THE CONTROVERSY ABOUT THE ESSENCE OF LAW: A DISPUTE BETWEEN HART AND DWORKIN

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Abstract

Does the law merely contain rules? Or does it also include morality? The debate between H.L.A. Hart and Ronald Dworkin revolved around this very issue. Hart considered the law is nothing more than a set of rules whereas Dworkin believed that the law contains not only the rules but also principles which are morality and justice. This paper is trying to explore the issue of the relationship of law and morality in the context of this debate between Hart and Dworkin. The debate itself is very significant in the study of law. Following their arguments we can learn a lot about how the law should be understood and practiced. By listening to their whole debate we will also know that Hart's positivistic thought and Dworkin's tendency towards the natural law are not mutually negating. Hart Positivism is not anti-morality. It is precisely through positivism which he defended Hart aims at safeguarding the law by morality; whereas Dworkin has shown what had previously forgotten by the legal positivistic way of thinking, that is moral principles are integral parts of the law.

Keywords: *H.L.A. Hart, Ronald Dworkin, legal positivism, the primary rules and secondary rules, principles, soft positivism, theoretical disputes.*

I. Introduction

Herbert Lionel Adolphus Hart (1907-1992) and Ronald Dworkin (1931-present) are two of the most prominent contemporary legal thinkers. Hart has successfully brought back the attraction of legal studies into its place. On the other hand, Dworkin, who is known as the fiercest critic of positivism, has been successful in linking the study of law with other disciplines such as politics and ethics.

Hart's book that makes him the most influential thinkers of more recent developments of legal positivism[2] is *The Concept of Law* (first published 1961) and the most prominent topic of the book is his understanding of the law that is practically exceptional. Law, according to Hart is the legal union of primary

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[2] Several points lead to Hart's positivism are his assumptions (a) that law as a command over men; (b) that there is no connection between law and moral norms or among what it is and what should be; (c) of an explication over a meaning of law concept should be differ from history and social study, and critical assesment over a law concept should be appropriate to morality, social objectives and its purpose, etc; (d) a set of law system is no other then a "closed logical system" where proper decision can be infered from sets of law that have been promulgated; solely appropriate to rational reasoning; (5) unlike factual judgement, moral judgement can not be established in order of rasional argument and evidance; (non-cognitivism in ethics). H.L.A., Hart. (1994). The Concept of Law, Oxford : The Clarendon Press. p., 302.

and secondary rules.[3] The primary rules include rules on the liability rules that impose liability or obligation. Meanwhile secondary rules includes the rules of the criteria in identifying the validity sets of law that appropriate in the legal system (*rule of recognition*), providing authority rules for the legislature to change or generate new law (*rule of change*), and rule which authorizes the court to decide matters of law and procedure to follow (*rule of adjudication*).[4]

The primary rules govern behaviors of the society, while secondary rules centered on the question of how primary rules are created, developed, deleted, interpreted and formally defined. It appears in the beginning that secondary rules perform as a gauge to verify the validity of the primary rules. Consequently, law in Hart's view is a field that is independent, and therefore must be judged on its own internal elements; the validity of a law is hereby determined by the relationship between these two elements, its validity is not judged based on moral principles, a sense of justice, or other social goals.[5]

Ronald Dworkin, one of the most outstanding legal philosopher of modern age on the other hand, put critical assessment over Hart's view about the nature of law as briefly described above, which centered on several issues. According to Dworkin, Hart's legal theory *first* of all solely as a compound of primary and secondary rules ignores absolutely moral principles, whereas in fact, insists Dworkin, moral principles have its fundamental role in the theory of law. *Secondly*, regarding significant concepts in Hart's legal philosophy as the *rule of recognition,* Dworkin believes it is a concept which is inadequate in explaining the validity of the law concepts.

This paper will examine the debate between Hart and Dworkin on the relationship of law and morality. First of all I'm going to explore their arguments and expose their dissimilarities. Then I would like to argue that law and morality are inseparable. The law is not just a pile of legislation rather an aspiration to promote a just and dignified life.

II. Hart and the Law as Rules

It seems to me that this following quotation represents all Hart understanding of the nature of law. In his *The Concept of Law,* Hart wrote,

"If we go back and consider the structure ensuing from the combination of primary rules that imposes obligation with secondary rules of recognition, change, and court rulings, it is clear that we have had not only the core of the legal system, but a very solid basic device for analyzing what is by most legal experts (*jurists*) and political theorist regarded as a puzzle".[6]

Hart's legal philosophy can be seen as a retortion to what was developed by John Austin (1790-1859). The specificity of the legal philosophy of Austin centered in what was called a command (*command*) imposed sanctions enforced by the sovereign power. Hart retorted to the idea of Austin. According to Hart, the law as a command fails when facing latest and factual cases. This failure of the legal theory based commands due to a combination of the constitutive

[3] I refer to Hart's idea saying that he is trying to construct new understanding on law which is sets of rule that influences primary and secondary rules. Hart, (1997). op.cit., p. 80

[4] Hart, (1997). *ibid*., pp. 92-94.

[5] Unlike Hart, in his Law's Empire, Ronald Dworkin see to believe that there is primacy of law, '*law beyond law*'. Dworkin, (1995). *Law's Empire.* Massachusetts: Harvard University Press, pp. 400-413. Dworkin also believes that apart from '*sets of rules*,' law consist of '*principles*'. See, Dworkin (ed.), (1977). *The Philosophy of Law,* Oxford : Oxford University Press. pp. 47-49.

[6] Hart, (1997). *ibid*., p. 98.

elements of legal theory such as the idea of order, obedience, habits, and threats, as generally accepted in command-based legal theory but does not produce an idea of the rule.

On the contrary, Hart believed that without involving the notion of rules we could not expect a detailed and adequate explanation on law even in the very basic forms indeed.[7] The law construing as legal rules can on the one hand become the key to understand characters of impulsively command contained in the law and on the other can be used to clarify the relationship of legal theory with morality.

In order to strengthen his understanding of the rules, Hart began with the idea about social rules.[8] He believed that there are at least two concepts on behavior which is *first*, behavior that is governed by the rules of behavior; and *secondly*, habitual-based behavior. He also distinguished legal rules from standards and rules of law from the commandments that contain threat. The rule in itself according to Hart, consist of two fundamental aspects that is external aspect and internal aspects. From the standpoint of the internal aspect then appears awareness to comply with or admit the rules.

The two aspects of rules play role in arising acceptance and admittance awareness to the rules in the way that human internal perspective tends to lead to a demand which direct men behave in accordance with the rules. Then, social pressure suffered by a person or a special group will be labeled deviant if whose behavior fits to no rules.

Hart distinguished rules into two types namely rules which direct one's deed, or refraining from acting, and the type of rule that authorizes a person to be able to do something legally such as in terms of making wills and contracts. On these distinctions, Hart came up with formulation of the nature of law which consists of two types of rules, *primary and secondary rules*. The combination of these two types of rules is Hart's fundamental understanding of philosophy of law. Law, in Hart's perspective is hereby a reciprocal relationship between primary and secondary rules, in other words is *the interplay of primary and secondary rules*.[9]

Besides the primary rules control human behaviors through the creation of actions liability relating, this rules can in contrast fail to inflict obligation. But, although the primary rules play a main role in the establishment of coercive obligations, it could not construct legal system as well. The creation of a legal system needs mainly reliable categories which explicitly admit an authority making law that includes construction of a new form of law and its enforcement, particularly in terms of conflict resolutions. These rules are called *secondary rules of law* which existence is recognized to the extent related to the primary rules. As a result, a social bonds based without help on the primary rules would suffer some potential impediments that is, *of uncertainty; static;* and *inefficient*.

Uncertainty, in Hart's perspective, can be overcome by what is included in the secondary rules as a rule of recognition; which rules allow a community to identify the primary rules with reference to the characteristics taken by an authority of a community. *The rule of recognition* includes authoritative texts for instance laws and legislative act; practices that have become habit, public declarations of persons or court decisions in the past in cases of particular or

[7] Hart, (1997). *The Concept of Law, op.cit.*, p. 80.
[8] Hart, (1997). *The Concept of Law, ibid.*, pp. 55-59.
[9] Hart, (1997). *The Concept of Law, ibid*., p. 82.

specific.[10]

Other than uncertainty, rules are static; that means rules have no other way of how discursively adjust any other rules to change environment, either through the elimination of the previous rules or by introducing new rules. Next, that the administration of the rules is *inefficient* because there is no specific body possessed power to eventually find out certainty and have an authority to set about the facts of violence or violation of law. To the weaknesses of static and inefficient of primary rules, secondary rules would prefer perfected through the concept of changing the rules (*rules of changes*) and the judge's decision rules (*rules of adjudication*).

For short, Hart seemed to give a very large portion to the rules. No other matters beyond the rules that are considered as legal. For Hart, the principle which says that there is still law beyond the law basically incredible because the law merely defined and limited by rules that have been provided by the rule of recognition, legal rights, the various duties, and power. Such a kind of consideration reiterates claims of legal positivism that what legally referred as the law is merely the rules.

Despite his deliberation reiterated legal positivism; Hart realized that the rules themselves are not at all clear and definite. Rules have what is by Hart known as an open-textured,[11] which allows a judge to perform lavish decision in deciding such a case based on personal considerations. By claiming rules as an open texture, Hart admited the insufficiency of the concepts that consider the formulation of a written law as the only reference in decision making to a case. Faced with certain concrete situations, many legal standards can be directly applied. Therefore, as anticipation towards severe criticism, Hart rejected formalist or literalist view that applies law effusively.

Obviously, legal standard law cannot be granted in any certain situation for any reasons but the application of it must be regarded in consideration to the case faced law. In such a certain situation or circumstances, the court or a judge is obliged to execute a diversity of considerations and options before making a decision to a lawsuit. Hart, however, did not intend to maintain skepticism in law which believes a precarious construe of a law. The uncertainty of interpretation of a law could not ignore the fact that the system of law or act remains referential to law enforcement officials and ordinary citizens who sustain by a particular legal system.

It is not dubious that Hart's tenacious view to these rules raises convincingly numbers of decisive issues. Is it true that law simply concerning of rules? What about the validity of a fact that judges sometimes have to refer to something outside the rules in issuing a verdict? Does not this designate that rules are not

[10] Hart, (1997). *The Concept of Law, op.cit.*, p. 97.

[11] *Open texture*, is English translation of a German word, *Porosität* which means *permeate*, refers to the fact that subject of law is incapable or have no means just to formulate the language of law that finally demand a subject of law to prepare for any conceived of possibilities. In his *Essays in Jurisprudence and Philosophy,* Hart reqouted three of Wittgenstein's most important views in philosophy of language in German: (1) '*Ich sagte von der Anwendung eines Wortes: sie sei nicht überall von Regeln begrenzt*': I speak about the use of a word, which usage however is limited without any rules; (2) '*Wirsind nict für alle Moghlichkeiten seiner Anwendung mit Regeln ausgerustet*': We are fully equipped with any rules for all the possibilities of such usage of a wod; (3) *'Der Umfang des Begiriffs ist durch eine Grenze nicht abgeschlossen: er ist nicht überall von Regeln begrenzt'*: The range of a concept is not surrounded by a boundary: such a kind of range is surrounded by no rules. Hart, *Essays in Jurisprudence and Philosophy, op.cit.*, p. 274. English translation my own.

at all clear and definite or imply what he does not intend to preserve, that is skepticism in law? All these questions are, as identified by Ronald Dworkin, breach of thought that pave the way for series of controversial amongst the two outstanding legal philosophers.

III. Hart versus Dworkin

The debate between Hart and Dworkin is the most eminent discourse that has ever happened in the history of contemporary legal philosophy. Though it touches many themes, the focal point of the debate centered on the matter of legality and morality. The focus itself could be formulated this way: whether the law simply provides social rules or the law also contains moral rules? Is the validity of the law determined by social facts or moral facts?[12]

A. Dworkin on the Law as Rule and Principle

Dworkin's opposition against Hart was broadly summarized in two main books, *Taking Rights Seriously and Law's Empire.*[13] Both of these two books inquire about explanation just to make visible that Hart's legal positivism and his conviction that rules of law is a combination of primary and secondary rules, is fundamentally inadequate and fails to explain the phenomenon of law. While instigating with a wrangling argument, Dworkin simultaneously strengthened his own understanding of law as well, that law contains not just the rules but the principles at once.

Hart's legal positivism, according to Dworkin is centered on three main thesis which is of the *pedigree* thesis, discretion, and legal obligation thesis as well.

1. *Pedigree* thesis reads that the law of a community is determined according to unambiguous criterion, which means verifiable under the supreme law (*pedigree*) or the way the law was adopted and developed. The verification through the *pedigree* can be used to distinguish which law is valid and which one is invalid. Evidently, the validity of a law is not determined by the content of the law.
2. Discretion thesis comprehends that set of rules that are legitimate in accordance to its source, is entirely of the law. Beyond such by decree decision, neither standards nor legal principles are a law. In case that a rule of law is not available for a certain case, or if it is available but such a kind of rule has ambiguity in meaning, this imply that such a case could not be decided according to this kind of rules or such a rule could not be applied to such a case. The case was decided based on discretion.
3. Obligation thesis reads that a legal obligation, both command and prohibition in order to do something, simply derived from the rules.

In Dworkin's consideration, *Pedigree* thesis (1) contains two main concepts which are: *first*, in every community which has a legal system, according to

[12] See the complete explanation on the debate in Michael D. Bayles, (1992). *Hart's Legal Philosophy,* Dordrecht: Kluwer Academic Publisher, p. 165; bdk. Scott J. Shapiro, *"The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed"*. University of Michigan Law School, Public Law and Legal Theory Working Paper Series, No. 77 (March, 2007). Accessed from SSRN: http://ssrn.com/abstract=968657.

[13] Ronald Dworkin, (1977). *Taking Rights Seriously*, Cambridge: Massachusetts Harvard University Press,; Ronald Dworkin, (1968). *Law's Empire,* Cambridge, Massachusetts: The Balknap Press of Harvard University Press.

positivism, there exist a supreme law (*pedigree*) used to distinguish which is the rule of law and which rule is not of law; *secondly*, the criterion of supreme law in determining which is the rule of law and which rule is not of law is social fact, namely the establishment of a law by the legislature, a court decision ever issued, and enforcement by other regulatory agencies such as the presidential decree, or regulation issued by the ministry concerning a particular case. Supreme law prevailing in positivism, according to Dworkin, is always free from morality.

There is nothing but *pedigree* thesis, for Dworkin, which is intended to exemplify the recognition rule that is Hart's *rule of recognition*. For him, this *rule of recognition* is nothing more than supreme law that determines the validity of law based on the origin, genealogy, or the source. But Dworkin considered this type of determination of validity of a law as inadequate, since such a kind of determination ignores the fact that morality is also often justify the validity of the law. The law is valid not just when it was made by the legislature, decided by the court, or issued by any other authoritative institutions of but by morality as well.

Dworkin's view on the legal validity of law derived from his conviction about the law; that law, for him, not simply contains the rules but likewise the principles. He did not mean to say that the validity of the rule of law is determined by the *pedigree*, but assents to the fact that the validity of the principles can be verified by the moral content of the principles. Contrasting to the rule of law, the appliance of a principle by a judge did not set by whether these principles have ever been applianced in deciding a lawsuit or whether it contained in a recognized source of legal propriety but because of its properness when applied into a case.[14] In other words, the content of the principles itself that determines whether or not the principle can be applied. For instance, if the application of the principle said "no one is allowed to take into account an advantage of his crime", judged unfairly applied in a particular case the principle itself is invalid.

Referring to the discretion thesis (2), in Dworkin's perspective, Hart's positivism is exceedingly considered of law simply as rules or that rules explicitly consist in the law. The consequences of such law model is, when a case does not have rules, or the rules themselves less rigorous, it is imply that a judge should be doing discretion. For Dworkin, the understanding of law as merely of rules and its derivativeness, that is discretion, is basically insufficient.

In reference to the unbreakable cases, Dworkin has been trying to reinforce his argument. A judge, according to him, in addressing to the cases which is complicated, could never be allowed to decide the case at his discretion as the consequence that he is bound by legal principles. In case that some number of rules can not be imposed upon certain cases, it does not suggest the judge's ruling against the unbreakable case can take place outside the law. However, the verdict is still a legal decision in the sense that based on the existing sources of law, that is to say principles to which the judges are in confined.

The general criterion of the appliance of rules, in Dworkin's perspective referred to be "all or nothing", or otherwise explicit. For instance, if a valid rule states that a testament must be witnessed by three persons, it implies that a testament witnessed by two persons could not become a legitimate testament. Therefore, it is the rules that rigorously binding can not be in contrast with other rules. If there is a contradiction, as much happen in local government regulations

[14] Roland Dworkin, (1977). *Taking Rights Seriously, op.cit.*, p. 40.

issued in recent years, it is certainly that one of these rules are invalid.

On the other hand, the principles of the law that is not stringent can oppose to each other. Principles have, according to Dworkin, a "level dimension".[15] Therefore, if the principles contrast to each other, of appropriate methods to resolve conflict among rules are to choose a principle that has a stronger level and disregard the principle that has weaker levels. Principle which states that no one is allowed to take into account an advantage of his crime, for instance, for Dworkin, could not be applied consistently in the sense that all cases should be subjected to this principle.

In many cases this principle becomes a less stringent principle and some people would take into account the benefit from their actions to contravene the law.[16] One might have committed violations of law such as breach of contract or employment agreement to get a higher wages elsewhere. Because the person has violated the contract, he will pay compensation as stipulated in the contract but when he moved his permanent workplace, he will get benefits, that is to say higher wages from his new company.

A law which is perceived simply of rules ignores the principles. Yet, to the contrary, on the practical level of law, principles often applied vigorously. According to Dworkin, a judge is bound not just by the rules but by the principles as well. For example, the principle said that no one is allowed to take into account an advantage of his crime committed. Dworkin gave an example of using this principle in the murder of a grandfather by his grandson that called public attention that time (Riggs against Palmer case).[17]

Judges, in this case, according to Dworkin, did not act outside the law because judges are bound by the principles. Dworkin argued, if principles bind to no judges, consequently that rules would bind to none of them. An example of binding principles is the principle of "legislative supremacy", that is set of principles that binds the judges to give priority over the rules derived from the legislators. Another principle which is binding on the judge is related to the precedent, namely the principles relating to the issue of justice and consistency in law appliance.[18] Therefore, according Dworkin, without binding principles, then the rules would not be binding on the judge.[19]

Another argument suggests that judges are bound by the principle is that, in making changes over the rules, judges absolutely show the principle applied in making these changes. In the case of *Riggs against Palmer,* it is the principle that no one is allowed to take into account the benefit of his or her crime committed which verifies judges' decision.

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[15] Roland Dworkin, (1977). *Taking Rights Seriously, op.cit.*, p. 26.

[16] Roland Dworkin, (1977). *Taking Rights Seriously, ibid*., p. 25.

[17] In 1889, New York judicial tribunal to the case *Riggs against Palmer*, should decided whether the grandson, whose name appered in the testament, inherits or has a right of inheritence in the property of grandfather following the letter's death, eventhough the grandson has murdered his grandfather, from whom he received testament to inherit the properties. The tribunal had admited in line with the law that the grandson whose name appeared in the testament was the only heir, and that has the right of inheritence over the properties of his grandfather. But, when the case reached its highest development, the tribunal had to decide that not any law nor contract is beyond the control of general and fundamental principle of common law, that is to say that no one is allowed to take into account the benefit of his criminal, and the grandson by the verdict of the tribunal has no right of inheritence over the properties of his grandfather. Roland Dworkin, (1977). *Taking Rights Seriously, ibid,* p. 23.

[18] Roland Dworkin, (1977). *Taking Rights Seriously, ibid*., pp. 37-8.

[19] Roland Dworkin, (1977). *Taking Rights Seriously, ibid.*, p. 38.

Thesis of legal obligations (3) which states that legal obligations derived from the rules is inadequate because it would turn towards the *ex post facto* law or retroactive. Consequently, if a case happens before the promulgation of a law, then the judge must create new law through discretion. Dworkin believed that this explanation is inadequate because it would imply that judges can issued a verdict over a case with the new rule was made after a case occurs, in other words the judges themselves intervene retroactive principle.[20] An adequate legal view is that judges, in facing of such severe cases, by using the principles of the relevant laws, provide commentary on the existing rules, not to create new law through discretion.

B. Soft Positivism: Hart's Defensive Argument

As it has already been described above, Hart's legal positivism is summarized by his opponent in debate into three theses that is *pedigree*, discretion, and the thesis of legal obligations. Pedigree thesis refers to Hart's concept of rules regarding recognition or *the rule of recognition*, that the legal validity of law is determined by social facts, support by the power enforcement agencies but not by morality. Hart blamed Dworkin over such assessment. According to Hart, rule of recognition as the legal validity criterion of law does not encompass only *pedigree* aspects but at the same time virtue and justice.[21]

Hart even sincerely admitted in some legal systems the validity criterion of morality of law. For Hart, the rule of recognition as the definitive validity criterion of law is not univocal. Each of community has its different provisions. Rule of recognition can be either king's decision, habit, court decisions, legislative voting, or moral norms.

It seems that Hart has foreseen in advance of Dworkin's wrangling argument of the deficit of morality values unto rules. Whereas on the contrary, Hart argued that the principle and morality, as far as socially accepted as valid __ as the judge and authorized officers have agreed upon in a certain legal systems __ may become the final criterion of legal validity of the primary law. By adhering to the view that morality can be part of the recognition rule, Hart called himself as a soft positivist whom support *soft positivism;*[22] and insisted that morality can be the validity criterion of the law.

Following Hart's defensive argument we can say that Dworkin's delineation of the rule of recognition by equating it with the supreme law is inappropriate. It is necessary to emphasize that neither principles nor morality are usually used as criterion to take account of specific rules into law but to omit the law instead. This can be verified in the principle that no one is allowed to take into account the benefit of the crime committed, which principle as has already been described above, infringe a right of inheritance over properties bestowal by a testament.[23]

Furthermore, in the discretion and legal liability thesis, Dworkin tends to indict Hart as of simply admitted rules of law, while excluding the standards, norms, and principles in the system of his legal philosophy. Identification of law merely as rules directed Hart to remove discretion thesis. If a rule does not

[20] Roland Dworkin, (1977). *Taking Rights Seriously, op.cit.,* p. 44.
[21] H.L.A Hart, (1983). "*Postscript", in*, *The Concept of Law, op.cit.*, p. 241.
[22] H.L.A Hart, (1983). *"Postscript" in, The Concept of Law, ibid.*, p. 250.
[23] See, Michael D. Bayles, (1992). *Hart's Legal Philosophy, op.cit.,* p. 168.

available for a certain cases, have must a judge make a decision outside the law accordingly. In contrast, for Dworkin discretion may not happen because either the rules or principles are bound to the judges.

To lay stress upon principles, Dworkin tended to criticize both of Hart's *pedigree* and discretion theses. The failure of *pedigree* thesis because of the institutional sustenance does not prevail principles. The principles are valid not just because it has ever applied by the court on the former cases, or it has ever been written on the law, but more on because its appropriateness or relevance to the case at hand. Arguments based on principles also be used to argue against Hart's thesis of discretion; that is to say since the judge is always bound by the principles of law, the judge would not take *extra-legal* decision accordingly. Binding characteristic of the principles upon the judges, according to Dworkin, is not because the principles are socially intended to bind but because the content of its morality.

Hart denied that he has developed a theory of law based solely on the rules, and ignores the principles. Though in the *Concept of Law* he paid not much attention to the principles but that does not mean he ignored the principles altogether.[24] Besides, Hart also did not consider the law merely as a rule that is standard that has a characteristic "all-or-nothing" which could not be in opposition to each other and would not have the dimension levels. Law is, for Hart, all the standards which in a certain legal system be considered to have authority. These standards, as has already mentioned, can be a standard that is not conclusive or principles, which are socially conceded as binding.

By this explanation that elucidated his understanding of judge's discretion, we understand that it is apparently different from what have been described in Dworkin's. Discretion by the judge is done not because there are no conclusive rules but because of the character of all standards, rules, and principles, which are accepted as binding unto the judges, is always open and can not anticipate all the possibilities that will occur. Discretion, therefore, could take place when, the rules and principles are not sufficient to solve cases, since "the law does not provide an answer in that case ... therefore to decide upon a case the court must make visible law-making function ... discretion."[25]

Dworkin objected to this answer, because by making discretion visible, judges have made new law, which means punish *ex post facto* or retrospectively. But according to Hart, both enactment and enforcement of law by understanding differently the rules that exist, practically, have no significant effect. In facing a sophisticated case, the judges according to Hart, possess no other duty except "making the greatest moral judgment onto moral issues that might be his problem."[26] So, there is nothing to justify the blame that Hart was not aware of the obligation of judges in the standards of morality appliance unto unbreakable cases.

C. Further Debate

Hart's response to the grievance argument developed by Dworkin does not satisfy him. After twenty years of their dispute, Dworkin again and again strove against Hart's positivism. In his *Law's Empire* (1995), Dworkin delivered

[24] Hart, (1983) . *"Postscript", in, The Concept of Law, op.cit.*, p. 259-60.
[25] Hart, (1983). *"Postscript", in, The Concept of Law, ibid.*, p. 252.
[26] Hart, (1983). "*Postscript", in, The Concept of Law, ibid.*, p. 254.

a staunch defense of argument that legality is not simply determined by social facts, but by moral facts all at once. To support his thesis, Dworkin designated the fact of a "theoretical disagreement" in law, which according to him, has been ignored by Hart.

Hart's philosophy of law, which according to Dworkin based on what is called *plain-fact view,* is identified by two principles that is: *first*, the legal basis of any community is an agreement. If the officials agreed upon the fact *f* as a fact for the legal basis of a legal system, that means the fact f is a legal basis of that legal system; *secondly*, Hart argued that the kind of facts that could become the basis of law is the *apparent historical facts*. Law is all about questions of what has been promulgated by authorized institutions in the past. If in the past authorized agency had declared that the thief should be put into jail for three years, that's the valid law.

Thus, according to positivism, all the problems of law will always be easily resolved, that is by looking at books containing court's decisions in the past or at the legislation.[27] These two principles, according to Dworkin, makes Hart find difficulties to sufficiently explain the possibility of a common *theoretical disagreement* in law. Legal disputes in Hart's opinion are only centered on empirical question; while Dworkin understood such disputes as dealing with theoretical inquiries.

To attain a better understanding of Dworkin's perspective on the theoretical disputes law contained, we must first of all know his views about the law. Law, says Dworkin, is closely related to daily practice by law participants, judges, lawyers, and all the citizens. Participants in the practice of law aimed directly at the decree of what law is through the legal process continuously evolving, filled up with controversy, and entail interpretation activities. Each party can express their opinions of each on the essence of the law. In such a situation, judges could not hinder from engaging in the interpretation of what law desired.

How Hart respond to this allegation? Hart, as has already been mentioned, disagreed with the idea that the validity of law is just determined by the factual rules basis. Rules of recognition which is the final criterion of the validity of law for Hart can be the substantives of morality which has been agreed upon. In facing the sophisticated cases, Hart insisted that judges may agree to have them interpreted based on moral values, even if they disagree which moral values that should be applied in such cases.

However, Dworkin persisted that in such an unbreakable case judges do not have a consensus on determining the validity of the law, therefore, they should engage in 'theoretical dispute'. Hereby, if an inclusive legal positivist believes that the rule of recognition requires unbreakable cases to be decided in reference to moral principles, it implies that the rule of recognition is no longer a social rule.

IV. A Necessary Relationship between Law and Morality

The debate between Hart and Dworkin attempted to explain the nature of law. It dealt with the question: 'What are the essential aspects of the law, is it purely a set of rules or it also contains morality?

As it was already summarized above, Hart stated that the law is a system of rules that are complementary in a combination between primary and secondary

[27] Dworkin, (1968). *Law's Empire, op.cit.*, p. 7.

rules. By saying that the law is a rule, Hart did not mean to deny the existence of morality. Hart admited that morality takes part in law yet morality is not a significant and compulsory part of law. We can talk about law without referring to moral issues. However Hart agreed that law at least should contains moral values otherwise it will not gain moral justification.[28] Nevertheless we can not assume that morality then becomes an essential part of law. In other words, law is not necessarily related to morality.

Hart agreed, nevertheless, that moral considerations can be included in a legal decision, as much as morality may influence the law and justice is an important aspect of the law. This is consistent with 'the separation thesis' which admits that there is no absolute correlation between law and morality. Yet this thesis should not be misunderstood as a call for separation of morality from law as is regarded in the general assumptions of legal positivism.

Having a careful look at this, we could say that Hart's stance remains inadequate. In fact, laws are always connected with moral issues. Law does not only deal with the number of rules but the content of the rule itself. As citizens we can not receive punishment merely because of the rules and regulations, but also because we believe that the rules are in accordance with our moral outlook.

Yet arguing that the law and morality are absolutely integrated does not mean that we should follow Dworkin's opinion which holds that the principles or morality compose a law and hence there is nothing else outside the law. We should not confuse positive law with morality. Assuming the absolute relationship between morality and law is not necessarily meant that both are the same.

In the explanation below this paper would try to elaborate four points wherein both morality and law are integrally related [29]:

A. Law should have real concern on the objects of morality

Morality has objects. Some of them become integral objects of the law. In other words, wherever there is law, there is also moral issue. Both law and morality concern with human life and social living. This is why law is important. This also explains why the normative debate about the legitimacy and authority of the law has an important meaning.

B. Law should necessarily make moral claims

The law tells us what we should do, not just what will give us benefits, and the law requires that we do not act against the interests of other persons, except when the law permits otherwise. Each system contains legal norms to be followed regardless of whether or not the norm is in accordance with the interests of the people who are in the legal system. Legal order thus becomes categorical reasons for action. It imposes a duty that citizens should comply. Of course, though the law has absolute imperative but it does not make all its claims morally infallible. It is very likely that legal imperatives, at some points, contradict moral values. In the case as such, there is no moral obligation to

[28] "Law according to Hart must include at least three moral content, namely, the prohibition of violence, theft and fraud". Hart, (1983). *The Concept of Law, op.cit.*, p. 193.

[29] See. L. Green, "Positivism and the Inseparability of Law and Moral", *University of Oxford Faculty of Law Legal Studies Research Paper Series*, No. 15/2008. Available at http://ssrn.com/abstrak=1136374

follow the rule. But the fact that law has categorical imperative assumes that the law has a valid and moral authority.

C. Law should promote justice (justice-apt)

A legal system, which is formally and procedurally fair can be misused and bring harmful result. Legal systems that enforce fair rules, when applied indiscriminately, will not be necessarily analogous with the sense of justice in society. The fact that the administration and procedure of law did not ensure the fulfillment of justice candidly reveals that law and justice or morality in general not related. However, this fact can also be seen in reverse. It is precisely because the law can be contrary to morality that we can say the law is a moral matter. And when we see that law results in injustices, we are compelled to question that law. The law is always scrutinized from the perspective of justice and morality. Considerations of fairness applied to laws that aim to regulate the distribution of burdens and benefits among citizens. Towards this kind of law we pose question whether it has been applied fairly or not, does it promote justice or not.

The fact that there is an absolute correlation between law and morality is very important. Not all human affairs closely related with justice, music or poetry, for example. In the world of art it is quite irrelevant to ask whether a particular music or poetry is fair or not. Criteria for good music or poetry is internal. Good music is music that has harmonious, unified, and interesting rhythm. We do not demand justice from music.

D. Law contains moral risks

As it has been stated above, the law can be used for purposes contrary to morality. Thus, the assumption that the law has the character of goodness is not entirely true. In fact, whenever law takes effect, the moral risks emerge. When the law is enacted not only efficient tools of living are assured, but also new evils are established: such as the oppression of the poor and the weak, the growing of the new hierarchy, and the possible harassment through legal instruments against people who fight for justice as what we commonly experience in Indonesia. Although law has absolute virtues, it also contains the danger of harming human rights. All of these point to the absolute relation between law and morality.

So far in this paper we have seen that there is an absolute relationship between law and morality. It is acceptable for Hart and Dworkin that morality should be a reference to the practice of law. Law is not meant to harm the common good. Taking morality seriously is necessary for law to avoid a static legal life, precisely because morality is always relative to the ever-changing life situation.

V. Conclusion

The above elucidations seem to prove that Dworkin was blaming Hart for his negligence of morality and principles enclose to law practice. The validity of law in Hart's philosophy of law is simply determined by common or supreme law, or legal basis that has social character. Such a basic understanding of law, in Dworkin's consideration is basically insufficient since it fits the argumentative structure of law not by nature, where the answer to the question of what law is cannot be found by simply referring to the practice of the courts in the past or

in codex iuris civili; whereas the definitive understanding of what law is, always involves a dispute that requires people to give the best answer based on moral and political considerations related to the purpose of the existence of the legal system itself. Hart, according to Dworkin, failed to explain the existence of such dispute.

On the other hand, Hart agreed with Dworkin on the view that morality can verify the validity of the law. Therefore, the rule of recognition which is the validity criterion of the law, not merely in the form of institutional support but also in the affirmation that morality and substantive justice adopted in the practice of law. Hart likewise admitted that he considered theoretical disputes less important, but he conceded that in facing unbreakable cases the judges would make decision that was preceded by a careful debate about the principles which are appropriate to be applied upon difficult cases at hand.

From this description it can be concluded that both Hart and Dworkin acknowledged the role of morality in the law. Hart, who regarded law as a set of rules, did not mean to reject morality. His emphasis on the importance of rule simply reminds us that the law in the first place is a rule, and as a rule it can conform or contradict morality. Moral criticism of the law is thus only possible if the law is considered not as a moral rule itself. This is to say that the argument which considers law as merely a set of rules and regulations is not worth followed.

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