conferred on them by the rules of change and adjudication, authorizing them to make new laws and to settle disputes. To claim that the rule of recognition is a power-conferring rule is to confuse it with either rules of change or rules of adjudication.[69]

The rule of recognition imposes an obligation on the law-applying officials to recognize and apply all and only those laws satisfying certain criteria of validity spelled out in the rule, which criteria include indications of how conflicts of laws are to be resolved.

So, from the point of view of formal application, officials have a duty to fulfil the conditions laid down by the rule of recognition. Therefore, it is not quite correct, in Raz's judgement, for Hart to say that the word 'obey' does not describe what judges do when they follow the rule of recognition and apply other rules of the system.[70]

Raz accepts that there is an ultimate rule in a legal system that validates other subordinate rules. Hart has justified such a rule by simply saying that it is accepted as a social practice constituting a reason for action and the question of this validity does not arise. Implicitly, the ground of its justification is its source: social practice. But Raz thinks that there is no need to appeal to practice in other to justify the ultimate rule. He affirms:

> With the rest of the law both the rule and its source could with equal justice be regarded as the reason for doing as the rule prescribes. Ultimate rules are likewise reasons for action they require, but not so their source. That the English courts hold themselves bound to apply statutes is not the reason why they ought to do so. The rule that they should apply statutes is such a rule. The practice is no more proof (constitutive proof) than the rule is a legal rule. It is neither aground for the validity of the rule nor for the action it prescribes. It is this fact, which establishes the character of the rule as an ultimate legal rule. The fact that a rule is an ultimate legal rule means no more than that there is no legal ground, no legal justification for its validity. It does not imply that there is no ground or justification for the rule, only that if such ground exists it is not a legal one. With ordinary legal rules their source is the legal ground of their validity and a reason for behaving as they prescribe. That Parliament so enacted is a ground for the validity of the law and a reason for the required behaviour. These are legal reasons for their character as grounds of validity is itself determined by another law.[71]

By definition, ultimate legal rules are not similarly grounded on legal reasons. The absence of a further law determining the grounds of validity of the ultimate rules is precisely what makes them ultimate legal rules.

Implicitly, Raz reasons that we do not have to appeal to social practice, as Hart did, to justify our acceptance of the ultimate rue of the system, like the rule of recognition. For Raz, a rule of recognition exists but he denies a legal ground for justifying it. The fact that it is

identified as ultimate rule is enough for it to be taken as valid. No need to raise the question of legal ground for its validity or to appeal to extra-legal source for its validity, say Raz. It is obvious that it has an extra-legal source.Like Hart, Raz differentiates a legal and non-validity. He states:

> Moral validity is presumably established by argument and the way to argue that a rule is morally binding or valid is to show that it is justified, that the requirements and restraints it imposes ought to be observed. Here validity and justification seem particularly close. But law is different. The legal validity of a rule is established not by argument concerning its value and justification but rather by showing that it conforms to tests of validity laid down by some other rules of the system, which can be called rules of recognition. These tests normally concern the way the rule was enacted or laid down by a judicial authority.[72]

Raz speculates that Hart's elaboration of validity of a rule is 'systemic.' And it is characteristic of systemic validity that a legal rule "ought to be obeyed because it is part of a legal system which is in force in the country concerned."[73] Raz writes:

> While the direct (i.e. non-systemic) validity of a rule turns on the goals and values which it serves or harms, its legal, systemic validity depends on the fact that it belongs to a given legal system and that it is justified as such.[74]

Raz claims that a theoretical account of validity of a rule is systemic—belonging to the system that generates it. Where this validity of a rule is justified as such in a given system, then its account of validity is no longer value-free. (Here he comes closer to Dworkin). Indirectly, this implies internal statements made by people in a given system are not totally value-free. However, since a valid rule may be enforced or not enforced in a country, its independent character stands on systemic validity. This claim, according to Raz, rests on the view of law as a social fact.[75]From the positivist's point of view, Raz reasserts that validity or normativity of rule derives, as in Kelsen, from its membership to a legal system:

> A rule is valid if and only if it has the normative consequences it purports to have. It is legally valid if and only if it is valid because it belongs to a legal system in force in a certain country or is enforceable in it, i.e. if it is systematically valid. Similarly an obligation is a legal obligation and a right is a legal right if and only if they are an obligation or a right in virtue of a rule, which is legally valid.

> Validity presupposes membership and enforceability. Judgements of membership and enforceability are judgements of social fact. Judgements of legal validity are normative judgements partly based on those facts.[76]

Since normative consequences are certified within the legal community, Raz's understanding of validity of rule does not diverge seriously from Hart's. An enforced rule is valid and normative. In this way, it will be a reason for action. And such a rule does not have to be moral. Raz corroborates this Hartian position with his concept of a detached statement.

Essentially Raz believes that a value free jurisprudence is possible as argued by Hart since judgements of legal validity are normatively based on social facts. Raz appreciates Hart's distinction between external and internal statements. However, the impression that is given is that there may not be a middle course. Certainly, Hart has smartly argued for a descriptive jurisprudence for that can be studied on its own right. But Raz indicates that there is another class of statement that may be made of a legal system that can be value-free. He calls it 'detached statements' or 'statements from a point of view.' He writes:

> If I go with a vegetarian friend to a dinner party I may say to him, 'You should not eat this dish. It contains meat.' Not being a vegetarian I do not believe that the fact that the dish contains meat is a reason for not eating it. I do not, therefore, believe that my friend has a reason to refrain from eating it, nor am I stating that he has. I am merely informing him what ought to be done from the point of view of a vegetarian. Of course the very same sentence can be used by a fellow vegetarian to state what ought to be done. But this is not what I am saying, as my friend who understands the situation will know.[77]

A detached statement states a certain view that is not necessarily the view of the speaker; but essentially from the point of view of those who hold such a view. By stating it, the person who makes a detached statement, like Hart's external statement, is not committed to the view of the statement he makes. He is simply affirming what those who hold those views believe.

Hart acknowledged the contribution of Raz in supplying what is lacking in his analysis of external statements. But it must be maintained that external statements, detached statements and internal statements may not have exclusive lines dividing them. B can affirm what they hold in his legal system (internal statement); C can say what B holds (external statement); G can cite what C can say what B holds (detached statement). In the detached statement, it might be that B

takes the position of C or G to make a statement about his statement. As Finnis rightly points out, speakers of committed or non-committed statements do not have fixed standpoints.[78]

If this is the case, the strong line to maintain a strict descriptive jurisprudence or descriptive sociology—a value-free system—seems to break. Against this background then, Finnis argues that a "theorist cannot give a theoretical description and analysis of social facts unless he also participates in the work of evaluation, of understanding what is really good for the human person, and what is really required by practical reasonableness."[79]With Finnis' rejoinder to the position of Hart, the interrogation whether there can be a value-free jurisprudence seems to continue.

Neil MacCormick observes that Hart's theory have some implications for legal reasoning. Hence he proposes a detailed account oflegal reasoning and theory. In his work, *Legal Reasoning and Legal Theory*, MacCormick claims that his theory directs the judge properly on what to do when rules become limited. His basic argument centers more on judicial adjudication. He argues that rules are not enough but second-order justification provides alternative since it "involves justifying choices; choices between rival possible rulings. These are choices to be made within the specific context of a functioning legal system; that context imposes some obvious constraints on the process"[80]

Also second-order justification involves testing of fact as in the scientific arena. It is like the Popperian theory of scientific justification where the logical element constituting scientific discovery is the logic of testing and which do not happen in vacuum. So in the legal system, what counts in testing concerns what happens in the world. For instance, the test that is asked is: what is the empirical evidence or effect that it has in the world at large? On that account, MacCormick contends that legal decisions do not exist in a vacuum. They deal with the 'real world' as do scientific hypotheses. Hence, it is in the context of a whole body of 'knowledge', and in this case, the whole corpus of the normative legal system, rather than a corpus of descriptive and explanatory theory.[81]

By implication, legal decisions make sense in the world and they also make sense in the context of the legal system. They are based on rulings which make sense in the context of the legal system. And just as scientific justification involves testing one hypothesis against another, and rejecting that which fails relevant tests, so it is with second-order justification in the legal system. MacCormick insists that second-order justification in the law involves testing rival

possible rulings against each other and rejecting those which do not satisfy relevant tests—relevant test being concerned with what makes sense in the world, and with what makes sense in the context of the system.[82]

Harthas earlier argued that in such situations where there are insufficiencies of existing rules; otherwise in hard cases, that the judge or interpreter resorts to using his discretion in a 'strong sense' in such manner that the judge is free from every form of legal constraint.[40] MacCormick does not accede to this form of reasoning in discretional cases.

Like Dworkin, he advocates for a weak form of discretion in the sense that where the judge uses his discretion, he is restricted by 'the constraint of formal justice"[83] which derives from universalization; i.e., (the need to conceive of the decision at hand as reproducible in future cases), consistency (the need to avoid contradictions with other existing rules), coherence (the need to look for a decision that fits well with the recognized principles of the legal system), and consequence (the need to avoid a decision that would yield absurd consequences).[84] The requirement of formal justice is that the "judge must treat like cases alike and different cases differently, and give to everyone his due."[85] To treat like cases alike

> implies that I must decide today's case on grounds which I am willing to adopt for the decision of future similar cases, just as much as it implies that I must today have regard to my earlier decisions in past similar cases. Both implications are implications of adherence to the principle of formal justice; and whoever agrees that judges ought to adhere to the principle of formal justice is committed to both these implications.[86]

In this way, MacCormick avows that judges ought to adhere to the principles of formal justice, as a minimal requirement of doing justice at all and a fortiori 'justice according to law'. It is his observation more-so, that formal justice in such matters includes making choice between the rational and the arbitrary in the conduct of human affairs, and in asserting it as a fundamental principle that human beings ought to be rational rather than arbitrary in the conduct of their public and social affairs. On a practical level, the principle of justice asserts that if

> I decide today's case in the knowledge that I must thereby commit myself to settling grounds for decision for today's and future similar cases. There is no conflict today, though there will be in the future if today I articulate grounds of decision which turn out to embody some substantive injustice or to be on other

> grounds inexpedient or undesirable. That is certainly a strong reason for being careful about how I decide today's case.[87]

Here, the justifying discretion must involve the making of a 'ruling' which is (in the strict logical sense) 'universal', or 'generic', even though the parties' own dispute and its facts are irreducibly individual and particular, as must be the orders issued to them in termination of the dispute. On the contrary, the limitation of formal justice means that no decision may be given which cannot be universalized. It is formally irrational to say, for instance, that X is the right solution in circumstances Y, unless you accept that there is a class of Xs which will always be right for the class of Ys. That does not mean that rules can have no exceptions. Where there is an exception, there is something present beside Y.

MacCormick further makes it clear that what is formally essential is universability, not generalization. For so far as formal justice is concerned, one could support the holding in Donoghue v Stevenson by a universal rule to the effect that all manufacturers of ginger beer are liable to residents of Paisley, who suffer foreseeable damage from decomposed snails in the manufacturer's bottle.

Again, MacCormick reasons that these factors acting as constraints to judicial discretion are oneswhich are not in themselves provable, demonstrable, or confirmable in terms of further or ulterior reasons although that does not mean the same as saying that no reasons at all can be given for adhering to such ultimate normative premisses or 'principles' or as grounds for action and judgement.

Other factor includes those needs of principles of correspondence and coherence. Correspondence principle seeks "to define true statements as being those which correspond with a reality whose existence is independent of the statement" while coherence involves "interpreting the directly visible, audible, performances of witnesses, appearance of productions, and such-like within a web of general assumptions, beliefs, and theories—no doubt rather inexact and unscientific theories."[88]Legal rulings are normative. They do not report, they set patterns of behaviour; they do not discover the consequences of given conditions, they ordain what consequences are to follow upon given conditions. They do not present a model of the world, they present model for it.

In the final analysis, second-order justification is also not without regulation. Within the limits set forth by the requirements of formal justice, consistency and coherence, and within the

range authorised by principle and analogy, legal reasoning is essentially consequential. It is the consequences of making a ruling one way or the other, to the extent at least of examining the types of decision which would have to be given in other hypothetical cases which might occur and which would come within the terms of the ruling.[89]

The principle of consequence is the first essential element of second-order justification and it is essentially both evaluative and in some degree subjective. It is evaluative in the sense that it asks about the acceptability and unacceptability of such consequences. It is subjective in the sense that while judges evaluate the consequences of rival rulings, they may give different weight to different criteria of evaluation, as to the degree of perceived injustice, or of predicted inconvenience which will arise from adoption or rejection of a given ruling.

In most problems of relevancy, interpretation and classification, more than one decision may be formally just; i.e. universalized into a ruling and more than one ruling consistent and coherent with the rest of the law and authorised by principle or analogy. When this is so, the perceived consequences of alterative rulings are what do (and ought to) justify judicial decisions. Can one admit, at this point, that this theory is a variety of ideal rule-utilitarianism? But he prefers the label ‘consequentialist’ to ‘utilitarian’ because he is anxious to stress that there is no Benthamite objective scale for measuring good and bad consequences. His view on this point is contrasted with the theory of the economic analysis of law that, in common law contexts, at least, the underlying logic of consequentialist reasoning is related to an objective scale.

At this point, MacCormick identifies three different senses of consequences: First, there are considerations of corrective justice, i.e. ‘for every wrong there ought to be a remedy’. Secondly, there are considerations of ‘common sense’; i.e. a judicial expression which boils down (he says) to perceptions of community moral standards. Third, there are considerations of public policy. The latter includes both direct public interest in bringing about changed behaviour, and also questions of convenience or expediency such as the desirability of having a clear rule or the floodgates argument, i.e. ‘allow this claim, and the courts will be flooded out with litigation’.

A particular decision may be shown to be irrational, if the foreseen consequences were premised upon incorrect facts. But there comes a point at which the consequences may be agreed and yet honest men still differ as to the rulings that are justified. At this stage, the choice is irreducibly subjective. For that reason, MacCormick disagrees with Dworkin’s view on discretion.

The second essential element of second-order justification, according to MacCormick, concerns what makes sense in the system. The basic idea, here, is of legal system as a consistent and coherent body of norms whose observance secures certain valued goals which can intelligibly be pursued all together. The idea of a consistent body of norms, according to MacCormick, is adopted on the fact that it is consistent and not contradictory of some valid and binding rule of the system. He contends:

> Not merely must a decision be justified by good arguments from consequences and/ or from principle or analogy. It must also be shown to be not inconsistent with established rules. But whether a given proposed ruling is or is not inconsistent with an established rule may plainly depend upon the interpretation which is put on established rule.[90]

What this means is that judges recognize an obligation not to controvert established rules of law, not to institutionalize conflicting rules; but rather to give only such rulings as can be fitted without inconsistency into an already established body of rules. Coherence is concerned with a certain rational principle, an order or arrangement within the calculated body of norms. One can imagine a random set of norms none of which contradict each other but which taken together involve the pursuit of no intelligible value or policy.

Harris admits that MacCormick's requirement of coherence means that, even where there is no question of logical contradiction, the legal reasoner should not put forward a ruling which cannot be coherently sustained in conjunction with other rules in the system. This implies that rules requiring different coloured cars, for instance, to observe different speed limits would not be logically inconsistent, but would be incoherent since no set of evaluation could justify them.

Thus if a proposed ruling promotes value X, by indicating that a certain pattern of behaviour or a certain state of affairs is desirable, and it would not make sense to pursue value X whilst also pursuing values embodied in other rules of law, then it is irrational to adopt the proposed ruling; for the concept of coherence involves attributing rational purpose to the law, rather than regarding it as a wilderness of single instances. In this way, MacCormick likens his idea to that of Fuller.

The fact that a proposed ruling is consistent and coherent with the rest of the system is legally permitted if authorised by principle or analogy and legally justified, if it would have

better consequences than any other similarly authorised ruling. On this account, he rejects Dworkin's definition of principles as propositions describing rights. For him, principles are "relatively general norms which are conceived of as 'rationalizing' rules or sets of rules".In the view of the person putting it forward as a principle, a legal principle explains and justifies existing legal rules. It also authorizes any new ruling which it would also explain and justify. Having this authorizing function, a principle may, through regular explicit application by the courts, acquire great presumptive weight in its own right. It however, never fully justifies a decision. It is only consequences that do that.

The second order condition also involves the 'validity thesis' which presents law as comprising or at least or including a set of valid rules for the conduct of affairs. Such rules must satisfy the requirement of consistence, at least by including procedures for resolving conflict. But rules can be consistent without the system being coherent as a means of social ordering, if 'order' involves organization in relation to intelligibly and mutually compatible values. To the extent that the rules are or are not treated as being instances of more general principles, the system acquires a degree of coherence.

When problems of relevance, interpretation or classification arise within the system, the requirement of coherence is satisfied only to the extent that novel rulings given can be brought within the ambit of the existing body of general legal principle. The requirement of consistency means that in deciding whether a certain rule is legally relevant or in choosing between two rules each of which is permitted by different interpretations of a statute or by different classifications of facts, no rule can be accepted which contradicts any other rule in the system. The system here means all the rules valid by reference to criteria of recognition at the time when the decision is made. What are the reasons why this is a requirement of legal justification? MacCormick answers in the following manner:

> There are limits to the ambit of legitimate judicial activity: judges are to do justice according to law, not to legislate for what seems to them an ideally just form of society. Although this does not and cannot mean that they are only to give decisions directly authorized by deduction from established and valid rules of law, it does and must mean that in some sense and in some degree every decision, however acceptable or desirable on Consequentialist grounds, must also be warranted by the law as it is. To the extent that the existing detailed rules are or can be rationalized in terms of more general principles, principles whose tenor

> goes beyond the ambit of already settled rules, a sufficient and sufficiently legal warrant exists to justify as a legal decision some novel ruling and the particular decision governed by it.[91]

In the first place, MacCormick connects legal reasoning and interpretation to a Hartian-positivist's conception of law and specifically of legal validity. According to MacCormick, the legal syllogism, the deductive model of justification, "operates with rules whose validity has been established according to the criteria set forth in a (Hartian-like) 'rule of recognition'".[92]

As MacCormick consistently stresses the role of principles in legal reasoning, he invariablyconceives of the law as a system. While Hart considered it sufficient to base the idea of a legal system on the unifying concept of the rule of recognition, MacCormick stresses the importance that "rules of a legal system be considered as parts of a meaningful whole."By this, the unity and identity of legal systems should be traced not just at a formal level (i.e., the system is the total sum of the norms that satisfy the formal criteria of validity set up by the rule of recognition) but also on a substantial level (it is vital that valid norms are coherent with the background principles and values of the system).

Dworkin argues that the rule theory misses the proper function of judges and the salient features of a municipal legal system. The rule theory does not answer all questions about the essence of law since besides rules there are other extra-legal standards such as principles and policies which are applied in courts and which cannot be ignored (as Hart has done). In fact, the rule theory fails to account for the importance of legal principles and other standards. This becomes evident in hard cases where legal rules give no clear directives as to how a case should be decided. Consequently, Dworkin insists there is much more to law than a system of rules.

Rules differ from principles and the distinction between a legal principle and a legal rule is, a legal one. The difference is that legal rules are applicable in an "all-or-nothing" fashion, that is, either the rule applies to a given case or it does not. If it fits the case, it has to be applied in decision making, and if it does not then it should not be applied at all. Legal principles, however, do not have this feature of "all-or-nothing", for they only incline a judge to decide a case in certain direction by providing him with additional reasons for doing so. But they do not, unlike legal rules, "necessitate a decision." In hard cases, judges are guided to their decisions by these standards, which are not rules. These standards include policies and principles. Principles cover various types of norms or standards.[93]

A legal principle only inclines, or, in other words, suggests, as it were, to the judge the direction in which he should judge the case. Another difference between legal rules and legal principles is that the latter have dimension of weight or importance[94]That is why a person who finds himself in a situation of conflict between two principles has to ask himself which of the two has more weight or of more importance. Legal rules, however, do not have this dimension; there is no question of weight or importance with regards to legal rules. If two legal rules are in conflict it simply means that one of them is not valid. Legal principles constitute standards or policies underlying legal rules, and they have to be taken into consideration by judges in applying legal rules. They are often resorted to by judges and cited as justification for giving a new interpretation to legal rules or for enunciating new legal rules.

Again, Dworkinassumes that the rule theory claims that “when a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance, then the judge has, according to that theory, a ‘discretion’ to decide the case either way. His opinion is written in language that seems to assume that one or the other party had a pre-exiting right to win the suit, but that idea, in Dworkin’s assessment, is only a fiction.” It is a fiction because “in reality, he (the judge) has legislated new legal rights, and then applied them retrospectively to the case at hand.” For Dworkin therefore, the rights thesis insists that

> even when no settled rule disposes of the case, one party may nevertheless have a right to win. It is however, the judge’s duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.[95]

One may wish to know why people assume judges make new law. According to Dworkin, statutes and common law rules are often vague and must be interpreted before the can be applied to novel cases. Some cases, moreover, raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules. So judges must sometimes make new law, either covertly or explicitly. But when they do, they should act as deputy to the appropriate legislature, enacting the law that they suppose the legislature would enact if seized of the problem. Dworkin’s position in this case is that the rule theory does not show the importance of principles and policies.

Principles determine decisions even in hard cases, Dworkin says. To buttress this point, he cites the US case of Riggs v Palmer 115 NY 506, 22, NE 188 (1889). Here a court had to decide whether an heir named in the will of his grandfather could inherit under that will, even

though he had murdered his grandfather to do so. The court held that, because of the legal principle that no person may profit from her own wrongdoing, the murderer was not entitled to inherit.

Again, Dworkin cites Henningsen v Bloomfield Motors, Inc, (1960) 32 NY 358). Here Henningsen had bought a car, and signed a contract which said that the manufacturer's liability for defects was limited to 'making good' defective parts—'this warranty being expressly in lieu of all other warranties, obligations or liabilities.' Henningsen argued that, at least in the circumstances of his case, the manufacturer ought not to be protected by this limitation, and ought to be liable for the medical and other expenses of persons injured in a crash. He was not able to point to any statute or to any established rule of law that prevented the manufacturer from standing on the contract.

The court nevertheless agreed with Henningsen.[96]Thus Dworkin argues that the standards set in these cases are not the sort we think of as legal rules but legal principles. Principles do not determine the decision of every case to which they properly apply. In some situations, such as adverse possession, people do legally profit from their own wrongdoings. Such counterexamples are not exceptions to the principles, nor do they invalidate them, but they do need justification.

Scholars have pushed this argument further in discussing the distinction between rules and principles. Christie says rules cannot contain all exceptions[97]; and Joseph Raz argues that rules are more specific[98] As for Dworkin, the distinction between rules and principles is often difficult to make; hence at times it seems to be a matter of form and substance.[99]

Nonetheless, it seems clear that unless principles are merely quite general rules, Hart does not include principles in the law. He does recognize the role of aims, purposes, and policies in penumbra or hard cases[100] but he offers two reasons for not calling them law.[101] First, the judicial process can be more clearly described without doing so. Second, excluding principles emphasizes that a hard core of settled meaning in rules is more centrally law.

Dworkin contends that Hart's analysis, insofar as it uses only rules and omits principles, cannot be adequate. Principles are not rules and yet are part of legal system. They function as grounds for legal decisions. In deciding particular issues courts often refer to principles of law like one that a person cannot profit from her own wrongdoing. Sometimes, rules are invalidated as contrary to principles. And judges use various principles of interpretation in construing statutes and rules. They take an internally point of view toward these principles as formulating

norms for decisions and criticize others for not following them. They refer to them as "legal principles" or "principles of law."

As for whether rules or both rule and principles are binding on judges, [102] Dworkin's argument is that if they do not, rules cannot be binding either. But notwithstanding that statutes and prior decision are the primary sources of rules; Dworkin insists however, that judges are required to apply statutes and precedents because of the principle of stare decisis. And even though these principles can be outweighed in some situations, they still make rules binding. Thus, a system of rules that judges have a duty to apply (the law) is not possible without principles also binding judges.

What Dworkin is saying is that rules are binding on judges. But it does seem that rules are binding on judges as citizens. Judges are however, required to apply rules, and to use them in reaching decisions. The principle of legislative supremacy and stare decisis indicate why they must be applied. Yet, the same question can be raised about them—why do principles bind judges? Hartian and Dworkinian responses to this question are central to their differences, but this leads to Dworkin's attack on rules of recognition.

Thus in the language of Dworkin, arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument of policy. Arguments of principles justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favor of anti-discrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle.[103]

It is Dworkin's concern that if a theory of law is to provide a basis for judicial duty, then the principles it sets out must try to justify the settled rules by identifying the political or moral concerns and traditions of the community which, in the opinion of the lawyers whose theory it is, do in fact support the rules. The process of justification must carry the lawyer deep into political and moral theory, and well past the point where it would be accurate to say that any 'test' of 'pedigree' exists for deciding which of two different justifications of our political institutions is superior. For example, a political decision, like the decision to allow extra income tax exemptions for the blind, may be defended as an act of public generosity or virtue rather than on grounds of either policy or principle.

In all cases, principle and policy are the major grounds of political justification. Even when is it a program that is chiefly a matter of policy, like subsidy program for important industries, may require strands of principle to justify its particular design. Like the case of the aircraft manufacturer we cited earlier, Dworkin maintains that in such situation that the aircraft manufacturer sues to recover the subsidy that the statute provides, he is arguing for his right to the subsidy. Here his argument is an argument of principle and not of policy.

Dworkin accuses Hart for bringing in through the back door what he threw away though the main door. By this, Dworkin refers to Hart's rule of recognition where Hart argues that it serves as the condition sine qua non for the existence and validity of primary rules. According to Hart, the rule of recognition validates the secondary rules. It establishes the ground for recognition of the secondary rule as rule to be obeyed or observe.

Hart still maintains that if principles are binding on judges, they must be law. In *The Concept of Law*, Hart's theory did not account for principles as law. This is the ground Dworkin criticizes his 'rule theory' as inadequate. According to him, if Hart's theory did not recognize principles as part of law, it then means that Hart threw away completely the idea that law pre-exists legislation. In Hart's theory, for instance, for a norm to count as law, it must be identified by the rule of recognition. In fact, the rule of recognition serves as a yard-stick for identifying a given norm as belonging to a legal system. If this is true and still the case, Dworkin says, therefore, it means that the rule of recognition is at the cause of the confusion found in Hart's legal theory. On this backdrop, Dworkin sets himself to dismantle this confusion. This he did from various angles.

The first comes from the point of view of pedigree. Here Dworkin argues that a prominent or central tenet of positivism is that laws are identified by their pedigree or origin. But principles cannot be so identified, Dworkin contends. There are two sides to this argument. The first, according to Waluchow[104]and Simmonds[105] is that a rule of recognition cannot use the content of norms as a criterion. Because principles do not normally become legal ones by their pedigree; i.e. legislative acts or specific court decisions, therefore, they cannot be identified by a rule of recognition. Again, principles are incorporated over time by a variety of institutional acknowledgements of their appropriateness, that is, because of their content.[106]

Hart's view has two strong defenses against this objection. In the first place, he allows a rule of recognition to use content as a criterion. Here he argues that moral content is a criterion in

some systems.[107] Usually, we should note, content operates not as a criterion for including but for excluding norms. For example, most of the Bills of Rights of the U.S. Constitution impose disabilities on lawmaking. Even Dworkin's favored equal protection clause specifies that states cannot deny protection of the laws.

On that note, it imposes a disability on state lawmaking. In fact, it is a test of invalidity, not validity. A norm does not become a valid law because it gives equal protection. Instead, and contrary to Dworkin, [108] a criterion of a rule of recognition could include norms as valid law by content, say, customs from time immemorial.

The second defense of Hart is that Dworkin's description of how principles become recognized in law closely resembles Hart's account of social duty-imposing rules. As noted above, the rule of recognition is not a duty-imposing rule. Instead, a social rule requires judges to use standard of recognition to identify the laws that they enforce. Hart's view could easily be extended to include principles. The gradual adoption of a principle by officials seems to fit the development of a social rule requiring its use for interpretation and so on.

Judges take an internal point of view toward it, criticize others for ignoring it, and so forth. New judges find it, like the rule requiring use of the standard of recognition, part of the duties or responsibilities of the office or role of judge.The second pedigree argument is against a form of this account.[109]The pedigree is taken to be the amount of institutional support available for a principle. Dworkin objects that the choice between lines of precedent in deciding a case is not based merely on institutional support, but also on the moral merits of over the other. Consequently, not even social rules can settle this matter.

To summarize our discussion,the crucial question is: what is the essential feature of law? From what we have seen so far, it is clear that neither sanction nor command can be the essential feature of law as legal positivists Bentham, Austin and Holmes would want us to believe. Holmes went as far as saying that it is prediction; a systematized prediction as to what would happen to a person (sanction) if he does a given thing that is forbidden. Kelsen and Hart are also of the view that legal imperatives are not co-extensive with moral imperatives; hence what law is has to be differentiated from what it ought to be.

Joseph Raz aligns with Hart and the rest that law can be described in value-neutral terms without resort to moral argument; that is, a rule can still be a rule, even though it violates a moral standard.[110] Alf Ross concurs with the removal of justice from law for there is no way of mutual

understanding in issue of justice. For him, it simply leads to "implacability and conflict, since on the one hand it incites to the belief that one's demand is not merely the expression of a certain interest in conflict with opposing interests but it possess a higher, absolute validity; and on the other hand, it precludes all rational argument and discussion of a settlement."[111] Thus Ross declares

> Justice, therefore, cannot be a legal-political yardstick or an ultimate criterion by which a law can be judged. To assert that a law is unjust is…nothing but an emotional expression of an unfavorable reaction to the law. To declare a law unjust contains no real characteristic, no reference to any criterion, nor argumentation. The ideology of justice has thus no place in a reasonable discussion of the value of laws.

Raz maintains the essence of law is located in the 'source thesis' if we want to put in perspective the meaning of 'positivism' within legal philosophy. Kelsen attempts to purge the legal theories of Bentham and Austin of what he called a political bias occasioned by the introduction into law of utilitarian principles. And Hart claims to de-emphasize the coercive element of law purported by the imperativists by his rule-theory of law. Finis, Fuller, Dworkin and MacCormick continue to fine-turn Hart positivist project by aligning the essence of law to morals.

Following what has been said, it becomes clear that obligation is thus, the essence of law since it accounts for the sanctity of law and derives from natural foundation. Sanction cannot be the essence of law because it is only an appendage to law, intended to discourage its violation and encourage its observance. Thus sanction is meant to protect law, and so it cannot be its essential feature. Nor can it consist in the fact that it is a system of rules since the concept of law is not exhausted by the concept of "system of rules." As for Dworkin, there is much more to the concept of law than the rules in a legal system. Judges know better. For where the application of rules conflict with any principle of natural (law), justice, that legal rule in question has to give way to the said principle.

Thus, the stand heretherefore, is that whichever theory answers the question about the essential feature of law must have some implications with regard to legal adjudication, justice, right, obligations and legal reasoning etc.

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CHAPTER THREE

HART'S LEGAL POSITIVISM

3.1 Three Recurrent Issues

In his *The Concept of Law*, Hart shows that philosophers have sought to settle three recurrent issues by defining 'law'. The first concerns how legal obligation differs and relates to orders backed by threat. The second involves the relationship between law and morality. The third is about rules and to what extent law is an affair of rules.[1]

3.1.1 Law and Legal Obligation: The First Recurrent Issue

In discussing how legal obligation differs and relates to orders backed by threat, Hart began by explicating the concept of obligation. He believes that being obliged to do something is not the same as having obligation to do that. According to him, to say a person is or was obliged to do something refers to her beliefs or motives. And this is not the same when we say a person has an obligation.

In the Austinian theory, 'X is obliged to do A' implies that X believes unpleasant consequences will result if she does not do A. But for Hart, this does not mean that X has an obligation to do A. In being obliged to do something, Hart says, the consequence is thought to be important and serious. It suggests that X's motive in doing A is not strictly to avoid these consequences. Thus, in having obligation, the motives and beliefs that characterize being obliged are neither necessary nor sufficient. A person can have those beliefs about and motives for doing A, but still have no obligation to do A. In that case, having an obligation is not the same as being obliged.

In the Austinian theory, 'X has obligation to do A' presupposes that X will be punished if she does not do A. For Hart, a situation where X is not punished is not a contradiction as they claim.[2.] Sanctions are not necessary for duty-imposing rules. The Austinian theory cannot account for the variety of sources, origins or the normativity of law. Rather, Hart argues the theory fails to distinguish between the meaning and force of a statement.[3] A prediction or warning of a sanction might frequently be part of speaker's intent, but it is not part of a sentence's meaning. When people use rules to speak about obligations, they are not merely or even primarily predicting punishment.[4]Instead, they are indicating that the rules provide a reason

for inflicting an evil for deviation. In this sense, courts do not use duty-imposing rules to predict that defendants will suffer an evil, but as reasons for inflicting it. An armed robber takes noncompliance with her demands as a basis for imposing harm, not merely a prediction as to what she will do. Thus the person shoots because the victim did not comply.

To be obligated or obliged therefore, Hart says, is to perform an action only if a rule of a certain kind requires one to do so.[5]Here some distinguishing features make such conduct nondiscretionary:

> First they are supported by a general demand for conformity to them with considerable social pressure brought to bear on those who deviate. Second, usually they are deemed important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it. And thirdly, duty-imposing rules prescribe conducts that can be contrary to an actor's wishes or interest. Of course, the required behaviour might be in other's interest. But characteristically, one can infer that duty-imposing rules are identified by their dependency on a social practice, their possible independence of content, and an element of coercion involved if they are violated.[6]

Again, to have obligation is characterized by content-independence of what is said. This is to say that it has a peremptory character[7], which are not to function as another, even dominant, reason for subjects to use in deliberating about what to do. Instead, they are used to exclude deliberation by those to whom they apply.[8]Thus that people comply is not necessarily because there is a prediction of sanction being attached with noncompliance. Rather what the threat of sanction does is simply to reinforce the commands in case the subjects do in fact deliberate. This point fits with Hart's earlier claim that sanctions are logically independent of duty-imposing rules.

Bayles points out that the content independence of authoritative reasons harks back to Hart's early characterization of duty-imposing rules as content-independent.[9] Acceptance of the commander's command is like acceptance of a rule about promise-keeping. Thus content-independence consists in the fact that the command of the commander, like promises, need have nothing in common.[10] The intention of the one commanding is that his commands be taken as reason for performing actions.[11]

Having said this, it is obvious that what is lacking in the imperative theory is the distinctive normative aspect inherent in the habits of obedience. It is this disposition that renders

the commander's command as reasons for action, and not mere predictions of evil for failure to comply. What it means also is that authoritative reason is detached from any necessary connection to a command. The binding nature of obligations therefore stems from their providing at least partially peremptory reasons for acting or evaluating others and from accepting the rule as an at least partially authoritative reasons for acting or evaluating.

In talking about obligation, no motivation need be provided. Sanctions are not logically required for duty-imposing rules or authoritative reasons. To say someone has a duty or obligation is to say the act may be properly demanded or exacted of the person. It is to say that the act may be demanded or exacted from the person according to legal rules or principles. Hart's account therefore, requires the existence of a rule requiring the conduct, not a mere threat of sanction.

Although Bentham's obligation required a law, the imperative theory of law is not strong enough to capture obligation. A mere wish that others act in some way is compatible with rules of etiquette that do not impose obligations. The attitude of a person using rule as a guide to conduct reflects an internal rather than an external point of view toward rules.

3.1.2 Relationship between Law and Morality: The Second Recurrent Issue

On the second problem, Hart says it is concerned with distinguishing law and morality from each other. Precisely and specifically, it is about the casual influence of morality on law and vice versa; otherwise whether the definition or concept of law makes some reference to morality. Hart makes reference to a claim that law, especially in the brand of legal positivism or analytic jurisprudence, is to be value-free. The claim recommends a difference between legal obligation and being threatened. For Hart, "the certification of something as legally valid is not conclusive of the question of obedience, and however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny."[12]

On this note, Hart says, there are situations in law and morality where it appears that both law and morality have some certain things in common. Both law and morality make some conduct obligatory; hence there are rules restricting murder and violence. Terms such as rights and duties, excuses and justifications etc are frequently used in both legal and moral discussions. For Hart then, one might come to think that with this, morality is the nature or essence of law.

But he will rather not accept this position. Many laws, he says, concern matters about which people have no moral sentiments one way or another. If it is claimed that unjust laws are not laws at all, then it is difficult, if not impossible, to explain the status of some rules enacted by legislatures and enforced by courts.

Natural lawyers claim there is a relationship between law and morality on the ground that law is a reason that derives from the nature of things. Certain principles of human conduct, they admit, are recoverable by reason to which law must conform.[13]

Against this background, Hart contends that the belief in natural law fails to perceive, at least in the modern sense, the different senses of the word ‘law’. Law, in the sphere of human conduct, does not derive from the knowledge of regularity in nature. The view that human beings have the same nature that tends to a specific human end/good has long been criticized and disproved as myth by Hobbes[14] and Hume; [15]Hart says.

Again, it seems by experience that human nature cannot subsist without the co-operation of individuals. Hart recognizes this to be a fact. But does such a survival depend on a general teleological outlook specifying a way of life men should lead as claimed by the natural lawyers? Hart thinks it is not the case. Instead, he assumed that it is relevant to give some philosophical considerations to the relation between law and morality with regard to social control of conduct.

There are rules relevant to both law and morality, which he termed the minimum content of natural lawandwhich are derived from the following facts: i) the vulnerability of human condition, ii) appropriate equality, iii) limited altruism, iv) limited resources, and v) limited understanding and strength of will. [16] Hart insists therefore, that the minimum content discloses the core of good sense in the doctrine of natural law.

Obviously, traditional natural law theory recognizes objective standards based on human nature for evaluating law. Aristotle calls it “the ideal law of human conduct,”[17] and the Stoics identifies it with the “law of reason.”[18] For Aquinas, law is nothing but a dictate of practical reason emanating from the ruler who governs a perfect community. It is an ordinance of reason promulgated by one who has care for the community. Law is a product of practical reason, coming from the leader, that is, and one who has concern for, or is in-charge of a perfect community, in which he exercises practical reasonableness of integral directiveness geared towards the common good of humans in all its constituent parts.[19]

Ronald Dworkin rejects the positivism of Hart though; he does not accept that he is a natural lawyer. Dworkin claims that a political morality is necessary in jurisprudence.[20]His insistence on some kind of political morality is however, that such morality is a good morality. But this not always so! Some other theorists have sought a middle course in the relationship between law and morality, maintaining that law and morality coincide in various respects; but the relationship, they think, should be held contingent.[21]

Although law and morality share the same normative words, the force of invocation is not the same, such that an unjust law could still be valid. But not many will accept this view that a substantive law that is unjust is still law.

Utilitarianism claims to serve as an alternative basis, but there are questions about its adequacy for issues such as justice. In his later writing, Hart distinguishes between evaluating and criticizing the content of a legal system from determining whether there is an obligation to obey the law…[22]The two issues are not completely distinct, because it is unlikely that an obligation exists to obey a bad or corrupt legal system. Even if the laws of a legal system are generally good and just, Hart believes that a distinct type of argument is required to establish any general obligation to obey the law.

A group has reduced justice or the value of the principles of natural justice to procedural justice.[23] Procedural justice claims that courts should be impartial in assessing and judging cases. This view claims that when courts are treating like cases alike, they are being just and fair. If this is the case, the question remains: are we obliged to obey a law that is unjust, even though it is valid? Hart reminds us that even in evaluating the content of laws of a legal system, one can distinguish (at least roughly) between substantive and procedural law; notwithstanding that evaluation of substantive law can vary in detail as when criminal law is used to enforce morality.

3.1.3 Law as an Affair of Rule: The Third Recurrent Issue

The third problem, according to Hart, is concerned with the nature of rules and how law is an affair of rule. For Hart, whether one views law as analogous to orders backed by threats or to morality, one thinks of it, or a large part of it, as consisting of rules.[24] He believes the understanding of sanctions in the imperative theory of law distorts the function of rules as means to social control.

The concept of command in the Austinian sense, Hart argues, provides an inadequate account of all the various kinds of laws, in particular, those which grant powers for making wills, contracts, and so on. Again, according to the Austinian theory, the sovereign cannot be legally bound, order or command herself, but in many legal systems, as Hart points out, legislators are subject to the laws they make.

More still, the command theory ignores a source of law important in some systems. Commands or orders require a person or persons who issue them, so the theory focuses on a legislature or sovereign as the source of law; but in common-law systems, customs is often an important source of law. Hence, the Austinian theory of law as commands unduly restricts the content, range, and origin of laws.

On account of this, Hart argues that law is an affair of rules. There are difficulties and uncertainties concerning the concept of rules, for there exists a broad class of legal rules that differ in function and kind from orders backed by threats. Orders and laws, on the Austinian sense, primarily impose duties with the threat of a sanction (evil) if one fails to comply, but many laws do not have sanctions. Instead, they provide facilities for a person to realize her desires by conferring powers to create structures of rights and duties.[25]

Some legal philosophers have held that judges do not decide cases according to rules but according to their prejudices, dispositions, and views of the moment.[26] But Hart thinks that part of the basis for this claim emanates from the obscurity of the concept of a person using or following a rule.

Furthermore, the complexity that is associated with following a rule, he says, is partly derived from the obscurity about what a rule is. In Hart's understanding, there are different kinds of rules. Some prescribe behaviour; others confer powers or establish conditions for engaging in certain kinds of activity such as making wills and contracts. The existence of these various types of rules might depend on different conditions; hence the question: What does it mean to say a rule exists and to what extent is law a matter of rules?

It is Hart's intention that the understanding of law as a matter of rule is the most profitable way to start. To guide against a shallow cognition of rule in relation to behavior, he isolates social habits which are not rules in the strict sense of the word but which can be confused with them. Social habits, according to Hart, have to do with a convergence of behavior. Thus a "mere convergence in behavior between members of a social group may exist; for

instance, all may regularly drink tea at breakfast or go weekly to the cinema, yet there may be no rule requiring it.”[27]

Besides, when a recruit in the army wakes up at 5 o'clock every morning because the law says so, he is not performing a habitual behavior. Instead, Hart remarks that the difference between people habitually going to the cinemas and a recruit getting up by 5am everyday even demonstrates itself in our language.

Therefore, in describing social habits, Hart argues, we do not wish to express an obligation. No doubt, we can criticize people for some habits when they exhibit some awkward behavior, it does not mean that when it happens, we are doing so with a view of claiming that they are liable to punishment. Social habits and social rules similarly refer to conduct in question generally, though not invariably. Hence social habits refer to objective fact in the world. In his statement, Hart argues that it is a performance understood within its environment of occurrence, as in a game. It cannot be reduced to truth conditions.[28]

In *The Concept of Law,* Hart pushes the game-analogy further as an elaboration of the method of elucidation. According to this game theory, to understand a rule is to come to appreciate how it operates within the system that gives rise to it. Hence legal rules ought to be understood from their internal aspect. It is Hart's conviction that “if a social rule is to exist, some at least, must look upon the behavior in question as a general standard to be followed by the group as a whole.”[29]

This is an appeal to contextual elaboration since it involves the attitude of those who know what it means to use the rules as standards of evaluation. Hart illustrates this as an attitude of those, for example, who play within certain rules of the game, like chess. Chess players play within certain rules and make the relevant moves within certain conditions. Thus, those who adopt the internal aspect of rules have “a reflective critical attitude to this pattern of behavior: they regard it as a standard for all who play the game. Each not only moves the Queen in a certain way himself but has views about the property of all moving the Queen in that way.”[30] Feelings, according to Hart, are neither necessary nor sufficient for the existence of ‘binding’ rules. What is necessary rather is a critical reflective attitude, as we have indicated.[31]

By way of summary, Hart's concern in introducing the internal aspect of rules is to establish the normativity of rule among those who take the rule as a standard of behavior. Since to understand a rule, it is necessary and sufficient to understand it from the point of view of those

who accept it as a criterion of behavior, (for there lies the normativity of rule), so also legal concepts should be understood and elucidated within a certain legal environment in which they occur.

On this account, what this implies is that the insider's viewpoint is not logically equivalent to non-legal judgements of the spectator—the external point of view. Instead, a reporter can describe the internal point of view itself. Hart therefore urges that his *The Concept of Law* be understood as an essay in descriptive sociology where his appeal to the internal viewpoint, as one of his linguistic tool, is a suggestion that we listen to the insiders' view within the context of usage.

3.2 Varieties of Imperatives

Having settled what he considered to be the three persistent problems of the concept and nature of law, Hart moved further to investigate on the varieties of imperatives. According to him, there are varieties of imperatives expressing authority and require immediate attention. Instances of imperative are 'Go home!' 'Come here!' 'Stop!' 'Do not kill him!' Hence Hart says "the social situations in which we thus address others in imperative form are extremely diverse; yet they include some recurrent main types, the importance of which is marked by certain familiar classifications."[32]

Furthermore, expression such as 'Pass the salt; please! is a form of imperative though a request. It is addressed to one who is able to render service to another without any suggestion either of any great urgency or any hint of what may follow on failure to comply.

Again 'Do not kill me' is also an imperative though it would be seen here as a plea because the speaker is at the mercy of the person addressed or in a predicament from which the latter has the power to release him. Furthermore, 'Don't move', being a form of imperative, may be a warning if the speaker knows of some impending danger to the person addressed (a snake in the grass) which his keeping still may avert. In all of these, Hart says, the most important of these situations is one to which the word 'imperative' appropriately applies: command, order and law.

3.2.1 Command

Hart sees command as a variety of imperatives, although he does not think a whole lot of law can be understood from the point of view of a command theory. It is true that command, as

an imperative, obliges one to do or refrain from doing something; yet it does not exhaust or express fully the idea of law. For Hart therefore,

> The clearest and the most thorough attempt to analyse the concept of law in terms of the apparently simple elements of commands and habits, was that made by Austin in the Province of Jurisprudence Determined.[33]

The imperative theorists Austin and Bentham had both conceived law in the form of a command. On that account, Bentham defines law as "an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power".[34] For Bentham, "law originates from the sovereign, packaged as his wishes."[35] The wishes of the sovereign manifest themselves as signs that say what the sovereign declares concerning conducts referring to certain persons or class of persons who are under his power, that is, his subjects. Thus, law is a command addressed to persons, covering a certain range of acts.

The sovereign expresses his will in various ways in the laws regarding aspects of conducts. Bentham sees force as the punishment and sanction, which the law requires in order to bring about compliance. Other laws and devices or 'corroborative appendages' may be used to make the subjects comply with the law or the wish of the sovereign. The manner in which the sovereign makes his will/wish known is called expression. Although Bentham claims that the source of law is sovereign, he does believe that sovereignty is only limited by custom, that is, those acts that are not left by custom to the sovereign to command.

In that same direction, every law, in Austin's conceptual scheme, strictly speaking, is a command, which is a key to the science of jurisprudence and morals.[36] Command invokes power and purpose of the party commanding to inflict an evil or pain in case the desire is disregarded. The evil likely to be incurred is called sanction or punishment. Where it obliges generally to acts or forbearances of a class, a command is a law or rule. But where it obliges to specific acts or forbearance, which it determines specifically or individually, a command is occasional or particular. The commands of a lawgiver are laws/ rules but the commands of a judge are occasional or particular which oblige only a set of acts, thus they are not laws.

Laws established by political superiors are general "as enjoining or forbidding generally acts or sorts; and as binding the whole community or, at least, whole classes of its members."[37] Where a law confers right it expressly or tacitly imposes duty. Every legal right is a creature of positive law. But it does not mean that the end of government is the creation and protection of rights. A government can exist for any motive and it does not have to create rights to justify its existence. A law that actually exists is law whether or not we like it, says Austin.

The existence of law is one thing and its merit or demerit is another thing. He claims that it is nonsensical to hold that laws which contradict the will of God are not laws. Habit of obedience to human sovereign or submission to a determinate or common superior who does not pay habitual obedience to a determinate person or body is a mark of political society. No law binds the sovereign, whether or not he is consistent with the sentiments of moral sanctions; in other words, the sovereign has no legal limitation.

Austin, like Bentham, claims the cause of habitual obedience is bottomed in the principle of utility, that is, a perception by the bulk of the community that political community is preferable to anarchy. It is to be noted that the habit of obedience is not always rational for people can simply obey on the consequence of custom (following the tradition of the fathers) or on the consequence of prejudice, which has no foundation in utility. It is Austin's conviction that epithets such as 'lawful' or 'unlawful', 'right' or 'wrong', or 'good' or 'bad' do not apply to the sovereign political government with respect to positive law.

Having developed the Austinian view of law, Hart presents in his own way traditional and standard objections to the conception of laws as commands.

First, the concept of command provides an inadequate account of all the various kinds of laws, in particular those which grant powers for making wills, contracts, and so on.

Second, according to the Austinian theory the sovereign cannot be legally bound; or order or command herself, but in many legal systems legislators are subject to the laws they make.

Third, the Austinian theory of commands ignores a source of law important in some systems. Commands or orders require a person or persons who issue them, so the theory focuses on a legislature or sovereign as the source of law; but in common-law systems custom is often an important source of law. Hence, the Austinian theory of laws as commands unduly restricts the content, range, and origin of laws.

3.2.2 Order

Like command, order is another variety of imperative, says Hart although, the imperative theorists had taken it as an essence of law. Order has element of coercion. It is this coercive feature that makes the imperative theorists to regard law as an order given by a superior to his subject. In the light of the imperative theories, Austin and Bentham speak of a situation where a gun man orders a clerk to open the safe otherwise face sanction which serves as punishment for noncompliance.

One major characteristics of order so-to-say is that the one who issues an order backs it up with a threat of sanction to be able to secure compliance with his expressed wishes.[38] The speaker threatens to do something which a normal man would regard as harmful or unpleasant, and renders keeping the money a substantially less eligible course of conduct for the clerk. For Hart, therefore, if the gunman succeeds, we would describe him as having coerced the clerk, and the clerk as in that sense being in the gunman's power. In this situation, Hart says, we would say that the gunman ordered the clerk to hand over the money since this rather military-sounding phrase suggests some right or authority to give orders not present in our case.

It would, however, be quite natural to say that the gunman gave an order to his henchman to guard the door. In a situation where an order is given, usually a force is attached to enforce obedience; hence order is closely related with a command.

But what does it mean to say that one is commanded or ordered to do or refrain from doing something? To command someone, Hart says, is characteristically to exercise authority over men, (him) not power to inflict harm, and though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect for authority.[39] Thus Hart does not think the notion of order is adequate to express the essence of law. After all, law has other characteristics quite different from that of order or command.

3.2.3 Law

Hart further believes that law as a variety of imperative, like command and order, is also a coercive order, which obliges us to do something or refrain from doing it. However, Hart says "the most prominent general feature of law at all times and places, is that its existence means that certain kinds of human conduct are no longer optional, but in some sense obligatory."[40] What is

meant here is that Hart disagrees with those who contend that law is either a command or an order backed by threat.

To say law is a command means that there are situations when an official, face to face with an individual, orders him to do something or a policeman orders a particular motorist to stop or a particular beggar to move on. In situations like these, the command theory says there is law. But Hart thinks these are simple situations which are not, and could not be, the standard way in which law functions. This is because no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which was required to do. In this respect, law is different from simply ordering some people to do things.

Furthermore, Hart admits that law has a character of promulgation, which involves bringing it to the public attention (especially attention of those for whom they apply) after they are made. This character is necessary, he says, because the legislator's purpose in making laws would be defeated unless this were generally done, and legal systems often provide, by special rules concerning promulgation, that this shall be done. Although, not in all situations is this possible, Hart says, but in any situation that it is done; whether before or after, it remains laws.

Also Hart affirms that in the absence of any special rules to the contrary, laws are validly made even if those affected are left to find out for themselves what laws have been made and who are affected thereby. What this means is that for those who argue that law is 'addressed' to certain persons, Hart says the fact is that these are the persons to whom the particular law applies, i.e.; whom it requires to behave in certain ways. As for the gunman situation, Hart points out that it is true there is a sense in which one can say that the gunman has an ascendancy or superiority over the bank clerk; i.e. the fact that it lies in his temporary ability to make a threat, which might well be sufficient to make the bank clerk do the particular thing he is told to do.

But outside this, Hart insists, there is no other relationship of superiority and inferiority between the two men except this short-lived coercion that dies with the occasion. With this, however, Hart indicates some necessary conditions of law such as continuity, persistence and limitation.

3.3 Varieties and Content of Law

By observation, Hart claims laws differ from command or order backed by threats. However, having identified some characteristics of law, he moved further to indicate the varieties of law such as those which confer powers (power-conferring rules) and laws which impose duty (duty-imposing rules). Regarding the contents of law, Hart argues there exists a broad class of legal rules that differs in function and kind from orders backed by threats. In the Austinian theory, orders and laws primarily impose duties with the threat of a sanction (evil) if one fails to comply. But Hart thinks there are many laws, which do not have sanctions. They simply provide facilities for a person to realize her desires by conferring powers to create structures of rights and duties; hence power-conferring rules and duty-imposing rules.[41]

3.3.1 Power-Conferring Rules

Against the background of the Austinian command theory of law, Hart provides an alternative clue that there could be a variety of laws of different kinds and forms obliging us to do something or refraining us from doing same. According to him, power-conferring rules form one of these varieties of law. Its operation and demands differ from the other in that it includes those laws that create duties and obligation by conferring powers on its holders.

For Hart, example of power-conferring rules is the power to make a will. Here, for a law which requires two witnesses to a will, it does not have sanctions attached to it. Rather, it merely prescribes that if one fails to have two witnesses, a will shall not be legally valid. Thus language indicates the difference between such laws and criminal laws, which seem closet to the Austinian theory. For Hart therefore, laws that confer powers are themselves diverse and not all of one kind.[42]They can be separated from the point of view of the type of power they confer and their subject.

Some laws, Hart says, like the one about wills, primarily concern private individuals and consequently private powers, whereas others concern public positions and thus confer public powers. Whether the powers conferred are private or public, Hart maintains, some laws prescribe the capacities or qualifications for a person having the power. It could be the prescription of the law that she be an adult and sane or that the manner in which such power may be exercised must be this way or that, such as for example, that contracts be written, or that legislation be passed by both houses, and so forth.

In all, what Hart means is that there are other laws which limit or specify the content or character of those powers, such as those limiting the duration of oral contracts and voiding contracts contrary to public policy.

Besides, such laws conferring public powers, Hart says, are least amenable to the Austinian analysis.[43]Such laws regulate courts and legislatures. Their purpose in regulating the jurisdiction of courts is not to command judges but to define the conditions and limits in which their decision on a matter outside its jurisdiction stands as valid law until it is quashed or set aside by a higher court. In that case, it would be odd to say that judges obeyed or disobeyed the law. But with the legislature the situation is even more different from what the Austinian theory suggests. For instance, if the law requires that a bill pass a legislature by a majority vote before it becomes law, one cannot say those legislators voting for a particular bill that passed have obeyed the law, while those voting against it have disobeyed the law. The same is true in reverse if the bill fails to obtain a majority.

This last point is not telling, because a defender of laws as commands would probably not say such a thing. Rather, she would say that the condition of a majority vote is part of the antecedent of a rule ordering someone to declare a bill as having been passed by the legislature.

3.3.2 Duty-Imposing Rules

In another but related note, Hart deposits that duty-imposing rules differ from power-conferring rules. The reason is because its operation is manifest in the criminal law. In the criminal law, failure to comply with the order or directives is regarded as a breach, violation, or offense. On the contrary, failure to have two witnesses to a will is not a violation or breach; rather, it makes a will invalid, a nullity, or have no effect or force. Despite the differences between power-conferring rules and mandatory or duty-imposing rules, Hart claims there are similarities and relations between them.

First, both types of rules are similar in that they constitute standards by which particular actions may be thus critically appraised"[44] The making of wills can be judged as correct or incorrect in accordance with power-conferring rules just as other actions can be judged as right or wrong in accordance with criminal laws.

Second, power-conferring rules are related to duty-imposing rules in that they confer power to create duties. Laws conferring power on judges enable them to impose duties on persons appearing before them.

According to Hart, defenders of the Austinian theory made two different suggestions for holding these difficulties and retaining the main elements of their view. One approach is to reverse or extend the concept of sanction to include nullity and invalidity as sanctions. The second is to eliminate power-conferring laws as complete rules and make them parts of duty-imposing rules. By the first approach, the sanction for not following a law requiring two witnesses to a will is the invalidity of the will; one's desires will not be carried out. Of course sometimes the sanction might be only a slight inconvenience and not an evil.

Hart's major objection to this first approach is that sanctions stand in a different relation to duty-imposing rules from that in which invalidity stands to power-conferring rules. In duty-imposing rules the prescribed or prohibited conduct can be distinguished from the sanction applied for nonconformity. Thus even though it might not be a legal rule, one can conceive of a rule prohibiting conduct without sanction at all.[45] But power-conferring rules cannot have their "sanction" of invalidity taken away and still be intelligible even as nonlegal rules.

Moreover, the concepts of violation of a duty (illegality) and violation of a power-conferring rule are distinct and need not go together. One can have the power to do something but a duty not to do it as in a situation where it can be illegal to sell stolen goods, but if this is in some circumstances the sale may be legally valid.[46] Contrarily, failure to have two witnesses to a will is not illegal, one does not violate a duty, but the will is invalid.

3.4 Modes of Origin

The Austinian theory of law reduced law to coercive orders. At the outset, this meets with the objection that there are varieties of law found in all systems which, in three principal respects, do not fit this description. The first is that even a penal statute, which comes nearest to it, has often a range of application different from that of orders given to others. In that case, such a law may impose duties on those who make it as well as on others. Secondly, other statutes are unlike orders in that they do not require persons to do things. Instead, they may only confer power on them. They also do not impose duties but offers facilities for the free creation of legal rights and duties within the coercive framework of the law. Thirdly, though the enactment of a

statute is in some ways analogues to the giving of an order, some rules of law originate in custom and do not owe their legal status to any such conscious law-creating act. Hence the effort to reduce law to this single simple form of the variety of laws ends by imposing upon them a superior informally.

3.5.1 Between the Sovereign and Subject

According to the Austinian theory, in every human society, where there is law, there is ultimately to be found latent beneath the variety of political forms, in a democracy as much as in an absolute monarchy, this simple relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to no one. This vertical structure composed of sovereign and subjects is, according to the theory, as essential a part of a society which possesses law, as a backbone is of a man. Where it is present, we may speak of the society, together with its sovereign, as a single independent state, and we may speak of its law. But where it is not present, we can apply none of these expressions, for the relation of sovereign and subject forms, according to this theory, part of their very meaning. Hart examines the implication of this theory via analysis of habit of obedience and continuity of law and the rest.

3.6.1 Habit of Obedience and Continuity of Law

According to Hart, in describing social habits, we do not wish to express an obligation. We can criticize people for some habits when they exhibit some awkward behavior not with a view of claiming that they are liable to punishment. Social habits and social rules similarly refer to conduct in question generally, though not invariably. Hence social habits refer to objective fact in the world. In his statement, Hart argues that it is a performance understood within its environment of occurrence, as in a game. It cannot be reduced to truth conditions.[47]

In *The Concept of Law,* Hart pushes the game-analogy further as an elaboration of the method of elucidation. To understand a rule is to come to appreciate how it operates within the system that gives rise to it; hence legal rules ought to be understood from their internal aspect. It is Hart's conviction that "if a social rule is to exist, some at least must look upon the behavior in question as a general standard to be followed by the group as a whole."[48] This is an appeal to contextual elaboration since it involves the attitude of those who know what it means to use the rules as standards of evaluation.

Hart illustrates this as an attitude of those, for example, who play within certain rules of the game, like chess. Chess players play within certain rules and make the relevant moves within certain conditions. Thus, those who adopt the internal aspect of rules have "a reflective critical attitude to this pattern of behavior; they regard it as a standard for all who play the game. Each not only moves the Queen in a certain way himself but has views about the property of all moving the Queen in that way."[49] Feelings, according to Hart, are neither necessary nor sufficient for the existence of 'binding' rules. What is necessary rather is a critical reflective attitude, as we have indicated.

Hart's concern in introducing the internal aspect of rules is to establish the normativity of rule among those who take the rule as a standard of behavior. Since to understand a rule, it is necessary and sufficient that it be understood from the point of view of those who accept it as a criterion of behavior, (for there lies the normativity of rule), so also legal concepts such as corporation, rights and duties are understood and elucidated within a certain legal environment in which they occur.

By implication, the insider's viewpoint is not logically equivalent to non-legal judgements of the spectator—the external point of view. Instead, a reporter can describe the internal point of view itself; hence Hart urges that his *The Concept of Law* be understood as an essay in descriptive sociology where his appeal to the internal viewpoint, as one of his linguistic tool, is a suggestion that we listen to the insiders' view within the context of usage.

3.6.2 Conditions of Law

As earlier stated, Hart indicates some necessary conditions for the existence of law. These include continuity, persistence and limitation.

3.6.2.1 Continuity

Hart notes that experience shows that there is a continuity of law from one sovereign to another. The Austinian theory cannot account for the continuity of law from sovereign to sovereign; hence it cannot account for the existence of law. Hart buttress his position imagining a primitive society in which the Austinian theory might apply.[50] According to him, there exists a king or sovereign, Rex. At first, there might be some difficulty in getting the people to obey him, but after a while they settle into a habit of obeying his orders. On Rex's death his only son, Rex

II, becomes king. Following the Austinian theory and because the populace is not in a habit of obedience to Rex II, he cannot qualify as sovereign.

Even more crucial, according to Hart, is the fact that usually succession is regulated in advance. Prior to his father's death, Rex II has a title to be king, and after his father's death, he has a right to rule. But the Austinian theory cannot account for Rex II having a right to rule or for expecting the populace to obey him since what is required to account for these features, Hart says, is simply the acceptance of a rule of succession, which "is characteristics of a legal system, even in an absolute monarchy, to secure the uninterrupted continuity of law-making power by rules which bridge the transition from one law-giver to another"[51]

In Hart's conceptual scheme, the idea of habits cannot simply perform the function of such rules. Even though the existence of rules resembles the existence of habits in that for both there must be convergent behaviour, yet there must be a general type or pattern of behaviour in society. Three central differences exist between habits and rules,[52] Hart admits. Firstly, with habits there is mere convergence of behaviour, but with rules failure to conform elicits criticism by others.

Secondly, nonconformity to a rule, unlike nonconformity to social habits, is considered a good reason for criticism. Thirdly, rules have an internal aspect absent from mere habits. To have a habit one needs not know that the behaviour is general or teach others to follow it. With rules the followers have a reflective, critical attitude that is not a mere matter of feelings and that they teach to others, for example, children.

3.6.2.2 Persistence

By experience, Hart flouts the Austinian theory on account of persistence. Here what is meant is that there is the persistence of law made by a sovereign into the reigns of succeeding ones. The Austinian view of sovereignty vis-à-vis his notion of habitual obedience will not account for this from one sovereign to another.[53] But in the context of persistence, Hart says, laws made in previous regimes, say, Rex's, will be held valid in the reign of Rex II. Though as being dead Rex is no longer habitually obeyed, why should his orders still be law? An Austinian reply maintains that the authority of laws comes from the sovereign who enforces them.

Thus laws made by Rex still apply, because Rex II enforces and thereby tacitly commands them. This defense runs into the criticisms of tacit orders, which seems to imply that

statutes are not valid until used by courts under the current sovereign. Whereas the claim that customs are not law until used by courts seems plausible, Hart observes that a similar claim about statutes is not.[54]

Such a claim about statutes goes beyond the one about customs by requiring courts to apply them during the reign of the present sovereign. This problem of persistence therefore, need not arise if one uses the notion of a rule validating statutes under certain conditions. Such a rule could have a criterion counting as law statutes from past sovereigns as well as the present one.

3.6.2.3 Legal Limitation

By history, it is clear that many systems contain legal limitations on legislative authority.[55] This means that in modern societies, the supreme legislative authority has only restricted powers. The United State Constitution, for instance, places limits on the areas in which Congress can legislate. Even though these restrictions might not be part of a law as it is odd to call the constitution a law, they do constitute legal limitations on legislative authority. Statutes contrary to these restrictions can be declared invalid. Thus a sovereign with unlimited legislative powers is not a necessary condition for a legal system.[56] Hart forestall a possible Austinian defense to the criticism about the limited power of many legislatures.[57]

Austin believed that even in England where the Queen in Parliament is unlimited, Parliament is not the sovereign. Rather, he maintained that at least in modern democracies the electorate constitutes the sovereign. Hence Hart advances two objections to such a defense.[58] The first objection might well be that the bulk of the population belongs to the electorate. If so, it would not make sense to speak of the bulk of the population habitually obeying themselves.

Obedience is not something one can give to oneself. Second, in this defense one must distinguish between people in their role as electors and in their roles as subjects. Such a distinction can only be made by reference to a rule stating necessary conditions for a valid election or referendum. That is, appeal must be made to a power-conferring rule. Thirdly, the concept of a sovereign cannot be founded on habits of obedience but requires the concept of a rule. Furthermore, even the populace might not be legally unlimited. Hence some constitutions have parts that cannot be amended by any method. In all, Harts recommends that to have a clear sense of law, consideration of the content, range, and origin of laws must be put into perspective.

3.6.3 Legal Limitations on Legislative Power

In the doctrine of sovereignty the general habit of obedience of the subject has, as its compliment, the absence of any such habit in the sovereign. He makes laws for his subjects and makes it from a position outside any law. This means that there are, and can be, no legal limits on his law-creating power. Thus the legally unlimited power of the sovereign is his by definition. Hence this corresponds to that theory that simply asserts that there could only be legal limits on legislative power if the legislator were under the orders of another legislator whom he habitually obeyed; and in that case he would no longer be sovereign.

This theory further says that in every society where there is law there is a sovereign with this attribute. For Hart, this is not always the case. This is because in every legal system, there are always criteria for identification of rule as law. There are rules that qualify what the legislator makes to become laws. But where the sovereign person is not identifiable independently of the rules, we cannot represent the rules in this way as merely terms or conditions under which the society habitually obeys the sovereign.[59]

3.7 Elements of Law

Hart insists that an account of law should explain the character of legal obligation. The similarities and differences between legal obligation and coercion, Hart says, is at the heart of every discussion about philosophy of law. However, before making this distinction between legal obligation and coercion, Hart first set himself to understanding it in its general form." Central to this task is an understanding of two points of view one may take toward rules. Once the nature of obligation is understood, one can proceed to examine how the addition of some power-conferring rules to duty-imposing ones provides a basis for a legal system. Before that, let us examine primary and secondary rules.

3.7.1 Primary and Secondary Rules

In the words of Harris, Hart "offers no definition of a legal system, but only tells us that the 'union of primary and secondary rules' is at the heart of every understanding of legal system."[60] Obviously, Hart distinguishes social rules from social habits. Having done that, he discriminates between the two types of rules that go into making a legal system. According to Bayles, Hart's preeminent contention in '*The Concept of Law*' is the fact that the nature or essence of law can justly be regarded as lying in the union of primary and secondary rules.[61] He

reaffirms his contention saying "it is in the combination of these two types of rules that there lies what Austin wrongly claimed to have found in the notion of coercive orders, namely 'the key to the science of jurisprudence'"[62]

The command theory identified only one form—primary rules which only create primary rules of obligation. Hart believes that any understanding of law must first start with an analysis of these types of rules and the role, he claims, they play in legal systems. Hart distinguishes the primary rule, the basic rule from the secondary rule. In a simple social structure, Hart claims that primary rules of obligation characteristically contain forms of restrictions. His words:

> Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concerns actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations. [63]

It is obvious that having analyzed the primary rule, Hart also specified that the operation of this form of rule is laden with difficulty; hence the introduction of the secondary rules.

> They may all be said to be on a different level from the primary rules, for they are all about such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.[64]

Perceptibly, the following passages provide at least four different possible distinctions between the two sets of rules namely:

(1) Primary rules are concerned with actions—physical movement, while secondary rules also affect legal relations. (2) Primary rules are duty-imposing rules; secondary rules are power-conferring ones. (3) Secondary rules are all

> about primary ones. (4) Secondary rules are on a different level from primary rules; they are all metarules.[65]

Moving further to point out what this difficult could amount to, Bayles writes without hesitation,

> The first deficiency of a system of primary rules Hart discusses, its uncertainty, stems from the lack of any authoritative method for determining what the primary rules are. If doubt arises concerning whether a particular rule exists proscribing specific actions, no basis exists for authoritatively settling the matter. There is no definite procedure for determining the existence of a rule or its precise requirements. Any official or recognized procedure for doing so would require secondary rules, which are excluded by hypothesis. Thus the people in society are under pressure to abide by rules but cannot be certain what the rules are or what they require.[66]

Thus Hart asserts that the remedy for this main defects in this simplest form of social order consists in supplementing the primary rules of obligation with secondary rules, which are of a different kind, [67]but identifies the primary rules, [68]Secondary rules may be said to be of different kind.

> They may all be said to be on a different level from the primary rules, for they are all about such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.[69]

What this means is that with the introduction of secondary rules, the legal social structure becomes more ‘robust’ since the primary rule can then be identified by their inclusion in the list; for there is now a reference to an authoritative text. Thus one finds codifications of laws among the earliest written documents. Hart says that a rule of recognition stands at the center of a system of primary rules; it provides unity and turns a set of primary rules into a system.[70]

Another defect that Hart points out about primary rules is its static quality or character.[71] Here Hart argues that without secondary, power-conferring rules, it is not possible to change primary ones quickly. No doubt, they can change over time as society comes to abandon old and

adopt new ones, but this must be a long, slow process. Hence, the system is not readily adaptable to changing circumstances.

According to Hart, this kind of defect of primary rules is remedied by the introduction of the 'rules of change'[72] which "empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group or of some class within it, and eliminate old rules."[73]

The simplest method of adding a rule of change is to empower a monarch or legislature to add or subtract rules. The power to change rules can be restricted in various ways, for example, by the procedure, such as requiring majority vote to effect a change. Hart indicates however, that some rules of change can concern procedure and others substance. In all, he says that rules of change must be implicitly recognized in a rule of recognition. They must serve as a criterion, for if a person or group can add, subtract, or modify primary rules, then a rule of recognition must identify rules so changed as belonging to the set of primary rules.

The third defect that Hart points out is the inefficiency that burdens primary rules of obligation.[91] Here there is no method for settling disputes and no organized method for applying sanctions to those who violate rules. Disputes as to whether individual actions come under the primary rules arise, but no one has authority to settle them. For a person to be authorized to settle disputes a rule must confer such power on her. Further, the enforcement of primary rules depends on unorganized social pressure from those members of society who accept them.

This defect, Hart says, is checked by *rules of adjudication.*[74.] Rules of adjudication do not impose duties but confer judicial powers and special statutes on judicial declarations about the breach of obligation.[75]These rules empower specific persons to determine when rules have been violated.

By this method authoritative decisions can be made as to when rules have been violated and what punishment is appropriate. According to Hart, some rules of adjudication might specify procedures to be followed in deciding these matters. Others will specify or limit possible sanctions for violation. Thus rules of adjudication form a basis for judicial and penal systems as rules of change do for legislative systems.

Like rules of change, those of adjudication also have to be referred to by a rule of recognition. If courts determine when particular rules have been violated, then they must authoritatively determine what the rules are. Allowing courts jurisdiction over certain matters is,

in part, to establish them as authoritative sources of what rules pertain to these matters. In other words, what this means is that one criterion for identifying primary rules must be the determination of courts.

3.7.2 Internal vs. External Viewpoints

Hart further recognized and made basic distinction with regard to attitudes towards a rule. He believes there is a contrast between an observer of a rule from the external and internal point of view. Thus Hart differentiated between a mere observer of a system of rule and a participant from inside of the system of rules, which he dubs external and internal aspects of rule respectively.

According to Hart, a person has an internal point of view toward rules if she accepts them as formulating requirements for conduct of a group and adopts a critical, reflective attitude toward behaviour complying with or violating them.This attitude is exhibited in criticism and demands for conformity. Normative language, such as ‘you ought to or you ought not to,’ you should and you should not etc, Hart claims, are distinctive of an internal point of view. A social rule shares its external aspect with a social habit. Hence the external aspect consists in uniform behaviour, which an observer could record.

A person has external point of view if she does not accept rules but only makes different statements about the legal system without accepting the rules themselves. Obviously, different types of external point of view exist and they are reflected in different types of statements. The mere observer is merely contented to record regularities of observable behaviour. The external point of view cannot reproduce the way in which rules function in the lives of those that take them as standard of conduct. But if it is a legitimate point of view where that can normatively be studied.

The external aspect shows that a reporter can study a particular legal system as a social reality without committing himself to the values of that system. In which case, one adopts a moderate external view point when one does not accept rules oneself but speaks about the group’s acceptance of them and refers to the way they function in the lives of those who accept them. This means that a value-free jurisprudence is possible, according to Hart. It also means that to say that one has an external point of view implies that one does not refer to the function of

the rules in the lives of those who accept them but merely views their behaviour in terms of observable regularities. This view approaches that of radical behaviorism.

From an external point of view, Hart points out; one can come close to describing the view of members of a group who do not accept its rules.Here also, one observes that if a person performs an act of a particular kind, she usually meets with hostile reactions. One then develops general rules about what sorts of conduct will meet with a hostile reaction. These correlations then serve as a basis for predicting the harmful consequences of certain conduct. Such views resemble the Austinian theory of obligation as a prediction of a sanction for not performing certain actions. Indeed, it equally reflects Holmes' bad man view of law as concerned with what the courts will do to him.

In what looks like a summary, we can reiterate that what Hart is saying is that from the perspective of internal view point, duty-imposing rules provides reasons for hostile reaction and by the function of statements of obligation 'being obliged' applies to rules of particular cases. As such they are normative conclusions and not simply statements of fact. Again, from the point of view of external observer, a descriptive study of socio-legal phenomena without value commitments is possible, though but John Finnis would disagree with this view.

3.8 Nature of Rules

With reference to the nature of rules, Hart admits that a legal system is *ipso facto* a system of rules. However, the characteristics of these rules are central to Hart's legal theory. Hence two features are at the center of this theory; namely the basis for their existence and secondly their indeterminacy or open texture.

Hart's analysis depicts that primary and secondary rules constitute the major elements of law. But the problem of the existence of a legal system (system of laws) is one of the existences of rules. Hart distinguishes the existence of rules of recognition from that of subordinate or ordinary legal rules. According to him, the existence of the subordinate or ordinary rules is the same as their validity. This is because, since their validity depends on the rule of recognition, it equally means that their identity and validity derive from it.

Hart further argues that there is no 'higher' rule on the basis of which the existence of a rule of recognition can be determined. Rule of recognition, he points out, has a different character from that of subordinate rules. He insists that to say that a law is valid or exists is to

certify that it meets the criteria of valid law specified by a rule of recognition.[76] In that case, a person who says a rule or law is valid, Hart says, is applying or using the criteria of a rule of recognition. To do this is to adopt an internal point of view towards the rule.[77]

A typical form of internal point of view is seen in statements like "It is the law that …' or 'L is a valid law' while statements like "It is the law in New York that …' or 'In New York they recognize as law…' depicts a form an external point of view.

According to Hart, statements of validity of particular laws presuppose two general conditions; namely they presuppose a rule of recognition in that the person making a statement of validity is using such a rule. What this means is that such a person accepts such rule as appropriate for identifying valid law and looks at the laws from an internal point of view. Secondly, they presuppose that a rule of recognition is generally used by most persons in the operation of the legal system, for otherwise a claim about validity would obviously be mistaken.[78]

3.8.1 Open Texture Characteristics

Hart argues that open-texture characteristics of rules are possible because rules use general terms which are not precise and have borderline cases in which their application is doubtful. Against this backdrop, he argues that rules must also have borderline situations in which their application is doubtful. It is their indeterminacy therefore, in some situations that Hart refers to as their 'open texture". [79]

Due to the open texture of rules, Hart says, frequently legislature cannot formulate laws without making arbitrary decisions that might lead to many injustices in specific cases. Hence, all legal systems compromise between the goal of providing clear and precise rules that can be applied by private individuals and the goal of leaving some questions open to be settled in concrete cases according to the peculiarities of the situation.[80]

Since rules are open texture, legislature cannot determine all cases in advance because they often lack knowledge necessary for carrying out their aim. The indeterminacy of rule is as a result of the open texture of rules. Words have more than one meaning. Wittgenstein in Philosophical Investigations had earlier argued that vagueness is the source of philosophical perplexity. But Hart does not support this argument. What constitutes ambiguity in law, he says, is the fact of diversity of reference or internal complexity. For example, Hart believes that term

such as ‘law’ applies to so many different things that there does not seem to be any general principle involved in all of its uses. Moreover, law differs greatly in their form and function.

Hart also claims that what constitutes ambiguity in law is the fact that words do not have straightforward connection with counterparts in the world of fact which most ordinary words have and to which we appeal in our definition of ordinary words. On this note, Hart maintains that “when people ask for the meaning of these words or phrases, they want to be led beyond dictionary or lexical meanings of them. But it does not mean that people do not know how to use these words in the way the dictionary designates. Rather it means that, in spite of the availability of the lexical understanding, puzzles about legal concepts still persist.There is need therefore, to clarify these puzzles as the effort to define them indicate that they do not have the straightforward connection with counterparts in the world of facts, which most ordinary words have, to which we appeal to in our definition of ordinary words.

It is on this basis that the definition of fundamental legal concepts are therefore genuine, although the problem is that many irreconcilable theories have arisen in the face of the innocent requests for definition of fundamental legal concepts, so that not merely whole books but whole schools of juristic thought may be characterized by the type of answer they give to questions like ‘what is right? Or what is corporate body.

Having said this, Hart insists that the quest for definition seems to necessarily lead us to the demand for a theory. Hence in the process of Benthamite elucidation, employed in *The Concept of Law*, Hart shows us how to understand the character of legal concepts while at the same time avoiding reductionist interpretation of them. The reason for the defeasibility in law, he says, is not just that legal concepts are not logically equivalent to non-legal words and statements; but that their irreducibility stems from an inherent deficiency of human condition and language. Thus the essentially non-reducible character of legal concepts is obscured by the way courts still frame their judgements. Courts give the impression that their decisions are the necessary consequence of predetermined rules whose meaning is fixed and clear.

On this backdrop, Hart sees the argument from vagueness of legal terms as inefficient but considers argument from open texture of terms more tenable. Open texture of legal rules states that judges employ a wide range of discretion in their judgement especially in hard cases because legal rules are not sufficient. Hart frowns at the lawyers who believe the vagueness of the language they use guarantees that inevitably there will be no right answer to certain legal

question (rule skepticism). Obviously, judges decide cases within the context of operation of rules; (legal formalism). One must recall that the tradition of formalism in law is associated with Austin who bequeathed the demand that the study and understanding of law be made into a science. There were two strands to Austin: (i) the logical analysis of legal concepts and their interrelationship; (ii) the direction of law by legislative reason—specifically, guidance by the principle of utility.

Formalism is a name given to a tendency (a tradition) which seized upon the idea of law as science but subtracted the concern with legislative reason from the picture. Instead, law was portrayed as if it were self-developing. For the formalist, the legal order consisted of a number of 'fundamental legal doctrines', and the legal scholar must rationally order and prune the variations so that the doctrine could be so classified and arranged such that each should be found in its proper place. The presupposition of this image of legal order was that a rational universe of legal doctrines existed which could be uncovered and which reduced the apparent (empirical) diversity of law to an underlying unity. On this account, Holmes agreed with Gilmore's opinionated analysis saying:

> It was possible, on a high level of intellectual discourse to reduce (varying principles in any particular field of law) to a single, philosophically continuous series and to construct a unitary theory which would explain all conceivable single instances and thus make it unnecessary to look with any particularity as what was going on in the real world.[81]

This tradition of law as science was the mainstream ideology of American law scholarship not until 1920s onwards when it was attacked by legal realist who wished to acknowledge the human element in legal development. Instead of emphasizing doctrinal coherence and focusing upon the rules mentioned in decisions as the material for analysis, realist claimed the truth of legal decisions lay in the social philosophies, motivations and mind-sets of the judges. Judges, it appeared, could not be blind to the social reality of law—even if in their judgements they did not specifically refer to their consideration of the social effects of their decisions.

But there are cases when such rules become insufficient such that legal rules, which are framed in common languages, do not anticipate all cases. Hart was aware of this situation that in his work *The Concept of Law*, he attempted an account of legal reasoning midway between the

traditions of legal formalism and the strand of legal realism which postulated rule scepticism. Hart sees the issue as relatively simple: no matter how extensive the regime of rules, neither a body of social rules, the rules developed by case law, nor the statutes or other regulatory devices created from scratch are entirely clear and immune from indeterminacy and conflicting interpretations. Law cannot escape being somewhat open-textured.

It should be recalled that Hart adopts the notion of open-texture developed by Frederich Waismann. According to Waismann, open texture is the possibility that even the least vague, most precise, term might turn out to be vague as a consequence of our imperfect knowledge about the world and our inability to predict the future. Thus, no matter how precise the term seems when used, there is the possibility of unanticipated instances which render the term vague when one asks if it covers the situation.Hart's particular use of open texture highlights our 'relative ignorance of fact' and 'relative indeterminacy of aim: In his words, we read:

> If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for 'mechanical' jurisprudence.[82]

For Hart, therefore, conversely, the open texture of laws means that the regulation of areas of conduct 'must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary from case to case. However, this does not cause much difficulty. As Hart puts it:

> At the fringe of…very fundamental things, we should welcome the rule-sceptic, as long as he does not forget that it is at the fringe that he is welcome; and does not blind us to the fact that what makes possible…striking developments by courts of the most fundamental rules is, in great measure, the prestige gathered by the courts from their unquestionably rule-governed operations over the vast central areas of the law.[83]

According to Hart, one difficulty is inherent to language. Hart insists that most terms have a core of settled meaning that make their average use clear and unproblematic, they have a penumbra of fuzzy region, where in many cases it is impossible to tell with certainty whether the

term does or does not apply. At the periphery—but only there—discretion is required. Judicial judgements are not always a consequence of pre-determined rules,even when they wrongly give that impression. Judges' intuition fails them when they attempt to explain everything away under some general terms. We cannot anticipate all cases. There are uncertainties.

The so-called familiar cases do not offer us greater consolation: they vary in their individual specificities. This fact of possible variant views, even with familiar cases, leaves the judge with a choice of alternative in his interpretation;our rules are framed in general terms which still need to be sorted out at the level of particular cases. Thus, the discretion thus left to him (the judge) by language may be very wide; so that if he applies the rules, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice. He chooses to add to a line of cases a new case because of resemblances which can reasonably be defended as both legally relevant and sufficiently close.

By arguing for the ineliminable need for judicial discretion in applying laws, Hart retains his conviction that legal concepts are irreducibly defeasible because they are not logically equivalent to non-legal words and statements. Their irreducibility stems from an inherent deficiency of human condition and language. This essentially non-reducible character of legal concepts is obscured by the way courts still frame their judgements. Courts give the impression that their decisions are the necessary consequence of predetermined rules whose meaning is fixed and clear.But Hart argues that, in very simple cases this may be so; but in the vast majority of those cases which trouble the courts, statutes nor precedents in which rules are allegedly contained allow of only one result.

In most cases there is a choice; hence the judge has to choose between alternative meanings to be given to the words of a statute or between rival interpretations of what a precedent 'amounts to.' It is only the tradition that judges 'find' and do not 'make' law that conceal this, and presents their decisions as if they were deductions smoothly made from clear pre-existing rules without intrusion of the judge's choice. Legal rules may have a central core of undisputed meaning, and in some case it may be difficult to imagine a dispute as to the meaning of a rule breaking out.

Hart's insistence is that human language is fraught with limitations; rules are framed in general language; each particular case seems to present novelty, the legislator does not foresee every situations. And general expressions, because of the indeterminacy of our language as a

whole, do not always determine the novelties of particular cases in advance. There are, then, always some gaps along the line in the framing and application of rules that leave the judge with discretion. There are clear cases where a concept can be applied and others where it cannot; giving rise to penumbra of uncertainty of legal concepts and possibility of there being a place for judicial discretion.

Hart's final position is that 'strong' discretion enables the judge to create new laws to supplement the lack and bridge the gap created by the insufficiency in the primary rules. And what accords the judge this 'discretional power' so-to-say, is that the rule of recognition empowers the judge to apply the rule of change and the rule of adjudication. It is in this sense that Hart builds his theory of law on legality. The secondary rules of obligation, besides the primary rule, which prescribe rights and imposes duties on the individual; confer power on the judge to be able to create new rules at the expiration of the primary rules of obligation.

It is obvious that Hart, somehow, advocated for moderation; rules have 'exceptions that cannot be exhaustively stated'. But this does not mean that they have no capacity to bind at all. Placing too much emphasis upon the 'penumbra' was itself an important source of 'confusion in the American tradition.' Hence Hart followed a host of legal opinions such as Benjamin Cardozo who says "Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one." Or Roscoe Pound who admitted that "Every day practice shows that a great mass of rules are applied without serious question".[84]

3.8.2 Rule of Recognition as Foundation of Law and Legal Validity

Of the rules of recognition, Hart admits that their existence depends on different factors than that of ordinary legal rules. But Hart did emphasize that the ultimacy of rules of recognition should be confused with the supremacy of a criterion.[85] To make laws systematic, the criteria of the rule of recognition must indicate that rules identified by one criterion take precedence over those identified by another. Here Hart writes that a criterion is supreme "if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the supreme criterion".[86]

What this means is that a rule of recognition is ultimate in the sense that there is no other rule to which appeal can be made to justify or establish it. And because no other rules can

establish its validity, it does not make sense to ask whether a rule of recognition is valid. It is the standard of validity for a system.

However, to make statements about the existence of rules of recognition, Hart declares, is to make statements from an external point of view.[87] On the other hand, statements from an internal point of view, whether committed or detached, are indicated by the use of a rule of recognition to determine the existence or validity of rules. But because no rules can be used to certify rules of recognition, statements of their existence are from an external point of view and factual (although one can also accept them). Their existence is shown in the conduct of officials and citizens. As the conduct of officials and citizens establishes the existence of such rules, statements of their existence are factual.[88]

Two elements, according to Hart, are involved in the existence of rules of recognition, and hence legal systems (systems of laws). The first is that citizens must generally obey the ordinary (primary) rules of a system.[89]

An ordinary rule or law need not be efficacious to exist, to be a valid law.[90] Obviously, if no rules of a system were efficacious, if all 'laws" identified by a rule of recognition were ignored, then no group of people now would exist. An example is the Roman law, which no longer exists because no group of people now generally follows the rules of that system. For average citizens, the existence of ordinary rules does not depend on any explicit or implicit appeal to a rule of recognition. For the most part they simply recognize them as laws and follow them.

Furthermore, citizens oftentimes obey laws, not because they accept a rule of recognition as a norm, but simply to avoid undesirable consequences of noncompliance. Secondly, Hart indicates that

> Officials must accept a rule of recognition as a norm of conduct. Hart maintains that the notion of a habit of obedience is not adequate for officials and their conduct. They must more or less explicitly recognize a rule of recognition. And in recognizing it, each judge does not merely follow it for her part only. Judges take it as a norm for a reflective, critical attitude toward behaviour. That is, they accept it as a norm for evaluating official conduct, especially judicial decisions. That means that they try to conform to it and criticize others for deviation from it. In effect, they take it as providing authoritative reasons for evaluating judicial conduct.[91]

It should be pointed out also that the factual nature of the existence of a rule of recognition is crucial in Hart’s theory. Hence Hart insists that in identifying laws of a legal system it is not merely the content of a rule of recognition that counts, but also who uses it and when. Thus the existence of a legal system depends on general obedience by citizens to primary rules and a critical acceptance by officials of those secondary rules providing a framework for primary ones.

The minimum conditions necessary and sufficient for the existence of a legal system, Hart says, are the fact that those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.[92]

What it means, therefore, is that the chief difference in the acceptance of rules by the general public and officials lies in their attitudes or motives. Citizens can obey ‘from any motive of respect for them. They must view them as providing authoritative reasons for conduct and evaluating others. The combination of these two types of behaviour is necessary for the existence of a legal system, according to Hart.

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CHAPTER FOUR

DWORKIN'S LEGAL THEORY

4.1 The Right Thesis of Law: A Critique of Hart's Rule-Theory

Dworkin proposed an alternative concept of law from the command theory of Bentham and Austin and the ruling theory of Hart. He calls it his 'right thesis' of law; otherwise his legal liberalism. In it Dworkin treated issues like right, liberty, equity and justice. Dworkin claims his rights thesis of law explains the essential feature of law, which neither the command theory nor the rule theory put into consideration. Specifically, he argues that the rule theory of law does not show the importance of legal principles, which he claims is a standard of conduct outside rule. In Dworkin's own conception, the rule theory assumes that

> when a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance, then the judge has, according to that theory, a 'discretion' to decide the case either way. His opinion is written in language that seems to assume that one or the other party had a pre-existing right to win the suit, but that idea, in Dworkin's assessment, is only a fiction.[1]

It is a fiction because "in reality, he (the judge) has created a new legal right and then applied it retrospectively to the case at hand."[2] For Dworkin therefore, the claim of the rights thesis of law is that

> Even when no settled rule disposes of the case, one party may nevertheless have a right to win. It is therefore the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.[3]

With this insight,Dworkin maintains that a theory of law is a constructive interpretation of a legal practice. As a constructive interpretation, it imposes a purpose on a practice to show it in its best light.[4] For Dworkin, to achieve a constructive interpretation of a practice, one must take an internal point of view.[5] Hence the test of a constructive interpretation is how closely it fits the data of the practice and critical political morality.

Although an interpretation need not fit all the data (some data can be discarded as anomalous), however, it must account for a minimum amout.[6]One must choose among

interpretations that fit the data on the ground that one provides a better justification of the practice than another.[7]

Hart assumesthe judge makes new law. This is not correct knowing that he does not have such power invested on him except the legislature. The legislatures, by an elective power, have been elected to make laws to guide people's conduct in the society. So it is not the duty of the judge to create one.

According to Dworkin, granted that statutes and common law rules are often vague. But they must be interpreted before they can be applied to novel cases. Again, granted that some cases could raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules; thereby allowing judges some power to make new law, either covertly or explicitly. But for Dworkin, when they do, they should act as deputy to the appropriate legislature, while enacting the law that they suppose the legislature would enact if seized of the problem.

In another note, Dworkin argues that his concept of law provides an abstract, agreed upon purpose of law. He takes the concept of law to be that it constrains and justifies the use of coercive state force by individual rights and responsibilities flowing from past political decisions.[8] However, he contends that the past political decisions include precedents and statutes. Thus using them along with legislative history and other elements as data, one constructs a theory that shows the practice in its (morally) best light. This theory will consist of a set of principles and rules. The principles can then be used to determine rights in situations for which there are no previously enunciated rules.

We must point out here however, that several points help fill out this view. First, a theorist must not only take an internal point of view, it must be a moral internal point of view. That is to say that the concept of law is that it justifies state coercion and the best interpretation is the morally best one reasonably fitting the data. Thus, one is accepting the law on moral grounds.

Second, the law consists not merely of the explicit political decisions, but all those decisions that flow from the principles that best justify them. According to Dworkin,

> Propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.[9]

The law consists of all true legal propositions. Thus, there is both explicit law and implicit law—the principles needed to justify the explicit law and all the other propositions that follow from them.

Third, Dworkin's right answer thesis—that there is almost always a correct answer for legal cases—follows.[10] Given a reasonably developed political history, the requisite principles be sufficient to provide answers for all cases. The denial of there being a right answer rests on mistaken or questionable versions of skepticism.[11]

Fourth, Dworkin's rights thesis is that courts must decide cases on the basis of principles, and rights, not policy goals.[12]"A person has a legal right…if he has a right, flowing from past political decisions, to win a lawsuit."[13] Because the best theory provides an answer for every case, except in criminal law one party or another will always have a right to win. Thus legal cases should be decided on the basis of rights. Consequently, the reasons courts use must be those of rights resting on principles rather than policies.[14] The principles of fairness, justice, and due process confer rights. In contrast, policies present collective goals or aims that do not confer rights.

On account of this claim, Dworkin call his theory of "law as integrity," although previously he wrote of "the soundest theory." Law as integrity emphasizes commitment to a coherent system of principles. Legislators should enact law that is coherent in principle; judges should see and enforce it as coherent in principle.[15]To do so, adjudicatorsmust develop a theory of law. Jurisprudence is only "the general part of adjudication".[16] Because one of the tests for a legal theory is a moral one, a theory must be normative. Because a theory is a normative moral one, legal rights are a species of moral rights.

4.2 Denial of Judicial Discretion

Dworkin's theory of law further puts into consideration the idea of judicial discretion. Judicial discretion or discretion in law is concerned with whether judges have the power or right to decide cases according to their own judgment and freedom or choice; i.e. (whether they are free from any restrain whatsoever) ormust decide according to the stipulation of the law. Hart and Hartian scholars believe that in deciding hard cases in court, the judge should come up with what ought to be the law. And by that, he is making new law. Hart writes in this way:

> The discretion thus left to him (the judge) by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice. He chooses to add to a line of cases a new case because of resemblances, which can reasonably be defended as both legally relevant and sufficiently close.[17]

According to Dworkin, the fact that there is a controversy in law does not immediately deny the possibility of a right answer. In other words, he believes there is always a right answer to a case. Dworkin does not deny the fact that positivists recognize that rules may not always be sufficient to enable judges reach a decision. It is true positivists claim that where a case cannot be decided by the application of clear rules, a judge must decide it by the exercise of his discretion and by so doing the judge creates a new law. But Dworkin is not comfortable with this kind of judgement; hence he contends that legal-moral reasoning is objective. And therefore, there is always a right answer.

It is Dworkin's belief that there are no gaps in law. There is always a right answer to the case at hand. It is only the theory that claims that law is simply made up of rules that runs into this problem. Besides rules, Dworkin insists, the law is made up of other standards. In the so-called hard case, the judge will have to find what institutionally fits, interpreting his data coherently as to find the right answer. In attempting to decide according to principles, he is thus, deciding what the law is rather than making a new law.

Law, for Dworkin, is an interpretive activity. Interpretation does not mean that what is described is an appeal to extra-legal material. Rather the adjudication aspires to some kind of legislative ideal, which Dworkin calls integrity. Thus, a judge that accepts to maintain this legislative ideal thinks that the law it defines sets out genuine rights litigants have to a decision before him. Litigants are entitled in principle to have their acts and affairs judged in accordance with the best view of what the legal standards of the community required or permitted at the time they acted, and integrity demands that these standards be seen as coherent, as the state speaking with a single voice.[18]

In addition, Dworkin believes that we need to listen to what the judges say they do than what they are doing. There are three arms of government in modern democracy. The legislature makes the law, the executive executes it and the judiciary interprets it. Only the legislature can make the law, that is, use arguments of policy. To say that the judiciary makes law, according to

Dworkin, is to claim that it has right to make a political choice for people. The people did not vote judges to their position.

Thus, for judges to make the law for people would imply that the law could they make apply retrospectively. In that case, people are judged with a rule whose existence they did not know or was not in existence at the time they committed a particular wrong. This is not correct. Hence, Dworkin reiterates therefore what he considered to be the primary function of the judge: to apply existing rights and not to make new laws. Dworkin writes:

> When a judge chooses between the rule established in precedent and some new rule thought fairer, he does not choose between history and justice. He rather makes a judgement that requires some compromise between considerations that ordinarily combine in any calculation of political right, but here compete.[19]

There are different sorts of judgement; Dworkin says. Sometimes we say that one ‘ought’ or ‘ought not’ to do something, and on other occasions we say that someone has an ‘obligation’ or a ‘duty’ to do something, or ‘no right’ to do it. In all these situations, Dworkin believes that these are different sorts of judgements. It is therefore, one thing to say that one ought not to do something and quite another to say he has no right to do so. Dworkin maintains then that judgements of duty are commonly much stronger than judgements simply about what one ought to do.

On this ground, Dworkin distinguished between the questions of claims of obligation or duty from such general claims about conduct. The law, he admits, does not simply state what private citizens ought or ought not to do; it provides what they have a duty to do or no right to do. It does not simply advise judges and other officials about the decisions they ought to reach; it provides that they have a duty to recognize and enforce certain standards.When it turns out that a judge has no duty to decide either way we can then speak of what he ought to do.

This is what Dworkin understands when we say in a case that a judge has ‘discretion’. He attributes this to the positivists; arguing that it is what they mean when they say that a judge has discretion. In real terms, positivists say that when judges disagree about matters of principle they disagree not about what the law requires but about how their decision should be exercised. They disagree not about where their duty to decide lies, but about how they ought to decide, all things considered, given that they have no duty to decide either way.

But again, Dworkin notes that in discussion we use the concept of discretion in three different ways. First, a man has discretion if his duty is defined by standards that reasonable men can interpret in different ways. In this sense, one's decision, whether right or wrong, is determinative of the troublesome case. Second, a man has discretion if his decision is final in the sense that no higher authority may review and set aside that decision. Like in the first case also, one applies judgement in reaching a decision.

With this, Dworkin concedes that judges have discretion in these two senses. But these two senses are the weak senses of the word. In the third sense, a man has discretion when some set of standards which impose duties on him do not in fact purport to impose any duty as to a particular decision. In the third sense, which is the strong sense of the word, judges have no discretion, says Dworkin, unless we accept the strongest form of social rule theory (which Dworkin rejects) that duties and responsibilities can be generated only by social rules.[20]

Rosenberg,[21]we recall has distinguished between primary and secondary discretion. Primary discretion, he says, arises when a decision maker has "a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process, and the secondary form of discretion enters the picture when the system tries to prescribe the degree of finality and authority a lower court's decision enjoys in the higher courts.."[22]

Discretion, in the primary sense, can mean simply that a person has the authority to decide. Courts, judges, and legal scholars often use the term discretion in this sense, referring simply to authority to decide, or unconstrained choice. This is an area within which the discretion-holder has authority to adopt, or not to adopt, whatever rule he deems fit. When used in this sense, discretion is quintessentially associated with variability of result. Rosenberg's primary discretion, however, deals with hierarchical relations among judges."[23]

On the secondary form of discretion, he argues it comes into full play when the rules of review accord the lower courts' decision an unusual amount of insulation from appellate revision. In this sense, discretion is a review-restraining concept. It gives the trial judge a right to be wrong without incurring reversal. Blackstone has pointed out that the judge does not make laws; he merely declares the law.[24] But Bentham and Austin would ridicule this claim on the ground that much law has been judge-made. Bentham hoped that law-making by judges might be eliminated by adequate codification.

On the ground of the inevitable imprecision of statutory language, some positivists have claimed that judges are bound to legislate, at least 'interstically.[25] Though this may have some unfortunate implications for democratic political theory, but facts must be faced. Perhaps something can be done to mitigate the inevitable retroactivity of judicial legislation by instituting the practice of prospective overruling.

Dworkin, we must note, contends there are no clash with democratic theory in existing practices, and no retroactive judicial law-making to mitigate. This is because judges do not legislate. Even in the most controversial cases, where lawyers disagree as to the proper verdict, the judge has no discretion. Though the answer may be difficult to find, and the judge may make a mistake; but there is always one right answer.

4.3 Necessity of Principle and Policy in Law

Dworkin's quarrel with the conventional positivist assumption is that the decision of legal questions on clear cases is by the application of valid rules. Rules are part of law, he argues, but he strongly adds that they are not enough. In his legal theory, which serves as a critique of the positivist 'rule theory of law', Dworkin admits, that the rule theory misses the importance of principles in law. Dworkin's insistence however, is that principles are central to law; hence his conviction that his theory of law is essentially that of the proper function of judges.

In hard and controverted cases, Dworkin believes judges are guided to their decisions by standards, which are not rules. Such standards are policies and principles. They are necessary as they form the nucleus of judicial reasoning. Dworkin uses principles to cover various types of norms or standards. He divides them into policies and principles in a more limited sense, and other kinds. Dworkin also contrasts principles with rules on two counts.[26]

According to him, rules apply in an all or none fashion; and that is to say, that if they apply to a case, they determine the decision without any leeway for an alternative.Still, he points out that there may be exceptions to rules, though they need not be stated as part of rules. Frequently, exceptions are stated as exceptive rules, rather than as part of the main rule because including them would make it too complex.

Arguments for principles do not necessarily determine decisions even in the cases to which they apply. Rather, they give clue which way the decision may take. To give a practical example, Dworkin cites the US case of Riggs v Palmer 115 NY 506, 22, NE 188 (1889). In this

case, a court had to decide whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so. The court held that, because of the legal principle that no person may profit from her own wrongdoing, the murderer was not entitled to inherit.

Again, Dworkin cites Henningsen v Bloomfield Motors, Inc, (1960) 32 NY 358). Here Henningsen had bought a car, and signed a contract which said that the manufacturer's liability for defects was limited to 'making good' defective parts—'this warranty being expressly in lieu of all other warranties, obligations or liabilities.' Henningsen argued that, at least in the circumstances of his case, the manufacturer ought not to be protected by this limitation, and ought to be liable for the medical and other expenses of persons injured in a crash. He was not able to point to any statute or to any established rule of law that prevented the manufacturer from standing on the contract. The court nevertheless agreed with Henningsen.[27]

Thus Dworkin argues that the standards set in these cases are not the sort we think of as legal rules but legal principles. Principles do not determine the decision of every case to which they properly apply. In some situations, such as adverse possession, people do legally profit from their own wrongdoings. Such counterexamples are not exceptions to the principles, nor do they invalidate them, but they do need justification.

According to Dworkin, principles can be more or less important in situations; they have a "weight".[28] But due to their weight, principles can be added together and balanced. If several principles lead to one decision and one or two to the opposite, one can "add up" the force or weight of the principles on each side and balance them to reach a decision. On the contrary, Dworkin says rules do not have weight and are not balanced; they either apply or not. Some rules of an activity can be more important for that activity than others, but this importance is not a basis for balancing. If a particular rule applies, it determines the decision; other rules must be held not to apply to this case.

Various scholars in the field have discussed the distinction between rules and principles. In the words of Christie, rules cannot contain all exceptions[29]; and Joseph Raz argues that rules are more specific.[30] But Dworkin himself recognizes that the distinction between rules and principles is often difficult to make; hence at times it seems to be a matter of form and at others a matter of substance.[31] Nonetheless, it seems clear that unless principles are merely quite general

rules, Hart does not include principles in the law. He does recognize the role of aims, purposes, and policies in penumbra or hard cases[32] but he offers two reasons for not calling them law.[33]

First, the judicial process can be more clearly described without doing so. Second, excluding principles emphasizes that a hard core of settled meaning in rules is more centrally law.Dworkin contends that Hart's analysis, insofar as it uses only rules and omits principles, cannot be adequate. Principles are not rules and yet are part of legal system. They function as grounds for legal decisions. In deciding particular issues, courts often refer to principles of law like one that a person cannot profit from her own wrongdoing. Sometimes, rules are invalidated as contrary to principles. And judges use various principles of interpretation in construing statutes and rules. They take an internally point of view toward these principles as formulating norms for decisions and criticize others for not following them. They refer to them as "legal principles" or "principles of law."

As for whether rules or both rule and principles are binding on judges[34] Dworkin's argument is that if they do not, rules cannot be binding either.[35] But notwithstanding that statutes and prior decision are the primary sources of rules; Dworkin insists however, that judges are required to apply statutes and precedents because of the principle of stare decisis. And even though these principles can be outweighed in some situations, they still make rules binding. Thus, a system of rules that judges have a duty to apply (the law) is not possible without principles also binding judges.

What Dworkin is saying is that rules are binding on judges. But it does seem that rules are binding on judges as citizens. Judges are however, required to apply rules, and to use them in reaching decisions. The principle of legislative supremacy and stare decisis indicate why they must be applied. Yet, the same question can be raised about them—why do principles bind judges? Hartian and Dworkinian responses to this question are central to their differences, but this leads to Dworkin's attack on rules of recognition.

In the language of Dworkin, arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument of policy. Arguments of principles justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favor of

anti-discrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle.[36]

It is Dworkin's concern that if a theory of law is to provide a basis for judicial duty, then the principles it sets out must try to justify the settled rules by identifying the political or moral concerns and traditions of the community which, in the opinion of the lawyers whose theory it is, do in fact support the rules. The process of justification must carry the lawyer deep into political and moral theory, and well past the point where it would be accurate to say that any 'test' of 'pedigree' exists for deciding which of two different justifications of our political institutions is superior. For example, a political decision, like the decision to allow extra income tax exemptions for the blind, may be defended as an act of public generosity or virtue rather than on grounds of either policy or principle.

In all cases, principle and policy are the major grounds of political justification. Even when is it a program that is chiefly a matter of policy, like subsidy program for important industries, may require strands of principle to justify its particular design.[37] Like the case of the aircraft manufacturer we cited earlier, Dworkin maintains that in such situation that the aircraft manufacturer sues to recover the subsidy that the statute provides, he is arguing for his right to the subsidy. Here his argument is an argument of principle and not of policy.

4.4 Inadequacy of Hart's Rules of Recognition

Dworkin accuses Hart for bringing in through the back door what he threw away through the main door. By this, Dworkin refers to Hart's rule of recognition where Hart argues that it serves as the condition sine qua non for the existence and validity of primary rules. According to Hart, the rule of recognition validates the secondary rules. It establishes the ground for recognition of the secondary rule as rule to be obeyed or observed.

Hart still maintains that if principles are binding on judges, they must be law. In *The Concept of Law*, Hart's theory did not account for principles as law. This is the ground Dworkin uses to criticize his 'rule theory' as inadequate. According to him, if Hart's theory did not recognize principles as part of law, it then means that Hart threw away completely the idea that law pre-exists legislation.

In Hart's theory, for instance, for a norm to count as law, it must be identified by the rule of recognition. In fact, the rule of recognition serves as a yard-stick for identifying a given norm

as belonging to a legal system. If this is true and stills the case, then Dworkin says, therefore, that it means that the rule of recognition is at the cause of the confusion found in Hart's legal theory. On this backdrop, Dworkin sets himself to dismantle this confusion. This he did from various angles.

Firstly, he argues from the point of view of pedigree. Here Dworkin argues that a prominent or central tenet of positivism is that laws are identified by their pedigree or origin.[38] But principles cannot be so identified, Dworkin contends. There are two sides to this argument. The first, according to Waluchow[39] and Simmonds[40] is that a rule of recognition cannot use the content of norms as a criterion. Because principles do not normally become legal ones by their pedigree; i.e. legislative acts or specific court decisions, therefore, they cannot be identified by a rule of recognition. Again, principles are incorporated over time by a variety of institutional acknowledgements of their appropriateness, that is, because of their content.[41]

Hart's view has two strong defenses against this objection. In the first place, he allows a rule of recognition to use content as a criterion. Here he argues that moral content is a criterion in some systems.[42] Usually, we should note, content operates not as a criterion for including but for excluding norms. For example, most of the Bills of Rights of the U.S. Constitution impose disabilities on lawmaking. Even Dworkin's favored equal protection clause specifies that states cannot deny protection of the laws.

On that note, it imposes a disability on state lawmaking. In fact, it is a test of invalidity, not validity. A norm does not become a valid law because it gives equal protection. Instead, and contrary to Dworkin[43] a criterion of a rule of recognition could include norms as valid law by content, say, customs from time immemorial.

The second defense of Hart is that Dworkin's description of how principles become recognized in law closely resembles Hart's account of social duty-imposing rules. As noted above, the rule of recognition is not a duty-imposing rule. Instead, a social rule requires judges to use standard of recognition to identify the laws that they enforce. Hart's view could easily be extended to include principles. The gradual adoption of a principle by officials seems to fit the development of a social rule requiring its use for interpretation and so on. Judges take an internal point of view toward it, criticize others for ignoring it, and so forth. New judges find it, like the rule requiring use of the standard of recognition, part of the duties or responsibilities of the office or role of judge.

The second pedigree argument is against a form of this account.[44]The pedigree is taken to be the amount of institutional support available for a principle. Dworkin objects that the choice between lines of precedent in deciding a case is not based merely on institutional support, but also on the moral merits of over the other. Consequently, not even social rules can settle this matter.

4.5 Rights and Goals

The language of rights now dominates political debate in the United States. The argument is: does the government respect the moral and political rights of its citizens? Or does her foreign policy or its race policy fly in the face of these rights? Do the minorities whose rights have been violated have the right to violate the law in return? Or does the silent majority itself have rights, including the right that those who break the law be punished?

The debate is not whether citizens have some moral rights against their Government apart from what the law gives to them. The problem is that not everyone seems to accept that fact that citizens have some rights. Bentham and his likes thought that the idea of moral right was 'nonsense on stilts'. But notwithstanding that individuals have some rights, what particular rights do they have? Does the fact that individuals have right to freedom of speech include the right to participate in nuisance demonstrations?

Dworkin makes a distinction between types of rights. We have noted that arguments of principle are arguments intended to establish an individual right while arguments of policy are ones intended to establish a collective goal. Principles are propositions that describe rights as policies are propositions that describe goals. The question that bogs the mindtherefore is: what are rights? What are goals? What is the difference between the two?

According to Dworkin, it seems natural to say, for example, that freedom of speech is a right, not a goal, because citizens are entitled to that freedom as a matter of political morality, and that increased munitions manufacture is a goal, not a right, because it contributes to collective welfare, but no particular manufacturer is entitled to a government contract. Dworkin makes further explanation on the difference between a right and a goal. He does not seem to attempt to show in his explanation which rights men and women actually have, or indeed have at all. Rather his explanation seeks to provide a guide for discovering which rights a particular political theory supposes men and women to have.[45]

What this means for Dworkin is that his attempts suggest that we discover what right people actually have by looking for argument that would justify claims having the appropriate distributional character. A man may have a right to do something even though what he wants to do is wrong or it is wrong for him to do it. But he does no wrong to proceed on his honest convictions, even though we disagree with these convictions, and though, for policy or other reasons, we must force him to act contrary to them.[46]

Dworkin's argument, no doubt, is that his concept of law puts the idea of right at its center. For him, a political right is an individuated political aim. An individual has a right to some opportunity or resource or liberty if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs and some political aim is deserved thereby, and counts against that decision that it will retard or endanger that states o affairs, even when some other political aim is therefore served. A goal is a nonindividuated political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals.[47]

Having said this, Dworkin moved further to explain that collective goals encourage trade-offs of benefits and burdens within a community in order to produce some overall benefit for the community as a whole. Thus economic efficiency is a collective goal; it calls for such distribution of opportunities and liabilities as will produce the greatest aggregate economic benefit defined in some way. For Dworkin again, some conception of equality can be taken as a collective goal. A situation where a community may aim at a distribution such that maximum wealth is no more than double minimum wealth, or, under a different conception, so that no racial or ethnic group is much worse off than other groups.

4.6 Liberty and Liberalism

Dworkin also speaks of liberty and liberalism. In his words, liberty as license is an indiscriminate concept because it does not distinguish among forms of behavior.[48] But every prescriptive law diminishes a citizens' liberty as license. Thus good laws diminished as well as bad laws. Dworkin insists that liberty as independence is not an indiscriminate concept. Independence for Dworkin is an aspect or dimension of equality. Thus an individual's independence is threatened, not simply by a political process that denies him equal voice, but by political decisions that deny him equal respect.[49] He further argues thus

> Laws that recognize and protect common interest, like laws against violence and monopoly, offer no insult to any class or individual; but laws that constrain one man, on the sole ground that he is incompetent to decide what is right for himself, are profoundly insulting to him. They make him intellectually and morally subservient to the conformist who form the majority, and deny him the independence to which he is entitled.[50]

Dworkin, on this ground, agrees with Mill when insisted on the importance of these moral concepts of dignity, personality, and insult. It was these concepts, not the simpler idea of license that he tried to make available for political theory, and to use the basic vocabulary of liberalism. Liberty as Dworkin conceives it is liberty that respects the equality of all humans on the ground of their moral attributes. He stresses the fact that

> Government must treat those whom it governs with concern, that is, as human being who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's. These postulates, taken together, state what might be called the liberal conception of equality; but it is a conception of equality, not of liberty as license, that they state.[51]

Summarizing this understanding of equality, Dworkin maintains that the right referred here is the right to equal treatment, that is, to the same distribution of goods or opportunities as anyone else has or is given. The second is the right to treatment as an equal. This is the right, not to an equal distribution of some good or opportunity, but the right to equal concern and respect in the political decision about how these goods and opportunities are to be distributed. This right to treatment as an equal is fundamental under the liberal conception of equality.

4.7 Liberty and Moralism

Liberalism and moralism seeks to investigate on the idea of public morality: whether actions seen as immoral are also criminal. If homosexuality, for instance, is immoral, can it also be criminal? The fact that there is public condemnation of an action, is it sufficient to justify an

act as criminal? Some views think public condemnation is a sufficient reason to criminalize an act simply because it is immoral. Something, they argue, is more required.

The liberalists of Mill's kind argue that for an act to be termed criminal, for instance, it must cause harm or be capable of causing harm to the other. The report of the Wolfenden Committee on the Lord Delvin's paper on 'The Enforcement of Morals' delivered in 1958 has raised some issues. In that lecture, Delvin had argued that the society has got right to criminalize immoral acts like homosexuality etc. simply because it offends public morality. The Wolfenden Committee had argued in criticism of Delvin's paper that homosexual practices in private between consenting adults no longer be criminal.[52]

Delvin maintains that it is the function of law to preserve public morality (public order, decency) and to provide safeguards against exploitation and corruption of others. While the law does this, the Committee insists that it is not also within the realm of law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior, further than is necessary to carry out the purpose which we have outlined. There must remain a realm of private morality and immorality which in brief, and crude terms, not the law's business.

As for whether the society has right to punish conduct of which its members strongly disapprove, even though that conduct has no effects which can be deemed injurious to others, Delvin's position remains that the state has a role to play as moral tutor and the criminal law is its proper tutorial technique.

For Dworkin, moral disposition are predicates of emotions. Like Hume, he argues that morality is a bundle of impressions. Dworkin further argues that when we delve into the concept of our moral position, our disposition to such conducts as homosexuality, for instance, to our surprise arise from authority of the Bible (as when we say that the Bible forbids it or one who practices homosexuality becomes unfit for marriage and parenthood), or prejudices (as when we mean that homosexuals are inferior because they do not have heterosexual desires, and so are not 'real men').[40]

Other reasons come from our personal emotions (as when one has a severe emotional reaction to a practice or a situation for which one cannot account), or rationalization (as when I base my argument on proposition of facts; e.g. that homosexual acts are physically debilitating), or when I cite the beliefs of others (as when I refer to the fact that everyone knows that homosexuality is a sin).[43]

In all, what Dworkin means is that at any time, we do not have sufficient reason to justify interference on the individual rights to liberty. For him, however, the right of the individual supersedes any form of interference and there is no rationalization that could warrant or justify any form of interference on individual liberty by any authority. This is taking rights seriously, as far as Dworkin is concerned.

End Notes

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2. Ibid., 87

3 Ibid., 69-74

4. R. Dworkin, *Law's Empire*. (Cambridge: Beklnap Press, Harvard University Press, 1986), 52

5. Ibid., 13

6. Ibid., 255

7. R. Dworkin, *Taking Rights seriously,* 340

8. R. Dworkin, *Law's Empire,* 66, 256

9. Ibid., 93, 108-110

10. Ibid., 225

11. R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), Chap. 5

12. R. Dworkin, *Law's Empire,* 412

13. R. Dworkin, *Taking Rights seriously,* 81, 82-90

14. R. Dworkin, *Law's Empire,* 152

15. R. Dworkin, *Taking Rights seriously*, 22, 91, 297

16. R. Dworkin, *Law's Empire*, 167

17.R. Dworkin, *Taking Rights seriously*, 90

18. Loc. Cit.

19. J.W. Harris., *Legal Philosophies,* (London: Butterworths, 1980), 185

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21. R. Dworkin, *Taking Rights Seriously,* 63-64

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23. Ibid., 23.

24Ibid., 26-27

25.G. C. Christie, *"The Universal Audience and Predictive Theories of Law"* in *Law and Philosophy*, (Oxford: Oxford University Press, 1986), 649

26J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press,1972) 830-39.

27R. Dworkin, *Taking Rights Seriously*, 27-28

28H. L. A. Hart, *The Concept of Law*, 200

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30R. Dworkin, *Taking Rights Seriously*, 29

31Ibid., 37-38

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34Ibid., 17

35W. J.Waluchow, *"Herculean Positivism"* in *Oxford Journal of Legal Studies 5*: (Oxford: Oxford University Press, 1985b) 192-98

36S. Nigel, *Central Issues in Jurisprudence* (London: Sweet & Maxwell, 1986), 100-01

37R. Dworkin,*Taking Rights Seriously*, 40

38H. L. A. Hart, *The Concept of Law,* 199

39R. Dworkin, *Taking Rights Seriously*, 43

40Ibid., 67 - 68.

41Ibid., 76

42Loc. Cit.

43. Ibid., 35

44. Ibid., 263

45. Ibid., 262

46. Ibid., 249-250

47. Ibid., 81

48Loc. Cit.

49Ibid., 82

50Ibid., 263

CHAPTER FIVE

THE DIALOGICAL PROCESS IN HART-DWORKIN DEBATE

5.1 Thesis: Complexity of the Concept and the Traditional Beliefs

Both lawyers and jurists encounter difficulties in their daily practices of their legal profession, in and outside of the court. Philosophers of law, for decades now, have generally attributed this resultant discrepancy evident in their legal opinions, approach and positions about the nature of law and legal concepts with the fact that the term 'law' is itself a complex one.One jurist, who clearly understood the problem, probably more than his contemporaries, was H. L. A. Hart.In his juristic thought that was sustained by an underlying principle that law and legal concepts are non-reducible to extra-legal facts, Hart argued that the existence of the complexity of law with its administration has in turn created 'the need for a specific form of legal science concerned with the systematic or dogmatic exposition of the law and its specific methods and procedures." This position is clearly demonstrated in two major articles of the first decade of his assumption of the chair of Jurisprudence in Oxford. The articles are: '*Definition and Theory in Jurisprudence*' (1953) and '*Problem of the Philosophy of Law*' (1967). These articles form part of his book, *Essays in Jurisprudence and Philosophy* published in 1983. Obviously, questions of the sort: 'What is law?' 'What is right?' 'What is the state?' and so many others, are ambiguous in the sense that they cannot be answered in one precise term. As Hart further pointed out, when people ask for the meaning of these words or phrases, they want to be led beyond dictionary or lexical meanings of them. It does not mean that people do not know how to use these words in the way the dictionary designates. But in spite of the availability of the lexical understanding, puzzles about legal concepts persist:Hence it is no answer to this type of question merely to tender examples of what are correctly called rights, laws, or corporate bodies, and to tell the questioner if he is still puzzled that he is free to abandon the public convention and use words as he pleases. For the puzzle arises from the fact that though common use of these words are known, it is not understood; and it is not understood because compared with most ordinary words these legal words are in different ways anomalous. Sometimes, as with the word 'law' itself, one anomaly is that the range of cases to which it is applied has a diversity of which baffles the initial attempt to extract any principle behind the application, yet we have the convention underlying the surface of differences. On this ground, the need to understand the basis of the variety of opinions surrounding the nature of law and legal concepts becomes necessary. Evidently, the

demand for definition of fundamental legal concepts are genuine; but the problem is that many irreconcilable theories have arisen in the face of the innocent requests for definition of fundamental legal concepts, "so that not merely whole books but whole school of juristic thought may be characterized by the type of answer they give to questions like "What is right?' or 'What is a corporate body."The quest for definition, according to Hart, seems to necessarily lead us to the demand for a theory. This is a wrong approach, in Hart's understanding; hence he asks: "Can we really not elucidate the meaning of words which every developed legal system handles smoothly and alike without assuming this incubus of theory?" The peculiar character of many theories tends to bring confusion in the way of our understanding of legal concepts.

In all of these, the traditional understanding of law remains one that is linked with some kinds of metaphysis. Right from the pre-Socratic down to the medieval era, law was seen as having its origin in God. Aquinas distinguished four kinds of law namely: the eternal law, natural law, human law and divine law. Eternal law is divine reason governing the whole universe. Natural law consists of the portion of the eternal law operative in nature. In fact, his reasoning is that "all things partake somewhat of the eternal law...from its being imprinted on them" and from this all "derive their respective inclinations to their proper acts and ends." This is particularly of people, because their rational capacity "has a share of the Eternal Reason, whereby it has a natural inclination to its proper end." Human law is a derivative of the precepts of natural law. And divine law is that which operates in accordance to humanity's supernatural purpose or ends, thereby directing people to their proper end. Finally, Aquinas strictly taught that the unifying principle of these four kinds of law is rooted in the eternal law, which refers to the fact that "the whole community of the universe is governed by Divine Reason."

5.2 Enthesis: An Evolution in Consciousness

The seventeenth century witnessed a change inthe direction of human thought. Factors responsible for this change included the emergence of Newtonian physics, Protestant revolt, the Second World War and the rest of them. Popularly known and referred to as the Enlightenment period, the philosophies of Hobbes, Hume, and the rest of other empiricistsfeatured greatly. In Chapter Six of the *Leviathan*' Hobbes could claim that his work gives a description of the human nature. The basis of his argument is that men are fundamentally selfish and are ruled by emotions. Hobbes believes that the judgements of men on moral issues are based on their own

feelings and volitions. Hence, for Hobbes, desires and aversions translate into love and hate.It is Hobbes's contention therefore, that right and wrong, good and bad are not in the nature of things but passions of the mind.At this point, one recalls that Hobbes was deeply influenced by the Newtonian physics, whereby entities, including human beings, were subjected to the same principles of science. Thus in this Hobbesian direction, everything in nature was seen to be object in motion. Law is itself a positive entity.

Hume followed Hobbes in this project of denying the hand of reason in human affairs. The whole of Hume's philosophical works portrays him as one who wanted to build a "science of man," whereby he could study human nature by using the methods of physical science. Hume understood the central fact about ethics as that moral judgement is formed not by reason alone but by the sentiment of sympathy. But reason, he says, "is not sufficient alone to produce any moral blame or approbation, for the movement from what is (a matter of fact) to what we are ought to do or required to do (qualities we place on objects-action) is a logical jump. According to Hume, what limits the role of reason in ethics is that reason makes judgements concerning matters of fact and relations whereas moral judgements of good and evil are not limited to matters of fact or relation. Moral judgements are not reports of matters of facts. They are sentimental ascriptions that cannot be contradicted in descriptive terms. Thus in his work, *An Inquiry Concerning the Principles of Morals*, Hume argues that such judgements implying "ought" are not conclusions of reason. He claims that since there is no connection between events, there is no basis to warrant us to make a judgement that any two events stand to each other as cause and effect respectively. And following this understanding, Hume speculates further that no set of descriptive statements entails prescriptive statements.Social facts exist separately. We cannot make a move from where societies are organized to say how they ought to be organized. Although reason helps us to discover primary qualities like figure, it bears no hand in a constant conjunction of passing from one impression to an idea.It is opposed to all the ideas that spring from an imagination.Reason can never advise us as to the following of the fancy of our imagination.For one to move into action, passion or sentiment has to be in place, thus morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular sense. The rules of morality, therefore, are not conclusions of our reason. It is Hume's belief that reason is not a species that causes or motivates actions.It can never prevent volition, and "is and only ought to be the slave of passions"Hume's conclusion is that both law and

morality are societal inventions, and they have their origin in human passion or motive. In Hume's conceptual scheme, therefore, law and morality would be as separate as they are not necessary. Moral and legal judgement would then be a matter of presumption and guess.

The aftermath became the emergence of legal positivism; a view that saw law as a product of a social system and practice. Austin and Bentham could envisage a system of law that consisted of command and prediction.

5.3 Prothesis: Beginning of Hart-Dworkin Debate

Thus, the Hart-Dworkin debate, which revolves around the concept of law, looms large over all legal literatures. 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 recent paper on analytic jurisprudence, Brian 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 particular of the Hart/Dworkin debate, there has been a clear victor."[3] In all indication, the Hart/ Dworkin debate 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.

5.3.1 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.

5.3.2 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. 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 imposes 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 require 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.)

5.3.3 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]

We recall that 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 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]

5.3.4 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. I suggest 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. 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]

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.

5.4 Synthesis: 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 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]

5.5 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 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.[35] What is crucial, Hart maintains, is that some liberties "are 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 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]

5.6 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 create 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.

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.

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19. Sidney in Lyon David, *Principles, Positivism and Legal Theory,* 65

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26. Loc. Cit.

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31. Ibid., 78

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60. R. Dworkin, *A Matter of Principle*. (Cambridge: Harvard University Press, 1985), Chap. 17
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CHAPTER SIX

EVALUATION AND CONCLUSION

6.1 A Critique of Hart-Dworkin Debate

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?[1] 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.[2]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 encapsulatethe 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 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.[55] 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.

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6.2 CONCLUSION

Both H. L. A. Hart and Ronald Dworkin have contributed much through their theories to the development of Anglo-American legal system. Much of their influence is still felt around those legal systems that have little or more to do with the Anglo-American jurisprudence. Our efforts in highlighting the dialogical process in their theories display the conviction that the Hart-Dworkin debate, in their overall significance, is more complementary to each than divisive albeit those who might think and conceive otherwise. The legal system to which the debate protects cherishes these two colossuses in the world of legal theorizing; hence H. L. A. Hart and Ronald Dworkin will ever remain great minds to be emulated in the world of jurisprudence.

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