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RONALD DWORKIN'S LEGAL NON-POSITIVISM: MAIN CHARACTERISTICS AND ITS CONFRONTATION WITH LEGAL POSITIVISM OF THE TWENTIETH CENTURY (H.L.A. HART)

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Abstract: *This note is based on the legal non-positivist model of Ronald Dworkin, developed in important works*[1] *such as Taking rights seriously, Law's Empire, and Freedom's Law —the moral reading of the American Constitution—. Furthermore, the consultation of the work of this jurist is taken into account, because in it a theory of justice is developed —Justice for Hedgehogs—.*[2] *This note is complemented with the reference of other authors to confront this model with the legal positivism view of the Twentieth Century, in particular with the positivist legal model of H.L.A. Hart. The main purpose is to show extracts that are considered significant to the theoretical principialist Dworkinian model of law, in order to understand and distinguish this cognitive-moral non-positivist type of model. Therefore, an emphasis on fundamental rights and the exposure of the premise regarding the only correct solution, or the only answer to legal controversies submitted to the analysis of the judges in difficult cases —the so-called hard cases— is taken into account.*

Keywords: *Law, fundamental rights, hard cases, legal non-positivism, moral.*

Resumen: *Esta nota se basa en el modelo no iuspositivista de Ronald Dworkin, desarrollado por este jurista en importantes obras como lo es Taking rights seriously, Law's Empire y Freedom's Law —la lectura moral de la Constitución Americana—. Además, se suma la consulta de la obra en la cual dicho jurista aborda una teoría de la justicia —Justice for Hedgehogs—, así como la referencia a algunos otros autores que complementan el estudio corres-*

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[1] Ronald Dworkin, Taking Rights Seriously (1977) [hereinafter TRS]; Ronald Dworkin, Law's empire (1986) [Hereinafter Le]; Ronald Dworkin, Freedom's law. the moral reading of the american constitution (1996) [hereinafter fl].

[2] Ronald Dworkin, Justicia para erizos (1st ed. in Spanish language, 2014).

pondiente, con el fin de confrontar este modelo con el iuspositivismo del siglo XX, en particular con el modelo iuspositivista de H.L.A. Hart. El objetivo principal es mostrar extractos que se consideran significativos del modelo teórico principialista Dworkiniano, con el fin de comprender y distinguir este modelo cognitivo-moral no iuspositivista, con énfasis en los derechos fundamentales y la exposición de la premisa de la única solución correcta o única respuesta a controversias jurídicas sometidas al análisis de los jueces en casos difíciles —los llamados hard cases—.

Palabras clave: *Casos difíciles, Derecho, derechos fundamentales, moral, no iuspositivismo.*

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I. Dworkin's Legal Model

It is important that the construction of Ronald Dworkin's model is based on a critique of a liberal theory of law that consists of two parts: the first concerning what the law is, and the second concerning what the law should be.[3]

This liberal theory of law has its origins, in turn, from Jeremy Bentham's utilitarian argument that gives a guideline to the consequentialist ethical position,[4] through which the greatest benefit is sought for the majority or for the greatest number of individuals, in such a way that the consequences of human acts matter and are taken into account for the sake of always producing that benefit in general terms. While in that liberal and utilitarian theory of law it is understood that the purpose of legal institutions is to serve at all times the general welfare —that is, the welfare of the majority—, the *Dworkin-*

[3] Ronald Dworkin, *in* TRS *supra* note 1.

[4] *See* Aída Rivera Sotelo, *El Utilitarismo de Jeremy Bentham ¿Fundamento de la Teoría de Leon Walras?*, 30 (55) Cuadernos de Economía 55-76 (2011), available at: *https://perma.cc/9VT3-QVN3*.

ian theoretical model is built on the idea of individual human rights, and by virtue of that, the purpose of legal institutions is to seek, to the greatest extent possible, the welfare of individuals.

Dworkin's model not only differs from the liberal theory of law that starts from Bentham's utilitarian premise, but also differs from the theoretical legal positivist model —also of a liberal nature—, even in the soft Twentieth Century version that derives from H.L.A. Hart's thesis. Furthermore, Dworkin is emphatic in pointing out a series of criticisms, especially regarding the open texture that Hart maintains in legal norms when they are vague and imprecise, giving judges free discretion in their application to specific cases. In fact, it is worth mentioning that the nature of the Benthamite theory resides precisely in Hart´s legal positivist version.

II. Dworkin's Critique of Hart's Positivist Legal Model

Ronald Dworkin refers to a general theory of law not only with a conceptual approach, but also with a normative approach.[5] The *Dworkinian* model constitutes the presentation of a very particular perspective of law —the American law—, which is supported by political philosophy and morality.

The conceptual approach of the *Dworkinian* model deals, to a great extent, with criticizing the *Hartian* theoretical foundation which reduces the right to a system of rules, ignoring the importance of principles as sources of law.[6] The latter, despite the fact that Dworkin himself argues that Hart's theory uses a non-limitative connotation of the concept of rule.[7]

On the other hand, the normative approach of the *Dworkinian* model contains, in turn, three important theoretical aspects: legislation, adjudication —better known as jurisdiction—, and compliance.

The theoretical aspect of adjudication itself is a theory of controversy, which establishes standards that judges should use when deciding difficult cases.

As Dworkin points out, in order to understand his model, it is important to specify some key elements that the legal positivist theory has, in order to confront it with the *Dworkinian* legal theory. For instance, it is important to mention that Hart brought to the contemporary stage of law —in the Twentieth Century—, a more detailed and complex theory. That is, in contrast, to other paleo-positivist previous authors such as John Austin, who conceived law as a system of rules to which he attributed the character of simple commands to be obeyed by their addressees, in a context of supra-subordination

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[5] Dworkin, in TRS *supra* note 1, at vii-viii.

[6] *See* Marisa Iglesias, *La teoría del derecho de Ronald Dworkin*, Academia.Edu (2006), available at: *https://perma.cc/5EW7-9GK2*.

[7] Dworkin, *The Model of Rules II*, in TRS, *supra* note 1, at 58-59.

and the imposition of legal sanctions in the event of failure to comply with those commands.[8]

Similarly, Dworkin points out that Hart managed to model a more elaborate conception of law, in which it is possible to distinguish —within a system of rules— between primary and secondary norms.[9]

Likewise, Hart emphasized that compliance with primary legal norms —which are those that establish rights and obligations— is enforceable by virtue of the fact that their addressees have accepted them as standards governing their conduct, and not simply because they are commands that must be obeyed, derived from the relationship of supra-subordination and consequent sanction, as expressed by Austin.[10]

Given that Hart is part of the theoretical current legal positivist of the Twentieth Century, Dworkin stresses that it is possible to notice in the *Hartian* model the importance given to the fact of verifying that the legal norms are such because they were issued in accordance with the corresponding legal procedure —established in the secondary legal norms—. Based on this conceptual premise, the famous *rule of recognition* derives and consists in the theory exposed by Hart.

Another point that Dworkin considers noteworthy in Hart's work, is that Hart made it clear that in the legal system it is possible for legal norms to become vague and imprecise, and therefore, judges —in their capacity as legal operators— interpret them according to what Hart called an *open texture* —as a property of legal norms— deciding with discretion the specific cases submitted to their jurisdiction.[11]

On this point, Dworkin makes a particular criticism, because his analysis on the topic of the discretion of judges makes his theoretical model clearly distinguishable from the Hartian positivist perspective. The latter by proposing a special argumentative construct that limits such discretion in the framework of a legal system not only composed by rules, but also of principles of justification, therefore Dworkin manages to emerge as an alternative reference of great importance in the Anglo-Saxon legal context, while providing significant contributions to contemporary constitutionalism in general.

On the other hand, Dworkin is clear when referring that the discretionality in the field of legal positivism is broad-spectrum or practically unlimited in the exercise that judges make of law, as the ultimate applicators of it[12] —although legal positivists like Hart insist that the discretional power of judges is limited in all cases—.

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8 Dworkin, in TRS, *supra* note 1.

9 *Id.*

10 H.L.A. Hart, El concepto del derecho (translation by Genaro, Carrió,1961).

11 *Id.,* at 158-159; *see id.* H.L.A. Hart, Post scríptum al concepto de derecho (preliminary study, translation to Spanish language, notes and bibliography by Rolando Tamayo y Salmorán, 2000), available at: *https://perma.cc/L3X7-NSCL.*

12 Dworkin, in TRS, *supra* note 1.

In fact, in view of this criticism of the legal positivist method on the issue of discretion, derived from the open texture of legal norms, Hart made some considerations by way of a *post scriptum* in the following terms: [13] although Dworkin rejects the position consisting that legal norms —in part indeterminate or incomplete— can be filled in gaps with judges exercising limited creative judicial discretion,[14] however, there will be issues where existing law cannot provide any correct solution, therefore, to resolve cases like these the judge has to exercise his creative legal power, also the judge does not have to do so arbitrarily: that is, he must always have some general reason to justify his resolution.

Another interesting point that emerges from the *Dworkinian* theoretical model, is that it also rejects the *Hartian* legal positivist thesis consisting of the following: that in every legal system there is a rule of recognition that makes it possible to identify which norms are legally valid —the formal validity that is the object of the analysis in the classical legal positivist model—; this, once it is verified, through a test or *pedigree*, whether or not such norms have been issued by the organ legally competent to carry out such issuance, added to the social acceptance that is assumed about such norms in terms of considering them standards that regulate the conduct of the individuals to whom they are addressed.

The rejection of the rule of recognition described by Hart in the aforementioned terms occurs in the sense that Dworkin considers that such a rule does not apply to a conceptual and normative theoretical model,[15] such as the one Dworkin proposes, that is, a model that contemplates not only rules but also principles. Accordingly, such a rule of recognition is not applicable as a test or pedigree for identifying which principles can be validly considered part of the law, therefore, as legal standards for resolving specific cases.

The *Dworkinian* model opts for an identification test that is much more complex than the recognition rule set forth by Hart, since it contemplates a verification technique that includes a moral reading of the supreme order, to which it is added an analysis of both precedents and legal provisions that cite or exemplify principles involved in the disputes, as well as the study of documents that support legislative debates that mention them.[16]

In Dworkin's work, dedicated to the moral reading of the American Constitution, this philosopher states that his purpose is to highlight the importance of the Constitution with a sense of political morality, while most contemporary constitutions recognize individual rights, contained in abstract clauses that invoke moral principles that appeal to justice and are interpretable.[17]

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[13] Hart, Post scríptum al concepto de derecho, *supra* note 11, at 55-56.

[14] In Hart's point of view, Dworkin argues that what is incomplete is not the Law, but the positivist view of it. *See id*.

[15] Dworkin, *supra* note 7, at 59.

[16] Dworkin, *The Model of Rules I*, *in* TRS, *supra* note 1, at 40-45.

[17] Dworkin, *Introduction: The Moral Reading and The Majoritarian Premise*, in FL, *supra* note 1, at 2.

III. The *Dworkinian* Model: The Distinction between Principles and Rules

Dworkin is noted for his adherence to the distinction between principles and rules, at least in a general sense.[18] For this jurist, principles are moral standards —of political morality— that are implicit in the legal system, that is, both in the Constitution and laws, as well as in precedents.[19] They govern the actions of judges in the substantiation and resolution of specific cases.

Based on the above, the principles differ substantially from the rules, in that the latter definitely apply, or do not apply to particular disputes. The rules have a subsumption methodology, that is, a logical operation from species to genus, and this is determined by the factual assumptions in each specific case, which means that the legal consequences of their application are directly and immediately applicable.

According to Dworkin, the principles do not operate in this way when taken into consideration to settle a dispute, since this logical operation of the subsumption is not applicable to them, and because they do not establish fixed or constant legal consequences which derive automatically according to conditions and assumptions of specific facts.

While the rules provide for legal hypotheses and may also establish an express list of exceptions to them, the principles are not capable of listing exceptions to hypotheses, but rather of attributing to them a dimension of weight or importance in each specific case, a property that the rules do not have.

IV. *Judge Hercules* and the Solution of Difficult Cases —*Hard Cases*—

For didactic purposes, Dworkin develops, in the part of his theoretical model dedicated to difficult cases, a fictional character he refers to as *Judge Hercules*: a judge in an American jurisdiction endowed with superhuman skills, great knowledge, patience, and insight to perform his functions; this, on the understanding that such a judge knows and recognizes the law corresponding to his jurisdiction, as well as the duty that judges have in the American context to follow the criteria contained in the previous rulings that they have issued, or to follow the criteria adopted by the higher courts and applied to specific disputes submitted for their substantiation and resolution.[20]

That *Judge Hercules*, in the North American common law structure, bases his decisions on an argumentative construct based on the Constitution, laws

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[18] Dworkin, *supra* note 16, at 23.

[19] Brian Bix, Jurisprudence. Theory and Context 91 (2012).

[20] Dworkin, *Hard Cases*, *in* TRS, *supra* note 1, at 105-106.

and judicial precedents, so that, based on a scheme of abstract justifying principles, he provides a construct with coherent legal reasoning that allows him to resolve the controversies that are presented to him for solution.

According to Dworkin, *Judge Hercules*' argumentative legal construct does not originate from his own personal convictions[21] —for this would imply giving a guideline to a scheme similar to that of the discretionality of the judges exposed by positivists like Hart—. On the contrary, although it is undeniable that the decisions of *Judge Hercules* reflect his own intellectual, philosophical, and moral convictions, such convictions do not have an independent force in the argumentative construct, but rather derive from the legal structures that constitute the objective Law applicable to each particular case —and which *Judge Hercules*, based on his arguments, takes care to justify—, taking as a first structural reference the constitutional clauses that recognize and protect individual rights.

The legal structures that make up objective Law implicitly contain the moral traditions of the community —political morality— which, although they may present some inconsistencies in the timeline, from that implicit morality *Judge Hercules* uses his own judgment to determine what rights and obligations the parties have in the dispute, and once this trial has been carried out, based on the much–discussed argumentative construct, there is no more substance left to be subjected to the scrutiny of either *Judge Hercules*' own convictions, much less to the scrutiny of other subjects, even if they constitute a democratic majority.[22] Moreover, the latter means that the *Dworkinian* model suggests the possibility that, when it comes to the protection of individual human rights, the judge may decide in a manner contrary to the majority premise, that is, the majority in terms of merely formal or representative democracy —*the majoritarian premise*—.[23]

V. The Connection between Law and Political Morality

It is equally relevant to bring up what Dworkin expounds in his theory of justice, in terms of understanding the relationship between law, ethics and morality, and more specifically, the indissoluble connection between law and political morality.[24]

This is based on the fact that, in principle, Dworkin distinguishes between ethics and morality, in the sense that while ethics makes proposals about what it is to live well, morality is related to the way in which one treats others.[25]

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[21] *Id.*, at 106-30.

[22] *Id.*, at 125.

[23] Dworkin, *supra* note 17, at 15-19.

[24] Dworkin, *supra* note 2.

[25] *Id.*, at 43.

Then, Dworkin argues that morality has a tree structure, *i.e.*, branched out.[26] In this branch, which corresponds to more general personal morality, we find political morality, and above the latter is law as a product made by human beings. All these branches, in turn, emerge from a main branch corresponding to a general theory about what it is to live well, that is, from ethics itself.

It is also important to understand that while from an initial orthodox perspective it is possible to conclude that, at least conceptually speaking, law and morality are not the same thing, the truth is that there is a clear connection between these two, because when a community decides which legal norms to create, morality must guide and limit it.[27]

The morality that guides and limits human beings constituted in advanced societies to create their legal and political regime is precisely political morality, which, when applying the law to concrete cases translates into justifying principles that are implicit in the legal structure's judges use in their practice, giving rise to a legal-argumentative construct that is as coherent as possible —*the adjudicative principle of integrity*—.[28]

The ideal or adjudicative principle of integrity directly instructs adjudicators to identify the rights and obligations of parties to legal disputes, expressing a coherent conception that evokes principles such as justice, equity, and due process, while providing the best constructive interpretation in the legal practice of a specific community.[29]

Thus, the *Dworkinian* theoretical model points out that there is often only one correct answer in complex controversies of law and political morality.

The only correct answer or solution is the one that emerges from the argumentative construct that has been referred to so much in this work, that is, the interpretative construct of a judge in the style of *Judge Hercules*.

VI. Dworkin and his Position on Fundamental Rights

We now turn to some of Dworkin's most significant considerations, in terms of fundamental rights. It is again important to note that the positions of this jurist are developed theoretically within the framework of the American legal system.

In Dworkin's work, there is an essay entitled *Taking rights seriously*,[30] which, along with twelve other essays, makes up the compilation of the same name.

In this work, Dworkin proposed to explore the implications of the thesis where individuals have in their favor a series of rights with moral content

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[26] *Id.*, at 20.

[27] *Id.*, at 486.

[28] Bix, *supra* note 19, at 93-95.

[29] Dworkin, in LE, *supra* note 1, at 225.

[30] Dworkin, *Taking Rights Seriously*, in TRS, *supra* note 1, at 184-205.

against the State, which are fundamental and are positivized in the Constitution. This set of rights includes the rights of individuals to protection by the State, as well as personal rights of freedom, which impose on the State the obligation not to interfere in that sphere of personal freedom.

The implications referred by Dworkin, have to do precisely with the obligation of the State to take seriously fundamental rights, as they represent constitutional rights with moral content before the public power.

Now, to take these rights seriously means to give this predicate a strong connotation or sense —in the strong sense—.[31] This, in turn, gives rise to the consideration that if a person´s fundamental right is undermined through the application of a legal norm or provision, that person has the right to disobey that norm or provision, insofar as it arbitrarily violates his sphere of fundamental rights. This is the meaning or strong connotation that Dworkin wants to convey by expressing its position of taking rights seriously.

Thus, the thesis that Dworkin defends, breaks with the traditional legal positivist scheme which establishes that the objective right must be fulfilled and obeyed in all cases. At the same time, the criticism of the non-positivist *Dworkinian* thesis is directed at the fact that validating such a position would imply diminishing the certainty of the law, since its coercive and obligatory character is weakened.

In this vein, it should also be noted that Dworkin recognizes that fundamental rights are not absolute, and that there are exceptional cases in which they can be restricted by state authority. In this regard, he suggests that when there is a need to restrict these rights, the justification that the State is obliged to provide must go beyond simply alluding to the objective of satisfying the general interest or utility.

Dworkin points to two exceptional cases in which fundamental rights can be justifiably restricted:[32]

— First, when there is a dispute between fundamental rights in the strictly personal or individual field —competing rights—, in such a way that the legal operator has to weigh up and solve the dispute by prioritizing the fundamental rights of one of the parties in conflict.
— And second, there is the exceptional case of the restriction of fundamental rights due to the prevention of a catastrophe, war or an emerging situation of great magnitude involving an imminent danger to society —in fact, assimilating this argument with respect to the Mexican legal system, this is the case of the express restriction contained in Article 29 of the Mexican Constitution, which was clarified by the constitutional reform on human rights of June 10, 2011—.

[31] *Id.,* at 190.

[32] *Id.,* at 193-195.

Another key point to highlight in Dworkin, as far as fundamental rights are concerned, is that deciding in favor of them can mean going against the majoritarian premise, which, moreover converges, *e.g.*, with the non-positivist European position of Robert Alexy.[33]

In that tessitura, anyone who professes to take rights seriously is because he considers the following:

> He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant […] Supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and that holds that such treatment is profoundly unjust.
>
> The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves…[34]

This can be summarized as follows: taking fundamental rights seriously means considering, first of all, the vague but powerful idea of the dignity of the person. And second, taking care of political equality understood as the right of the weakest to have the State care for them with the same intensity as it cares for the strongest in a society.

VII. Conclusion

Although Dworkin's model is developed specifically around the American legal tradition, the truth is that it complements and adds to the transcendence of the current neo-constitutionalist ideology, theory, and methodology, which is characterized above all by the contributions of neo-legal naturalists, principialist and non-positivist constitutionalists, and even neo-legal positivists or alternative legal positivists.

All of these propose a fresh and new perspective of law and its operation in the resolution of disputes or specific cases.

As could be seen from the research work presented, Dworkin's position focuses on highlighting the importance of individuals as integral parts of democratic societies organized legally and politically in such a way that the struggle for the general interest does not unjustifiably undermine the fundamental rights of individuals.

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[33] *See*, *e.g.*, Robert Alexy, *Los Principales Elementos de mi Filosofía del Derecho*, 32 Doxa, Cuadernos de Filosofía del Derecho 67-84 (2009), available at: *https://doxa.ua.es/article/view/2009-n32-los-principales-elementos-de-mi-filosofia-del-derecho [https://perma.cc/Q6T6-4JHM.*

[34] Dworkin, *supra* note 30, at 198-199.

Likewise, the *Dworkinian* model emphasizes the important work that judges do in resolving specific difficult cases emphasizing, of course, that this work must be done in accordance with an optimal argumentative construct, in which the discretion of judges, although impossible to suppress in its entirety, is constrained to a coherent expression that evokes justifying principles implicit in constitutional and legal structures, such as justice, equity and due process. All the above implies taking rights seriously.

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