

## **What are legal principles? Can the legal positivist account for their status in law?**

Professor Dworkin firstly describes legal principles in terms of a definite distinction between them and legal rule cast in the following terms, “rules are applicable in an all or nothing fashion, principles state a reason that argues in one direction, but does not necessitate a particular decision, they have a dimension of weight.” As a result of such a definition, Dworkin claims secondly that positivists are unable to account for legal principles since they cannot be encompassed by a social fact-based master test for legal rules at the apex of a positivist account of a legal system. In rejecting the adequacy of the positivist means of identifying all binding legal norms, thirdly Dworkin offers his own account of the means by which principles may be understood as legally binding norms. Specifically, that a principle is a principle of law if it figures in a theory of law that best fits with the legal materials and intrinsic moral soundness of the legal system it seeks to justify, necessarily precluding any scope for indeterminacy and judicial discretion. Indeed, as a result of such an explanation, such a justification, of the status of principles in law, Dworkin claims fourthly that, “what is in general a good reason for a decision by a court of law is in every respect simply another way of asking what is law.” By addressing first the question of ‘what are legal principles?’ I will seek to refute Dworkin’s first definitional claim. Further, via an analysis of the means by which the traditional positivist theory may be modified I will seek to simultaneously disprove Dworkin’s second claim and provide an affirmative answer to the question whether a legal positivist can account for the status of principles in law. In also refuting Dworkin’s third and fourth assertions I will seek to interrogate further the relative success of both soft and hard positivist defences and ultimately suggest that neither Dworkin nor positivists successfully account fully for the status of *all* principles in law. The fundamental difference between the theories then being perhaps that hard-positivists at least neither conceptually need, nor claim, to provide such a complete account.

In describing legal principles, Dworkin undoubtedly seeks to present a definite distinction between them and legal rules. In doing so he points centrally to the fact that legal principles, unlike legal rules, are characterised by an aspect of relative weight meaning that when they come into conflict, one presiding over the other does not cause the latter to lose its status as a principle. In short, this aspect, unlike rules,

means that legal principles are not susceptible to a notion of 'validity'. It is asserted that whilst Dworkin is indeed correct to identify that there is a "logical" distinction between the two concepts, and that indeed it is one that needs and should be accounted for in any theory of a legal system, his failure to accurately identify the real nature of principles and thus the true point of distinction leads him to falsely claim it as a necessary correlative that the positivist account of law, premised on a central notion of legal validity, is unable to account for their status as legally binding i.e. that the falsity of Dworkin's first claim above results in him falsely proceeding to his second.

As observed by Raz, and to be shown in more detail later in my treatment of Dworkin's fourth claim, it is important to distinguish the exact nature of the 'legal principle' which Dworkin claims undermines the positivist thesis. It is clear for example that Dworkin's critique cannot relate to the use of the word 'principle' to describe where the term is used as an umbrella term for a group of legal rules.<sup>1</sup> Perhaps more importantly, Dworkin seems concerned also only with 'norm-principles' and not with those that "do not guide behaviour directly by providing reasons for action as duty-imposing or power-conferring rules do, but rather they affect one's reasons for action indirectly by qualifying the meaning or application of laws which are norms."<sup>2</sup> His principles are principles of obligation, they are standards which "point to particular decisions about legal obligations in particular circumstances"<sup>3</sup> and as such one must be careful to recognise the extent to which his analysis may validly inform a critique of the notion of 'rules' as understood by Hart and indeed Dworkin's own alternative entire theory of law.

With a more accurate idea of the complexity involved in a response to the question of 'what are legal principles?' and the parameters of Dworkin's claims, one may move to identifying the true point of distinction between legal rules and principles. As successfully argued by Raz, it seems a distortion of the way in which we understand, define and use legal rules to suggest that they, in contrast to principles, can never conflict, since an individuation of a legal rule which does not include every possible 'exception' where they are not to apply in conflict with another

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<sup>1</sup> Indeed, Raz gives the clear example of a reference to the 'principle' of freedom of contract which in fact refers to the body of rules regulating the rights and restrictions thereon of contracting parties.

<sup>2</sup> Raz gives as a possible example of such a non norm-principle as 'the law determining the territorial sphere of validity of most of a country's law'. See Raz, '*Legal Principles and the Limits of the Law*' 81 *Yale Law Journal* (1972) 823 at p835

<sup>3</sup> Dworkin, 'The Model of Rules' 35 *U. CHI. L. REV* 14, 45 (1967) at 25

rule is, by definition, an 'incomplete' statement of the rule. It seems clear that the participants themselves within a legal system do not regard rules in this manner nor express disbelief at the notion of individually valid but conflicting rules. One may look to a case such as *Hinks*, where the legal rules of property clearly contradicted those of the criminal law and neither was regarded as a result as by definition invalid or incompletely stated.

As such, we must seek the distinction elsewhere than in different responses to conflict between rules and principles, since "it would be wrong to regard this as a logical difference between rules and principles or to take this feature to be a defining characteristic of principles."<sup>4</sup> Hart and Raz unite in their claim that the distinction is better understood as one of "degree", both as regards legal and non-legal rules and principles, as it is rooted in the relative levels of specificity in the behaviour demanded by each of the types of norms and "there is no hard and fast line between acts which are specific and those which are unspecific."<sup>5</sup> Indeed, when the distinction is understood in this less impermeable manner, the acceptance by legal positivists of the existence of legally binding principles seems far from logically impossible. In this vein, it should be noted here that "legal positivists have never refuted the notion of legally binding principles" and Hart's own characterisation of 'rules' is inaccurately regarded as necessarily excluding such an acceptance since, as Raz observes, "by rules he means what Dworkin seems to mean by 'standards,' namely rules, principles or any other type of norm."<sup>6</sup>

So if by rejecting Dworkin's first definitional claim we can conceive of the acceptance of legally binding principles by legal positivists, it remains for us, in order to refute Dworkin's second assertion, to prove that such acceptance does not entail the abandonment of the positivist sources thesis. Dworkin claims that any such acceptance of legally binding principles dictates such an abandonment since, legal principles cannot be identified by reference to a rule of recognition accepted in the practice of the courts capable only of identifying *valid* legal *rules*; that one necessarily must go beyond the reach of such a notion of legal validity into constructing the best interpretation of the whole notion of the legal system in order to account for legal principles.

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<sup>4</sup> Raz, 'Legal Principles and the Limits of the Law' 81 Yale Law Journal (1972) 823 at p832

<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid.* at p845

Indeed, both Raz and Hart themselves concede that a modification of the sources thesis as previously stated is demanded by the overt recognition of the legally binding nature of norm-principles, but that fundamentally such a modification can produce a criteria to provide for the *validity* of legal principles. Specifically that, legal principles are law because they are accepted by the judiciary as a judicial custom. That the social fact master test now stands as, “all the customary rules and principles of the law enforcing agencies *and* all the laws recognised by them.”<sup>7</sup> Under such a test the fundamental precept of positivism remains intact, namely that the distinction between legal and non-legal standards is made according to the identification of a factual *convention* whereby the courts have an obligation to apply them either because they are themselves a judicial custom or judicial customs make their application obligatory. As such, Dworkin’s second claim may be seen as refuted by the hard-positivist response that the master test remains and contains only morally-neutral pedigree criteria.

Indeed, in rejecting Dworkin’s second claim one is also able to retain the positivist notion of open-textured legal norms giving rise to the exercise of judicial discretion (in Dworkin’s strong sense) where legal rules *under-determine* the solution to a legal issue. Dworkin’s third claim is that the absence of a limit to the reach of the law due to its immunity to captured by a rule of recognition capable of accounting for the legal validity of norm-principles (i.e. his second claim) necessarily dictates that in ‘hard cases,’ not covered by any such legal rule, a judicial decision must extend into a theory of law that best fits with the legal materials and intrinsic moral soundness of the legal system it seeks to justify; that such a Herculean construction of the complete system is capable of yielding one, necessarily true legal outcome. As Raz points out, such a claim rests not only upon the idea that norm-principles *can* be legally binding and thus dictate a result, but rather that they *always* dictate a result where legal rules run out. However, it is asserted that Dworkin fails to give an adequate account of how this may be so absent any element of judicial discretion.

As Finnes pertinently asks, ‘what degree of fit’ is required to legitimate the adoption of any one construction of the pre-existing materials of a legal system, and indeed, how are we to set such a threshold before the most morally sound account can be selected? Further related to this persists the question, adverted to by Hart, of

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<sup>7</sup> *Ibid.* at p855

how we are to identify the pre-existing legal materials with which the true principles must fit. Dworkin's own answer to these logically prior questions seems to push us unavoidably towards the social fact basis of the hard-positivist account itself, "judges must make fresh judgments about the rights of the parties who come before them, but these political rights reflect, rather than oppose political decisions of the past...these *conventions*, exhibited in attitudes and manners and in history are *decisive*."<sup>8</sup> Indeed, the existence of a factually identified convention signalling a divide between those legal reasons, rules and principles relied on to make a decision and those beyond the remit of the law is evidenced and supported by the apparent instances of judicial discretion within the law. Raz points specifically to the need for discretion to resolve vagueness, the problem of deciding what relative weight to give to principles themselves and explicit laws of discretion directing judges to rely on considerations which are not legally binding. That far from negating discretion, the role of principles in all these contexts "pre-supposes and guides its existence"<sup>9</sup> and as such Dworkin's third claim regarding the means by which 'hard cases' must be decided may logically be refuted on acceptance of the positivist account for the status of norm-principles in law.

Dworkin's fourth assertion follows as a generalisation made possible by his purported rejection of the positivist sources thesis and theory of adjudication in favour of an interpretive theory of law embracing all moral principles appealed to in judicial determination as *part of* the law itself. In rejecting its accuracy I will fundamentally seek to show that the soft-positivist account admitting substantive moral criteria to the social-fact master test (as opposed to the hard-positivist account supported thus far), fails to avoid also falling foul of Dworkin's misconceptions and cannot ultimately be regarded as a successful means by which a *positivist* may account for the status of legally binding principles.

Hart, expounding his soft-positivism account claims that, "in some systems of law, as in the US, the ultimate criteria of legal validity might explicitly incorporate, besides pedigree principles, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints."<sup>10</sup> In so conceding Hart seems necessarily to make both the claim that (a) sometimes the identification of some laws turns on moral arguments, and also due to Hart as regarding himself as

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<sup>8</sup> Dworkin, 'Law's Empire'

<sup>9</sup> Raz, 'Legal Principles and the Limits of the Law' 81 Yale Law Journal (1972) 823 at p847

<sup>10</sup> Hart, 'The Concept of Law Postscript'

expounding a universal theory of the status of legal principles in law that (b) in all legal systems the identification of some laws turns on moral arguments.<sup>11</sup> Whilst Hart seeks to maintain his commitment to the morally-neutral sources thesis by pinning the legal validity of such moral principles on the social *convention* of their acceptance, it seems somewhat strained when such an apparently fact-based convention can only be identified with reference to moral arguments<sup>12</sup>. That indeed, “what is in general a good [including moral] reason for a decision by a court of law is in every respect simply another way of asking what is law.”

Whilst the complete success of the hard-positivist account of the nature of a legal system as a whole and particularly its account of the nature of legal authority cannot be addressed here, the frailties of the anti-positivist interpretive account for the status of legal principles in law have been highlighted through the rejection of Dworkin’s claims one to three. If it is accepted, as it is suggested it should be here, that soft-positivism fails to avoid slipping into an interpretive account of the legally binding nature of principles, absent a truly social-fact based sources thesis, it too suffers from the inability to account both for the apparent existence of judicial discretion and what Raz cites as the “essence of authority<sup>13</sup>” that we accept as being that it issues rulings, publicly ascertainable, which are “binding regardless of their [moral or otherwise] justification<sup>14</sup>”

Perhaps it is sufficient here to show that endorsement of the hard-positivist account of the status of legal norm-principles *in law* also more satisfactorily allows for the true status of binding non-norm principles *outside the law*. An allowance that simply cannot be made by interpretive accounts of legally binding principles, asserting the truth of Dworkin’s fourth claim that “what is in general a good reason for a decision by a court of law is in every respect simply another way of asking what is law.” Soper characterises such non-norm principles as “judicial technique principles,<sup>15</sup>” characterised by their immunity to deliberate change. Whilst the number of legally binding principles that can be characterised in this binding, yet

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<sup>11</sup> See Raz, ‘The Authority of Law’ at p47

<sup>12</sup> Soper ‘*Legal Theory and the Obligation of the Judge: The Hart/ Dworkin Dispute*’ Michigan Law Review 75 (1977) p511 seems to allow for the possibility that the convention of acceptance of moral principles can do all the work here but it should be noted that in admitting as much, the ‘morally-neutral’ function of the secondary legal rules such as the rule of recognition as curing uncertainty seems to necessarily have been transmuted into a function of providing morally acceptable means of curing such uncertainty.

<sup>13</sup> Raz, ‘The Authority of Law’ at p51

<sup>14</sup> *Ibid.*

<sup>15</sup> Soper ‘*Legal Theory and the Obligation of the Judge: The Hart/ Dworkin Dispute*’ Michigan Law Review 75 (1977)

non-legal manner may be disputed, it is asserted that their existence cannot easily be denied; That intuitively we can identify principles, such as those of statutory interpretation, that indeed seem to demand a distinction between the concept of legal reasoning and that of legal validity, those principles that bind simply by nature of their status as “minimally essential criteria for the proper conduct of certain types of rational activity.”<sup>16</sup> Perhaps then what is as important about the hard-positivist approach as their account of *legal* principles is their simultaneous account of *non-legal* principles since the limits of the law are maintained and recognised, not interpretively collapsed into Dworkin’s fourth claim.

The systematic rejection of Dworkin’s four assertions then provides not only a more accurate response to the question of ‘what are legal principles,’ but further, and perhaps more interestingly, reveals the philosophical capability of the hard-positivist alone to adequately account for the status of principles in law. In doing so, the frailties of the interpretive account are exposed and the potential strength of a positivist description committed to a true social fact- based sources thesis and theory of adjudication recommended.

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<sup>16</sup> Soper ‘*Legal Theory and the Obligation of the Judge: The Hart/ Dworkin Dispute*’ Michigan Law Review 75 (1977) at p5