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LAW AS AN INTERPRETATIVE PROCESS- PERSPECTIVE OF RONALD DWORKIN

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INTRODUCTION

"*The rendering of a judicial decision is not always an easy matter. Chief Justice Hughes once said that when we deal with questions relating to principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty. It would not be difficult to decide a case if only one single principle were involved. The difficulty, however, arises when the facts of the case reveal that it is in the neighbourhood of different principles. It is then that the painful process begins through self-searching of making a choice or of accommodating two or more principles. This for any conscientious judge is the agony of his duty."*[1]

Justice Khanna, while delivering the lecture on the 'Role of Judges' at Ahmedabad on 16 November, 1978 underlined the significance of judicial interpretation several times. He said, "*One of the most important tasks of the judges is that relating to judicial interpretation. There can be no doubt that the judges by their interpretation can make law subserve a social purpose. So far as the judges of the higher courts are concerned, their office demands that they be historian and prophet rolled into one."* There is little doubt that Ronald Dworkin would have found an ardent admirer in Justice Khanna if the two ever met.

*"*Interpretation, as applied to written law, is the art or process of discovering and expounding the intended signification of the language used, that is, the meaning which the authors of the law designed it to convey to others."[2] Aharon Barak[3] provides a much simpler definition for legal interpretation when he defines is as "a rational activity that gives meaning to a legal text." Aharon Barak places the emphasis on the use of 'rationality' in interpretation, a coin-toss is not an interpretive activity.[4] For any progressive and right-minded jurist, the entire judicial process has to be a constantly evolving organic process with the ultimate purpose to serve the public good. While it would be not be possible for legislature of any country to keep on making laws on each and every subject and then keep them up-to-date with the changes in the society, the role assigned to judiciary becomes crucial while applying the laws of the land to the disputes at hand.

It would be relatively easy for the judiciary to apply the laws at hand to the cases and disputes they are faced with, if the disputes were to be squarely covered either by a precedent or the provisions of a statute. "No system of law can, however, is evolved by just matching shades of colours of the decided cases with the cases at hand. If that were all to our calling, then in the words of Cardozo, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge."[5]

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[1] Dr. Lokendra Malik (Ed.), *Selected Writings of Justice H.R. Khanna* 227 (Universal Law Publishing Co., Delhi, 2013).

[2] Henry Campbell black, *handbook on the construction and Interpretation of Laws* 1 (1896) in Bryan A. Garner (Ed.), Black's Law Dictionary (West Group, 7th Edition, 1999).

[3] Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005).

[4] H. Kelsen, *Pure Theory of law* 348 (Knight Trans. From German, 2nd Ed. 1967) in Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005).

[5] Dr. Lokendra Malik (Ed.), *Selected Writings of Justice H.R. Khanna* 226 (Universal Law Publishing Co., Delhi, 2013).

THE RISE OF JUDICIAL INTERPRETIVISM:

The advent and advancement of modern jurisprudence can single-handedly be attributed to the initiatives and labour of legal positivists. The views and theories put forth by the early positivists were heavily influenced by the political system in United Kingdom, simply because early positivists were all English. Outside of Great Britain, seen in particular contexts, the theories and deliberations of positivists, more often seem ridiculous and highly implausible as they time and time again press that the law should be studied as law is and should be seen in isolation from politics and social structure.

Positivists faced serious challenges in jurisprudence with the rise of the United States of America (USA) to prominence as there was a different political system in place there, in the sense that the political power and the parliament (called Congress in USA) were limited by their Constitution. Constitution of the USA laid emphasis on separation of powers and thus made judiciary equally powerful for the first time on such a big scale. But, still Judges did not get their due place in jurisprudence till the time Ronald Dworkin started his assault on theories put forth by the positivists. It was a very brave attempt as the positivists were a very strong tradition, with a glorious past, but the views of Dworkin started gaining ground all over the world as the political and social structure was changing all around and was more suitable for Dworkin's views and very different from the soil wherein the Positivism was initially planted.

Such was the influence of positivists in jurisprudence that before Ronald Dworkin, only one jurist Roscoe Pound, who was the dean of Harvard law School for over twenty years, spoke about the role of judges in shaping the jurisprudence and law-making. But it was the works of Ronald Dworkin that really advocated the significance of the role of judges in jurisprudence and judicial decision–making.

Riggs v. Palmer[6]- Principles versus Rules:

Ronald Dworkin started his attack on positivists by challenging the views put forth by the most prominent Positivists of the modern era H.L.A Hart, who based his model of positivism on the prevalent of primary and secondary rules and the role played by them in the legal system of a given society. Dworkin advocated that no legal system could entirely be based on the primary and secondary rules as advocated by Hart and anyone who would try to comprehend a given legal system based on Hart's conception is bound to miss a substantial part of that legal system. What Dworkin advocated the existence of principles beyond rules, which were also considered by judges in arriving at meaningful conclusions day in and day out by the judges presiding over the courts of law.

Dworkin illustrated the existence of principles by taking example of the case of *Riggs* v. *Palmer*[7], wherein the New York State Court of Appeals refused to allow Elmer Palmer to inherit property as a beneficiary under the will of his grandfather, whom he had murdered by poisoning. Dworkin says that though, the legal rules say that legacy contained legally valid testamentary instrument are guaranteed to the beneficiary in accordance with the wishes of the testator, yet the Court in *Riggs* v. *Palmer* decided not to apply that rule, relying on the general rule that 'no one should be allowed to take advantage of his own wrong'. Dworkin further says that the principle applied here is not a pure invention of the judges involved but also a principle of law developed by courts over a period of time. Dworkin emphasized that the case at hand highlighted the fact that judges were interpreting rules in the light of governing principles, and hence the propositions of the positivists were far from perfect. Thus Dworkin states that judges must make the law the best that it can be through creative interpretation of existing legal resources.

[6] 115 NY 506(1889).

[7] *Ibid.*

Dworkin's Theory of Adjudication: Law as an Interpretive Concept.

"Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best there can be."[8]

Dworkin treats law as an interpretive concept and it is Dworkin's quintessential proposition that, to develop a theory of adjudication, it is necessary to engage in a constructive interpretation of law. As per Dworkin, the process of constructive interpretation is made up of three analytical stages; The pre-interpretive stage, the interpretive stage and the post-interpretive stage.

i) The Pre-interpretive Stage: Dworkin categorises this stage as the one in which 'rules or standards taken to provide the tentative content of the practice are identified. (The equivalent stage in literary interpretation is the stage at which discrete novels, plays and so forth are identified textually, that is, the stage at which the text of *Moby-dick* is identified and distinguished from the text of other novels.)'[9]. As per Dworkin, some kind of interpretation is necessary even at this stage.

ii) The Interpretive Stage: in this stage, as per Dworkin, 'interpreter settles on some general justification for the main elements of the practice identified at the pre-interpretive stage. This will consist of an argument why a practice of that general shape is worth pursuing, if it is. Dworkin further observes that, the 'justification' need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one.[10]

iii) The post-interpretive stage: Dworkin also calls this stage as the Reforming Stage. In this Stage, Dworkin states that, the interpreter adjusts his sense of what the practice 'really' requires so as better to serve the justification he accepts at the interpretive stage.

Of these three stages 'the interpretive stage' is pre-eminent. It is at this stage that the participant postulates the value of the practice. His proposal must satisfy two dimensions: it must be consistent with the data identified as constituting the practice at the pre-interpretive stage; and, in the light of his own conviction, he must choose a justification that he believes shows it in its best light.[11]

Law as Integrity:

"Integrity would not be needed as a distinct political virtue in a utopian state. Coherence would be guaranteed because officials would always do what was perfectly just and fair. In ordinary politics, however, we must treat integrity as an independent ideal if we accept it all…"[12]

As per Freeman[13], the conception of 'Law as Integrity' is the key to understanding Dworkin's constructive interpretation of legal practice. Dworkin argues that out of the three theories of law 'Conventionalism', 'pragmatism', and 'law as integrity', it is the law as integrity that shows the legal practice of a society in its best light. Dworkin further goes onto say that it is the 'law as integrity' that offers a blueprint for adjudication which

[8] Ronald Dworkin, *Law's Empire* 255 (Universal Law Publishing Co. Pvt. Ltd., Delhi, Second Indian Reprint, 2008).

[9] *Ibid* at 66.

[10] *Ibid* at 66.

[11] M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* 723 (Thomson Reuters (Legal) Limited, Eighth Edition, 2008).

[12] *Supra* note 8 at 176.

[13] *Supra* note 11 at 724.

directs a judge to decide cases by using the same methodology from which integrity was derived, namely constructive interpretation.[14]

For Dworkin, integrity is both a Legislative as well as adjudicative principle and its existence is *a priori*. He says, "A judge committed to integrity is required to decide particular cases by seeking principle that "both fits and justifies some complex part of the legal practices, that…provides an attractive way to see, in the structure of that practice, the consistency of principle integrity requires."[15] Integrity for Dworkin is the life of law and a *sine qua non* for maintaining coherency in any given legal structure.

Law as Literature: The Chain Novel

Ronald Dworkin tried to display his analogy of role of integrity in adjudication by following an example of 'the chain Novel', wherein numerous authors co-operate to write a single novel. Though each author has the duty of writing a separate chapter 'as best as he can' but the essential condition is that the consistency of the narrative should not be lost. Thus, the entire text of the 'novel' should be coherent as 'a flowing river'. A judge is like a writer trying to continue a story started by earlier writers. The writer must make the story as good as it can be. This necessitates that what he adds must be consistent with what went before (the requirement of 'fit'), and must make the best of that existing material by interpreting it in the most plausible and attractive way.[16]

Dworkin has further clarified that as per his theory judges do not enjoy the same freedom as the legislators do, as in his system the judges are kept in check by the structure of values of the legal system. Judges have to decide cases in a manner that will support and nurture the societal values on which the entire legal system is based. Thus Dworkin puts a premium on the need for consistency and does not give judges the freedom to decide the hard case 'any which way they like' as positivists do.

Hard Cases and their adjudication:

Though Dworkin does not provide a definition for 'hard cases', it can be inferred that by hard cases, he refers to the cases wherein laws made by the law-making authority cannot be applied to the cases at hand and not even an interpretation of such laws could be applied. So, in such cases, Dworkin admits that the judges make laws but only in the capacity subordinate to the legislators.

Dworkin maintains that the solution to the hard cases as provided by the positivists was the discretion the judges to decide such hard cases either was the judges wish to decide since there was no clear-cut law on the subject. On the contrary, Dworkin says that in hard cases, "Judges will make law in response to evidence and arguments of the same character as would move the superior institution if it were acting on its own. This is deeper level of subordination, because it makes any understanding of what judges do in hard case parasitic on a prior understanding of what legislators do all the time.[17] Dowrkin further suggests that, in the determination of hard cases judges should make use of policy or principles. He argues that judicial decisions, in the broad sense, are political decisions that attract the doctrine of political responsibility, and an argument of principle can justify a particular decision under the doctrine only if the principle cited can be shown to be consistent with earlier decisions not recanted, and with the decisions that the institution is prepared to make in the hypothetical circumstances.[18]

[14] *Ibid.*

[15] *Supra* note 8 at 228.

[16] *Supra* note 11 at 167.

[17] Ronald Dworkin, *Taking Rights Seriously* 82 (Harvard University Press, Cambridge, Massachusetts, 2008).

[18] Ronald Dworkin, *Taking Rights Seriously* 88 (Harvard University Press, Cambridge, Massachusetts, 2008).

DWORKIN'S CRITICISM:

"Dworkin has been described by Hart, with due apologies to Shakespeare, as "the noblest dreamers of them all". Dworkin's latest book dreams so nobly that it seems to contain more references to British theatre than to British courts. Even the title sounds as if it were destined for the big screen; *Law's Empire* would be a worthy sequel to the Oscar-winning *The Last Emperor*. Indeed, the prestigious *Yale Law Journal* has already reviewed the book as if it were a film in an article entitled 'Indiana Dworkin and *Law's Empire*', a review in which our hero is teased and pastiched. The opening credits are given as 'written, directed and acted by Ronald Dworkin'. Indiana Dworkin is described as a 'juristic adventurer of international fame and fortune' giving his own version of 'The Greatest Legal Story Ever Told'. *Law's Empire* is depicted as 'Indiana Dworkin's first full-length feature Film'. It is 'bound to be a massive box-office success. It is an action-packed, stand-'em-up-knock-'em-down extravaganza.' In more sedate fashion, I have reviewed the book for the *Oxford Journal of Legal Studies*, comparing and contrasting the reaction to the book with the Hans Christian Anderson fairy tale about the Emperor who has no clothes."[19]

The scathing remarks of the British law lecturer and legal author Simon Lee, who wrote these remarks while writing a book review of the Dworkin's famous Book *Law's Empire,* may seem very un-scholarly in the above paragraph but he hits the 'bulls-eye' while describing the manner in which Ronald Dworkin's views are treated across the Atlantic or in the entire commonwealth for that matter. Even the most ardent followers of Ronald Dworkin would admit that he takes the 'creative role' of a judge in the process of judicial-decision making and then stretches it a bit too far. Ronald Dworkin rose to prominence for his criticism of legal theory put forward by the noted positivist H.L.A Hart. Few can dispute that the Hart-Dworkin debate was at the centre of the entire jurisprudence at the fag-end of the twentieth century.

Hart-Dworkin Debate:

Though, for about past four decades, most of the ink of British-American legal philosophers has been spilled in advocating or opposing either H.L.A Hart and Ronald Dworkin, in fact, H.L.A Hart himself wrote too little in response to whatever Ronald Dworkin had to say against him and his 'fellow' positivists.[20]

Ronald Dworkin, in the *Model of Rules I*[21] three theses, which he believes Hart and most positivists are committed to:

(i) "The law of a community can be identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed."

(ii)"The set of these valid legal rules is exhaustive of 'the law', so that if someone's case is not clearly covered by such a rule (because there is none that seem appropriate, or those that seem appropriate are vague, or for some other reason) then that case cannot be decided by 'applying the law.' It must be decided by some official, like a judge, 'exercising his discretion.'"

(iii) "To say that someone has a 'legal obligation' is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something."[22]

About these three theses (Generally called 'the 'Pedigree Thesis', 'The Discretion Thesis' and 'The Obligation Thesis') Dworkin says that, this is only the skeleton of positivism. The flesh is arranged differently by different positivists, and some even tinker with the bones." One of the criticisms frequently attributed to Ronald Dowrkin

[19] Simon Lee, *Judging Judges* 20 (Faber and Faber Limited, London, First Edition, 1988).

[20] Published only after his death in second edition of *The concept of law.*

[21] Ronald Dworkin, *Taking Rights Seriously* 14 (Harvard University Press, Cambridge, Massachusetts, 1978).

[22] Ronald Dworkin, *Taking Rights Seriously* 17 (Harvard University Press, Cambridge, Massachusetts, 1978).

has been that his understanding of the theses as put forward by him did not squarely cover the entire meaning of the theories put forward by the positivists i.e. he misstated the thesis in a much narrower sense than the positivists ever meant.

Dworkin made out a case that the existence of legal principles clearly and categorically falsified the case of Pedigree and discretion thesis. Dowrkin says that these thesis must be rejected because sometimes the legal principles are binding on the judges simply because of their moral properties and not because of their pedigree and secondly even when principles are binding by virtue of their pedigree, no stable rule cane be carved out of the fact that certain principles have been institutionalized. Basic argument being, Law is not grounded in social facts, but moral facts determine the existence and content of law.

Response to the positivist critique of Dworkin has been twofold, 'Exclusive Legal Positivism' and 'Inclusive Legal Positivism'[23]. Positivists subscribing to the 'Exclusive Legal Positivism' accept the pedigree thesis put forth by Dworkin, while they accept that sometimes the judges are faced with cases wherein their decisions are based on principles that lack institutional pedigree, positivists such as Raz claim that the judicial obligation to look into morality does not ipso facto incorporate morality into law. Judges look into morality only because they are under 'legal obligation' to look into legal principles to solve the case under their consideration. Hence, Raz claims that the judges are not free to exercise their discretion as per their sweet will but only certain extra-legal principles.

Whereas, 'inclusive legal positivists' believe that Dworkin's characterization of positive law bereft of morality is not correct at all and have maintained that the positivist school has not prohibited the moral criteria of tests law altogether. They maintain and thus offset the objections put forth by Dworkin that the positive law is based on social facts and morality can be a barometer of testing legality. So their approach justifies their tag of inclusive legal positivists, since they do not outcast morality *vis-a-vis* law altogether.

With the change in times, there is no change in the relevance of the Hart-Dworkin debate, though both the scholars are no more, but the debate refuses to die or recede into oblivion. Positivists declare Hart a clear winner of the two, but the followers of Dworkin feel that the debate is far from over and that the positivists are reveling in their ignorance of the 'hard' realities of the practical world.

CONCLUSION:

"When Oliver Wendell Holmes was an Associate Justice of the Supreme Court he gave the young Learned Hand a lift in his carriage as Holmes made his way to the Court. Hand got out at his destination, waved after the departing, and called out merrily, "Do Justice, Justice!" Holmes stopped the cab, made the driver turn around, and rode back to the astonished Hand. "That's not my job!" he said, leaning out of the window. Then the carriage turned around and departed, taking Holmes back to his job of allegedly not doing justice."[24]

Ronald Dworkin starts his book *Justice in Robes*[25] (essentially a compilation of his earlier essays) narrating the above incident wherein Justice Holmes clearly said that 'doing justice' was not his job. This incident brings to the fore the gravamen of the controversy between Ronald Dworkin as an Interpretivist and the Positivists led by H.L.A. Hart i.e. role of the judge in the judicial process of decision making. The battle that has been at the centre of the jurisprudence for nearly four decades now and does not seem to end anytime soon has the role played by judges in the judicial process at its heart.

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[23] Scott J. Shapiro, "The "Hart-Dworkin" Debate: A Short Guide for the Perplexed" (Michigan Law, University of Michigan law School, Public law and Legal Theory Working Paper Series, Working Paper No. 77, March 2007). This paper can also be accessed at http://ssrn.com/abstract=968657.

[24] Ronald Dworkin, *Justice in Robes* 1 (Universal Law Publishing Co. Pvt. Ltd., Delhi, First Indian Reprint, 2007).

[25] Ronald Dworkin, *Justice in Robes* (Universal Law Publishing Co. Pvt. Ltd., Delhi, First Indian Reprint, 2007).

Whether the judicial process should consist of only 'social facts' as advocated by positivists or whether it also consists of 'morality' as advocated by Dworkin has proved to be the egg and chicken conundrum for the contemporary legal philosophers. The author is of the opinion that the while the 'social facts' are of utmost importance for the decision of any controversy that reaches the court rooms, the moral background of the judge (the moral convictions that he holds), involved in the case is of pivotal significance every single time.

To quote Dworkin himself, "Have I said what law is? The best reply is: up to a point. I have not devised an algorithm for the courtroom. No electronic magician could design from my arguments a computer program that would supply a verdict everyone accept once the facts of the case and the text of all past statutes and judicial decisions were put at the computer's disposal. But I have not drawn the conclusion many readers think sensible. I have not said there is never one right way, only different ways, to decide a 'hard case'. On the contrary, I said that this apparently worldly and sophisticated conclusion is either a serious philosophical mistake… or a contentious political position resting on dubious political convictions".[26]

[26] *Supra* note 8 at 412.