The Preferable Compromise of Legal Positivism and Natural Law

Legal positivism’s rules and Natural law’s principles/rights both offer comprehensive theories of legal reasoning. It is therefore submitted that the key benefits of both legal positivism and naturalism should be combined as a compromise, to produce the best overall theory of legal reasoning.

Both analyses of legal reasoning comprise of many competing theories, however they all can all be reduced to one fundamental premise. Natural law asserts that law as it ‘is’ and law as it morally ‘ought’ to be are essentially connected. Legal positivists in contrast, argue that there is no necessary connection between law and morality.

As Dworkin feels that the separation of ‘is’ and ‘ought’ is impossible, and also his principles share some common ground with Finnis’s basic goods, for the purpose of this essay, he will be classified as a natural lawyer. Hart, whose positivist theory of rules greatly improved upon his predecessors (Bentham and Austin) will therefore be used as a representative of legal positivism.
Concept of Law

Hart’s theory focuses on rules and his ‘union of primary and secondary rules’ is his fundamental premise. Central to this is the rule of recognition, which is a list of criteria ranked in order of importance, to determine the validity of law. This rule of recognition has enabled Hart to explain many puzzling aspects of law. This includes who is the sovereign of each legal system, the structure of legal system, how valid and which are not. Hart’s model of rules has been praised for its ability to describe accurately what judges apply as law.

Dworkin however, feels that this model is inaccurate, as in addition to rules; there are also principles and policies that are part of the law. This he demonstrated in the case of *Riggs v Palmer* (This case held that despite no law to contrary that a man could not benefit from his own wrongs and consequently could not claim under will of his murder victim; this effectively applied a principle instead of law). Dworkin’s principles essentially dictate rights which share common ground with Finnis’s basic forms of human flourishing: life, knowledge, health, play, friendship, religion and aesthetic experience. These concepts are arguably fundamental to all people and across all cultures. Natural law has therefore evidentially contributed significantly to the evolution of human rights. Consequently, Dworkin’s fundamental premise is that rights should be taken seriously and, therefore, Hart’s rule of recognition is not exhaustive.

Judicial Discretion and Hard Cases

One flaw in Hart’s system is that he is unable to prescribe a judicial process in the absence of applicable rule. He therefore concedes that judges do ‘fill in the gaps’ by exercising moral discretion.

Dworkin however states that there are no gaps in the law as all propositions of judges are true law, as they are applied on grounds and based on principles of justice, fairness and procedural due process.

A possible compromise?

Given the ability of Hart’s rule of recognition to explain so many aspects of a legal system, it should undoubtedly be preserved as part of any hybrid theory. However, Dworkin’s principle also provides a significant insight into law. It is therefore proposed that Dworkin’s principles be incorporated into a Hartian framework.

This could be done by drawing up a document of Dworkin’s fundamental principles. This document could be in the form of a Bill of Rights or
perhaps ‘Principles of Humanity’ and it would include these rights and principles that are considered to be fundamental to humans and society.

Arguably, the rights would stem from human rights, which ultimately emanated from natural law. Such rights would therefore include a right to life, free from torture and slavery and so on. The bill would also contain principles of justice, fairness, liberty and equality.

Now given controversy surrounding the legal status of such a document and taking into account Dworkin’s claim that principles are numberless and constantly changing, it would be preferable to primarily enact it as a basic structure.

This would mean that the statute would be given time to ‘settle’ with society. It would also provide that over a period of time (five or so years) the effect document could be evaluated in terms of society and judicial application. This period of time would also mean that the statute could be amended to ensure that it was an exhaustive list made with caution, as they have potential to make the document seem flimsy, and it is preferable for such principles to remain constant with time.

At the end of this evaluation period, it should be proposed that the Bill be entrenched as part of the Constitution (by whatever means the Constitution dictates). Arguably, as society and officials have been given an opportunity to interact with the document, and given that this interaction was positive, they would agree to such entrenchment and Bill (and its principles) would become part of the Constitution and consequently part of the rule of recognition.

**Benefits of a Compromise**

If such a amendment were to occur, it would have several beneficial implications for both naturalists and positivists.

The incorporation of Dworkin principles into Hart’s rule of recognition would mean that the gaps of judicial discretion in Hart’s theory would disappear. Because what was previously considered judicial discretion, in the application of justice and fairness, is now solely based on law. As principles are source-based, all is required is technical legal skills in reasoning from sources ad no moral acumen is required.

Therefore, Hart’s positive analysis can maintain the separation of law and morals, and still be premised upon the union of primary and secondary rules.
This incorporation would also mean that Hart’s rule of recognition fully constitutes a rule, both descriptively (in terms of structure) and prescriptively in terms of judicial process so now judges are solely applying the rule.

For Dworkin, the compromise has meant that only his fundamental principles could be incorporated. However, such an incorporation had meant that his theory of no gaps in law becomes a working reality. It also makes effective his using of principles having a threshold, as how as part of the constitution, they cannot be quashed by competing goals due to the hierarchical ordering within the rule of recognition.

Such entrenchment has also meant that rights are protected, and therefore ‘law as integrity’ is maintained. As a consequence, the law is taking Dworkin rights seriously.

Concerns of a Compromise

It is inevitable that such an incorporation theory will receive criticisms. It might be argued that the theory does not travel well and concepts of fundamental principles are limited to a Western vision. However, in light of the universal recognition and protection of human rights this century, and given that every nation in world has ratified a human rights treaty, it could be concluded that there are rights and principles that are fundamental to humanity and that transcend all cultures.

The notion of which rights are fundamental may also bring the theory into question. Similarly, the development of international law, which is predominantly based on natural law, each legal system should consider which rights or ‘good’ are necessary for human life and flourishing. Finnis could therefore provide a starting point and the various international covenants could help develop and expand upon these fundamental human rights, for each legal system.

It may also be argued that such a document is not exhaustive, its statements are too general and will therefore still lead to judicial discretion and disagreement. It is acknowledged that the Bill does not include minor principles, however all minor principles are effectively based upon broader notions of justice, equality and fairness. Therefore by merely applying these broader principles, as judges are required to do, the effect will be the same as if the minor principles have been applied.

Hart and Dworkin also both accept that in borderline cases there will inevitably be disagreement of whether a practice falls within an entrenched principle. However, it is argued (and supported by Dworkin) that in pivotal cases, a breach will be so obvious that no disagreement will arise.
Utilitarians may also find the emphasis on rights as to ‘egoistic’ and placing too much importance on the individual. However, it is considered that such entrenchment will inevitably influence and regulate the relationship between individuals.

The development of such relationships can only be considered as a pursuit of the common good; which is the ultimate objective of utilitarianism.

A Consensual Theory?

For Hart as a soft positivist, he consents that a society’s rule of recognition may consist of moral constraints and standards. This concession from Hart allows for his theory to increase in applicability and legitimacy and due to such benefits, Hart is willing to compromise.

Dworkin’s ultimate goal was to have rights taken seriously. Arguably, by having rights not only as legislation, but as a component of an ultimate legal authority, Dworkin’s needs are catered for. As the compromise allows for Dworkin’s notions of gaps and principles to become reality, and given that the vehicle was a Bill of Rights (of which Dworkin is a strong supporter), it is concluded that Dworkin consents to such a compromise.

In Reality

Modern legal systems have demonstrated that such a compromise is a viable and preferable option. This has especially been evidenced in the US, where the inclusion of a Bill of Rights into the Constitution, meant that moral standards and substantive principles can be incorporated (like 16th and 19th amendments) to constitute conditions of legal validity.

Conclusion

The key aspects of Dworkian principles and Hartian rules when combined, via a Bill of Rights, create a comprehensive legal compromise for both positivists and naturalists. This incorporation theory effectively removes from Hart’s system the defect of judicial discretion while providing a means for Dworkin’s various notions of law to be more practically applicable.

Rather than having two separate theories, this compromise represents the most preferable theory of legal reasoning as is evidenced by reality. It means that a superior form of legal reasoning is created, where Hart can maintain a ‘vision of primary and secondary rules’ and Dworkin has ‘rights taken seriously’.

Comments:
“A thoughtful, well constructed and interesting essay”.