Briefing Paper

Modern Jurisprudence
Dworkin's Deadly Attack on Legal Positivism

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Introduction

This paper will explore whether Dworkin (Professor of Jurisprudence at University of Oxford) has advanced the most deadly attack on legal positivism.

To discuss this we shall look at the concept of legal positivism in depth along with the views taken on this concept by legal jurists in particular the work of such leading jurists as Austin, Bentham, and Hart.

We shall then consider the theories of Dworkin and his views on legal positivism as well as the views of other leading jurists to understand their opinions, beliefs, and criticisms of legal positivism in depth.

We will do this to observe the different viewpoints legal positivism can be studied from and the criticism that it can face in light of other philosophical ideas surrounding law to put forward my own thoughts on the subject and find a definitive opinion of my own on the matter in hand.

Jurisprudential Background

Firstly, we must investigate what the theory of legal positivism is and what this concept means in the broad terms of its use.

A good starting point to this is found in Hart's essay 'Positivism and the Separation of Law and Morals'[1] in this Hart enumerates five main views that are commonly seen as the ideals of legal positivism.

[1] (1958) 71 Harvard Law Review 593, 601 n. 25

Hart tells us in this essay that; laws are commands of human beings; that there is no necessary connection between law and morals; that the analysis of legal concepts is both worth pursuing and distinct from sociological and historical enquiries and critical evaluation; that a legal system is a 'closed logical system' in which correct decisions may be deduced from predetermined legal rules by logical means alone and; that moral judgements cannot be established as statements of fact can, by rational argument, evidence or proof.

It must be noted that between all the leading positivists such as Austin, Bentham, Hart and Kelsen though there are always differing questions posed from each Jurist and that their method of enquiry and general objectives often differ to the same extent as their original questions there is always a common factor in their reasoning.

Although this is true, one common factor between all these authors remains. This is that the law as laid down should and must be separated from the purpose of study and the purpose of analysis. These authors on legal positivism would agree that there must be a clear distinction between what the law ought to be in a moral sense and what the law is as it actually exists. This is the second point made by Hart in his essay 'Positivism and Separation of Law and Morals'.

It must also be noted that in no way does this distinction between morals and law mean that these jurists disregard the use and importance of moralistic thinking within the law. Indeed all these leading jurists express deep moral criticism of law in their work. However, these jurists would argue that the most efficient method of analysing the law is to defer the moral judgement until it is clear what is trying to be explained, in other words one must know how the system of law works before we can criticise it with a moral view. This ideal is wholly central to the positivist way of jurisprudential thinking.

An additional point to make is that jurists who practice the doctrine of legal positivism do not always as is often put to them support the proposition that unjust laws must be followed merely because they are set forth in law. As Hart stated:

'[T]he certification of something as legally valid is not conclusive of the question of obedience...however great the aura of majesty which the official system may have, its demands must in the end be submitted to a moral scrutiny'[2]

I will now look at the opinions and theories of leading jurists in both classical (briefly) and modern (in depth) legal positivism and explore their outcomes and conclusions.

Austin is possibly the most revered classical legal positivist, his ideas are similar although by no means identical to those of Bentham who is another leading classical positivist and whose views also centred on the idea that law as it is must be separated from what law 'is' and what law 'ought' to be. Austin's 'command theory of law' is his most distinctive legacy that remains today.

Although the influence of Austinian jurisprudence has declined since the rise of modern positivism (which I shall scrutinise later) the theory of law developed by Austin is nevertheless important and centralises around his concept of commands or imperatives.

Austin's view is very restricted in that it only takes into account in the ain the criminal law, in this his belief is that anything that is not a command is not law at all, in this only general commands can count as law in the Austinian concept and only commands emanating from the sovereign are 'positive laws'. A key theory Austin is the concept of the 'Sovereign'. Of the 'sovereign' Austin tells us that;

'if a determinate superior, not in a habit of obedience to like a superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent'[3]

Here we can see that there are two main beliefs Austin holds on the 'sovereign'. In the positive; 'the bulk of the population habitually obeys the sovereign' and in the negative; 'the sovereign is not in the habit of obeying anyone'.

[2] Hart H.L.A, 'The Concept of Law', (Second Edn, 1994) p.206

[3] Austin, John, w/introduction by Hart, H.L.A 'The Province of Jurisprudence Determined' (1954), p.194

Austin based his idea of sovereignty on the habit of obedience adopted by members of a given society. This leaves Austin with a very narrow conception of a sovereign, one whose powers are unbreakable and indivisible and who is habitually obeyed. In 'Studies in History and Jurisprudence'[4] Bryce has suggested that Austin may have mistook the de facto sovereign - the body that receives habitual obedience (for example - the Crown) with that of the de jure sovereign which is the body that makes the law (for example - in the United Kingdom Parliament).

The final part of the large score of classical positivism that I will look at in particular the concepts put across by Austin is that of 'Sanctions'. Austin regards sanction as an essential element in the definition of law.

This belief is largely based on the idea that if the sovereign of a legal system expresses a wish and has the power to inflict a sanction then a person is obliged or under a duty to act in accordance with that wish. Austin's approach in this is another aspect of this theory of jurisprudence which has been widely attacked. It would seem that Austin has attempted to show that where there is a 'duty' there is a sanction if this duty or obligation is not fulfilled. However, as has been pointed out many times by other jurists there are many occasions in law where sanctions are not imposed for the non-performance of a duty, these occasions would include when people were to marry or make wills.

The command theory has many strengths and weaknesses and as we have seen it has been left open to much discussion and criticism. As Bix has commented in 'A Dictionary of Legal Theory;

'The strength of command theories is that they capture the coercive aspects of law, and the importance of the power of the state. Their weakness is in the problem of any theory that tries to reduce the variety of legal experience to one category, whatever that category might be.

[4] Bryce, J. 'Studies in History and Jurisprudence' (1901), vol. 2, 51-60

'Not only do command theories have difficulty accounting for power-conferring rules, they can also have difficulty accounting for the basic structure of the legal system itself - the rules that constitute the roles and institutions of the system, and have to guarantee its continuity over time'.[5]

Modern Legal Positivism

We shall now look at the work in particular of Hart and the theories of modern positivism.

Hart as one of the leading figures in modern positivism has severed the principles and ideas of positivism in general from both a utilitarianism and the command theory of law as held to be correct by both Austin and Bentham respectively.

Hart has ultimately rejected the belief of the command theory backed by a sanction or evil as a definitive stance as a description of law. Indeed hard stated that; *'the simple model of law as a sovereign's coercive orders fails to reproduce some of the salient features of a legal system'*[6]. However, out of the ashes of Hart's attack on Austin's imperative command theory of law he has built his own concept that materialised in his own book 'The Concept of Law'.

This imperative version of legal order and rules as purposed by Austin and Bentham has located the sovereign as being above and beyond the law, a concept that in today's thinking does not seem just or right, moreover, this failed to account for the requirement that legislators comply with basic law making procedures.

At the very centre of Hart's concept of positivism and his description of law and the legal system is the fundamental rules accepted by officials as stipulating these law making procedures.

[5] Bix, Brian, 'A Dictionary of Legal Theory', (2004)

[6] Hart H.L.A, 'The Concept of Law', (Second Edn, 1994) p.77

A key feature of Hart's theories is the idea of 'primary and secondary rules'. Hart suggested that all societies have social rules and these rules are split between moral rules and legal rules, in this, as a result of our human limitations there is a need for obligation rules in all societies 'minimum content of natural law'. These legal rules can be divided into two groups, those that are primary rules and those that are secondary rules. The former grouping of rules are those which must exist to suppress behaviour of a nature which would stop the members of a society from existing peacefully with one another, as Hart himself puts it; *'the free use of violence, theft and deception to which human beings are tempted but which they must, in general, repress if they are to coexist in close proximity to each other'*[7]. Hart suggests primitive societies merely have these primary rules which impose obligations, however, as a society becomes more complex and grows these primary rules alone will not suffice.

As a society becomes more complex there is a need Hart suggests to adjudicate on the breaches of these rules and this is where his theory of secondary rules are founded, in this the secondary rules will determine which rules are actually obligatory rules and which are not. Three secondary rules can be applied; rules of change, adjudication, and recognition. The first two of these rules; change and adjudication do not infer duties and obligations; however, the rule of recognition does impose duties.

Hart's theory on primary and secondary rules purposes that for a legal system to come into existence two vital provisions must be adhered to, firstly that valid obligation rules must be obeyed by the members of the given society and secondly that the officials of the society must embrace the rules of change and adjudication, also the officials of the society must also accept the rule of recognition, and this acceptance must come 'from the internal point of view'.

Further to this, Hart suggests that in order to explain the nature of rules we need to examine them from the point of view of those who experience them and from the point of view of those who pass judgement on them.

[7] Hart H.L.A, 'The Concept of Law', (Second Edn, 1994) p.89

Another key ideal of Hart's system of primary and secondary rules is that this distinguishes between 'being obliged' and 'having an obligation' this is a total detraction from the Austinian philosophy which cannot make a distinction between the two and why in some circumstances one might be obliged to do comply with a request but one will have no obligation imposed on you.

It is worth noting here that although a positivist Hart can be distinguished quite easily from the classical jurists such as Austin and Bentham in that he is far more concerned with the social source of legal rules, as the expression of our thoughts behaviour, and words, whereas, Austin was merely concerned with commands, sovereignty, and sanctions.

With regards to judicial function Hart has tried to reject the strictly formalised view of judicial precedents and codification. Hart has also attempted to reject the rule scepticism of the realist movement. In developing his theory of a primary and secondary rule legal system Hart has come to accept that law are rules and that judges have a reasonably wide discretion when arriving at decisions. This are of jurisprudence is widely debated and for good reason, in Hart's view when there is no applicable legal rule or where the rules are uncertain or ambiguous Hart believes that a judge must have a strong discretion to 'fill in the gaps' in so called 'hard cases'. Hart therefore, fully accepts that judges in such 'hard cases' make the law and although they are guided by a variety of persuasive cases ultimately the judge base his decision on his own conception of what he considers just fair and reasonable. The idea of 'filling in the gaps' is one that is widely contested and those who do not support the positivist ideology reject this as good law, this is discussed in depth below.

Throughout Hart's work in the Concept of Law it is clear that the end goal is to find a legal theory and system that will suit any given society no matter if the society is developed or not, or is what one man might consider good or another evil. One of the most outspoken critics of legal positivism is Dworkin. In his theory and concepts of jurisprudence attempts are made to rationalise more developed Western legal systems.

Dworkin's Jurisprudence

We shall now consider Dworkin's theories and concepts of the law of jurisprudence and in particular study his attacks and criticisms of legal positivism. We will also take into account other jurists criticisms of the positivist approach in an attempt to critically appraise the assertion; Dworkin has advanced the most deadly attack on legal positivism.

Dworkin recognised as one of the strongest and most vocal critics of legal positivism as Raymond Wacks states; *'It is no exaggeration to say that he has changed the face of contemporary legal theory*[8]*.* Dworkin's belief, unlike positivists such as Hart of Austin is that law and morals must and cannot be separated but are inevitably intertwined. For Hart and other legal positivists there is a much clearer understanding of law to be gained for the intention of analysis if law if viewed as it 'is' and not as it 'ought' to be.

The approach taken by Dworkin is that law is not merely made up of rules as Hart would suggest but also of 'non-rule standards'. Dworkin suggests that when a court must decide upon a hard case a court will draw upon these standards, principles and policies be they moral or political. As Dworkin puts it when a judge is called upon to make a decision in a hard case he must call upon principles which will include his own conception of what is the best interpretation of the *'great network of political structures and decisions of his community'* and must ask *'whether it could form part of a coherent theory justifying the network as a whole*[9]

In this Dworkin suggests that there is always one right answer to a legal question and it is down to the judge in the given case to find it. This answer will be right in that it suits best with the institutional and constitutional law of the land and in this Dworkin's theory tells us that legal argument is interpretive in its very nature.

[8] Wacks, Raymond, 'Understanding Jurisprudence – An Introduction to Legal Theory', (Second Edn, 2009) p.141

[9] Dworkin, Ronald, 'Laws Empire' (1998) p.245

Dworkin also takes the view that Hart's legal system of primary and secondary rules disregards the importance of legal principles which Dworkin believes act as guidelines which judges must take into account when deciding 'hard cases'. Although 'hard cases' are not a central theme of the positivist ideal it is nevertheless a feature in the fabric of the theory and indeed such decision making through limited judicial discretion in 'hard cases' is defended by Hart in the post script of the second edition of 'The Concept of Law'.

Dworkin argues through his concepts and theories that Hart's model is not correct, gaps in law which are filled by judicial discretion is unacceptable to Dworkin who feels that law is far more complex than Hart's basic model. It is in 'Laws Empire' Dworkin mounts one of his most comprehensive attacks on the principles of positivism and what he calls 'conventionalism', here he states that the law consists no more than in respecting a certain list of criteria through conventions and secondly it conceives law as incomplete and that there are no gaps of which judge fill by reference to their own predilections.

It is important and central to Dworkin's attack on positivism that there is a failure by positivist jurists to provide either a convincing account of the process of law-making or a sufficiently strong defence of individual rights. Dworkin's view is that when a judge in a 'hard case' comes to a 'gap' in the law he must not think of himself as giving voice to his own moral and political beliefs or even giving voice to those beliefs that the majority of the electorate would approve but he must, as Dworkin puts it;

'He knows the other judges have decided that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue according to his own judgement of how to make the developing story as good as it can be'[10]

[10] Dworkin, Ronald, 'Laws Empire' (1998) p.225

It is clear that Dworkin in his concept holds the belief that there is no law beyond law which is wholly contrary to the positivist thesis and ideals. It is also clear that Dworkin sees the law as having no gaps and that law and morality are intertwined in every way, and indeed cannot even if one were to wish it be separated. It is in this view that leads Dworkin to reject the positivist ideology and tell us that as Hart suggests a relationship of primary and secondary rules is not valid nor correct as a legal system model as it fails to take into account the principles and policies which are so obviously a part of legal system.

It has been commented by Coleman that:
'While for the positivist, the central legal figure is the law-maker or legislator, the central figure for Dworkin's theory is law's interpreter; the appellate judge'[11]

However, as mentioned before, Hart would tell us at this point that his work is merely descriptive and is not designed to validate a particular legal system or way of thinking and is only a model for which any society functions be it developed or not where as Dworkin's model in 'Law as Integrity' really focuses on Anglo-American modern legal systems.

Dworkin has also put forward a number of political arguments on his views of how judges should legislate in so called 'hard cases' which I shall mention here briefly.

It is the view of Dworkin that the law making power should not be vested in unelected and none accountable judges, in his view judges are appointed to apply and develop the law not merely invent it with their own thoughts as part of it. Secondly Dworkin's belief is that if a judge makes what is new law in a hard case then applies it to the case in hand then a defendant has not breached a duty to the claimant in the case but has lost because new law has been created and then applied to him retrospectively, as Dworkin argues and as I believe quite rightly this is unfair and unjust. There is no need in Dworkin's model for a judge to create new law as the answer and right answer to this issue is already in law and simply waiting to be found by an act of judicial interpretation of the existing law.

It is Dworkin's firm belief that law never runs out, he argues that *'the positivist's theory of judicial discretion is a consequence of his more general theory of law not an argument for that theory'*[12]

[11] Patterson, Dennis, 'A Companion of Philosophy and Legal Theory' (1996) p.242

Is it therefore Dworkin's view that the concept legal positivism is flawed in the general sense of its theory and not just in the idea of judicial legislation. Dworkin argues that there is no master test for law in the form of a 'rule of recognition' as a legal positivist such as Hart would have us believe. Instead, Dworkin argues that there is no mater test which can be used that could possibly encompass all the principals of a complex legal system.

It is clear that Dworkin has launched scathing attacks on legal positivism and the concepts and ideologies that surround it. His writing has stimulated lively debate in literature among his contemporaries which will continue far into the future.

Hart in his posthumously printed postscript of the second edition of 'The Concept of Law' has stated that he rejects Dworkin's notion that his own theory precludes a none participant, external observer from describing how participants experience law from an internal point of view. Hart also firmly rejects Dworkin's claim that his theory is prey to the semantic sting, Hart responds to this by denying that he ever held *'the mistaken idea that if the criteria for the identification of the grounds of law were not uncontroversially fixed, 'law' would mean different things to different people'*[13]

Conclusions

Dworkin's work has divided legal thinking and has shaken the principles of positivism to its very core, it is clear that Dworkin has launched the most deadly attack on legal positivism thus far in the theories of jurisprudence. No other jurist has launched an attack on positivism which has shaken its very foundation in the same light as Dworkin has through his rejection of Hart's concepts of law and the Hart system of primary and secondary rules and through his own beliefs on legal philosophy in 'Law as Integrity.

[12] Dworkin, Ronald, 'The Philosophy of Law' (1977) p.7

[13] Hart H.L.A, 'The Concept of Law', (Second Edn, 1994) p.246

His ability to point of the flaws of its very nature such as the ideology of 'gaps' that judges fill with discretion have allowed him to paint a picture of his own vision of legal theory. In this a view of a legal system where morals and the law coincide together for the benefit of each other and the benefit of the society in which they are a part.

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