DWORKIN V. THE POSITIVISTS: CONVENTIONALITY THESIS AND THE RULE OF RECOGNITION

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Abstract

Dworkin made some fundamental claims about legal positivism that literally divided legal positivism into two warring camps- inclusive legal positivism and exclusive legal positivism. The inclusive legal positivists did not expressly reject Dworkin's claims but gave much of their effort into coordinating their own jurisprudential commitments with the challenges posed by Dworkin. The result was the birth of a formative theory that sought to operate as a buffer between positivistic commitments and Dworkin's challenges. The Exclusive Positivists on the other hand accepted all of Dworkin's objections and built a critical alternate theory attacking both Dworkin' claims and that of the Inclusive Positivists' generally. The following essay is an attempt to capture the doctrinal position of Dworkin *vis-a-vis* the positivists. The essay looks at some positions that have been adopted by positivists in answer to these claims. More fundamentally it seeks to find answers to two very important questions which the author believes resides the very foundation of legal positivism.

i. Are judges under a legal duty to apply principles in hard cases?
ii. Can the rule of recognition account for moral principles, which as Dworkin argues is very much part of law and legal system?

Without taking any warring position the author endorses the position taken by the Inclusive positivists that judges do not have any duty to apply legal principles in hard cases. The essay is an effort to justify the endorsement.

Introduction

In a path breaking literature of legal theory Dworkin attributed the following position to legal positivism.[1]

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- The law of the community is a set of special rules used by the community directly or indirectly for determining which behavior will be punished or coerced by the public power. These rules can be identified by special criteria by tests having not to do with their content but with their pedigree. This test of pedigree can be used to distinguish between valid legal rules from others.
- These set of rules are exhaustive to the law, so that if someone's case is not covered under these rules then the case cannot be decided by "applying the law'. The case will have to be decided by an official (usually) the judge by applying his discretion (which would mean by applying extra-legal standards)
- To say someone has a legal obligation is to say that that his case falls under a valid legal rule. In the absence of such legal rules there cannot be any rights or obligations. Thus when a judge decides a case by applying his discretion he is not enforcing a legal right as to the issue.

These according to him constituted what he famously referred to as the "skeleton of positivism".[2] Though it is doubtful how much of these claims could actually be ascribed to legal positivism, it is nevertheless accepted that the claims were directed against the form of positivism as propounded by Hart.[3] Dworkin in particular was critical of three claims made by Hart, firstly the claim of judges exercising discretion in hard cases, secondly the rule of recognition as a rule for identifying valid legal norms from ordinary norms and thirdly the overall notion of the legal system as a system of rules. Dworkin asserted his position by reproducing the decision of the Court of Appeals of New York in *Riggs v. Palmer*[4], in which the court took recourse to principles to decide the case. The fact that the judges relied on principles rather than a rule of law led Dworkin to make the following attack against Hart's theory of law:

a) Law is not necessary a system of rules as advocated by Hart. In conflicting situations (Hard Cases) the rules may be vague or unclear or no corresponding rule may exist to resolve a conflicting situation.

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1 R. DWORKIN, THE MODEL OF RULES I IN TAKING RIGHTS SERIOUSLY 17 (Cambridge, MA: Harvard University Press 1977-78).

2 *Id.* at 28, 29.

3 *See* Jules Coleman, *Negative and Positive Positivism*, J. LEGAL STUD. (1982), *reprinted in* JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 3 (1988).

4 115 N.Y. 506, 22 N.E. (1889).

b) The judges are under a normative duty to apply principles or policies to resolve the problem at hand. Such principles or policies are not rules as the positivists generally understand them to be.[5]
c) Since the judges are bound to apply the principles, these principles are part of law and not some extra-legal consideration as Hart considered them to be.
d) A principle is treated as binding law not because it satisfies the criteria of validity contained within a conventional rule of recognition, but because it expresses(in the view of the judge who employs it), an ideal of justice, fairness or due process–an ideal which clearly cannot be established independently of substantive, and contestable, moral argument.
e) The application of these principles by the Judges is not a matter of discretion but a matter of duty.
f) The rules of recognition, a standard for identifying legal norms from non-legal norms are inadequate to account for the existence of these principles.

On an individual level each argument accounted for distinct facets of positivist ideologies held by different scholars at different times. On a cumulative level the arguments put to test the traditional position common to all legal positivists *viz.* the separation of law and morality i.e., the distinction of is from the ought.[6] On a collateral level however, the arguments went beyond the rhetoric of traditional positivist position to touch upon areas of adjudication and judicial discretion. For long Dworkin held the unsavory position that judges have a duty to apply principles whereas Hart believed that the use of principles by judges were discretionary. Notwithstanding the impasse between their relative positions, one thing was certain that the idea of duty as espoused by Dworkin could completely overshadow the claim of judicial *discretion* made by Hart. And indeed if that was the case it

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5 An account of how principles differ from rules has been wonderfully illustrated by Dworkin himself. DWORKIN, *supra* note 1, at 28, 29.

6 Also known as the Seperability Thesis, the positivist distinctively adheres to both the Seperability Thesis and Social Fact Thesis, there is however, a wide divergence as to actual nature of their adherence. Two forms of the thesis are identifiable:

1. As a matter of conceptual necessity, the legal validity of a norm can never be a function of its consistency with moral principles or values. (The Exclusive Legal Positivists)
2. It is conceptually possible, but in no way necessary, that the legal validity of a norm is in some way a function of its consistency with moral principles or values.(The Inclusive Legal Positivists)

became imperative to determine whether the duty was normative or governed by conventionality?

The essay looks at some positions that have been adopted by positivists in answer to these claims. More fundamentally it seeks to find answers to two very important questions which the author believes question resides the very foundation of legal positivism.

i. Are judges under a legal duty to apply principles in hard cases?
ii. Can the rule of recognition account for moral principles, which as Dworkin argues is very much part of law and legal system?

The essay has been divided into five parts. The first part introduces the subject matter of the essay and briefly touches upon the relationship between the rule of recognition and social convention; the second part deals with a critical analysis of the normative nature of the rule of recognition, the third part has been subdivided into two parts. Part A consists of a preliminary introduction to the rule of recognition and part B analyzes the conceptual position of the rule of recognition *vis-a-vis* morality. Part four consists of on an illustrative framework describing the positivist's position in support of their theory and Part five rounds up the essay with the conclusion. Since the paper confines its attention to the approach of the Inclusive Positivists in general, any reference to positivism should be construed as Inclusive Positivism unless the contrary is expressly mentioned.

Social Convention and the Rule of Recognition: "The Original Problem"

An important point of conflict between Dworkin and the positivists touches upon the legal status of the rule of recognition. The positivists see the rule of recognition as a social rule in so far as it satisfies two important criterion of law:[7]

1. General obedience to the criteria of legal validity as laid down by the rule of recognition (the external aspect, or in a tentative sense convergence of behavioral pattern). As pointed out by David Lyons, the rule of recognition exists and has the content it has because of certain social facts, in this case the official behavioral pattern of the officials.[8]

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7 H.L.A. HART, THE CONCEPT OF LAW 92 (Penelope A. Bullock & Joseph Raz eds., 2d ed. 1994).

8 David Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE LAW JOURNAL 415 (1977) 423-24.

2. Critical reflective attitude towards acceptance of the behavioral pattern as a standard of conduct (the internal aspect) and using the same to evaluate the validity of norms and certain behavior that deviates from the standard behavior.

It should however be understood that Dworkin's criticism against the rule of Recognition is not directed towards its existence *per se* but toward it being an inadequate concept to explain the moral criteria of legality when judges decide Hard Cases. The rule of recognition as a standard for identifying and validating law may hold good for any theory that considers legal system as consisting essentially of rules. The deficiencies however of such a standard become explicit when one is confronted with empirical situations like that of *Riggs v. Palmer.* The rule of recognition at such times fails to account for moral principles, which Dworkin considers are invariably a part of law. His criticism against the rule of recognition therefore can be categorized in terms of:

1) Its inadequacy to account for moral principles when dealing with Hard Cases.
2) The attribution of the social rule status to the rule of recognition.

Positivists argue that such a claim of Dworkin can easily be grounded on social facts. It is a fact that there is a convention among judges to recognize certain rules that bear certain characteristics as binding[9]. Thus when a moral principle is recognized as part of law by certain judges, the moral principle does not become law in virtue of its moral content. It is only when official (both legislative and judicial) incorporates them as a necessary part of the existing legal system that they acquire the characteristics of a legal rule. Such a claim, which is also known as the Social Fact Thesis[10] lays down that all valid legal rules need not have social source. What is important is that the rule that lays down the criteria of legality should be a social rule. Thus the commitment of legal positivists to social facts could easily be satisfied by the rule of recognition.

Since the rule of recognition validates all other norms in a legal system, the question whether it is itself valid or invalid seems on the face of it redundant.[11] Being a social rule, the rule of

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9 COLEMAN, *supra* note 3, at 139.

10 Scot. J. Shapiro, *Law Morality and the Guidance of Conduct,* LEGAL THEORY, Vol. 6, Issue 2 (2000) (conceding "Social fact thesis: All legal facts are ultimately determined by social facts").

11 HART, *supra* note 7, at 109.

recognition exists on a concrete social fact, which in this case is the actual convergent official practices of judges and officials and the "critical reflective attitude" which they have towards such practices.

The Non-Normative Nature of the Rule of Recognition

A core point of disagreement between Dworkin and Hart concerned the status of the rule of recognition in particular and the status of "secondary rules" in general. The rule of recognition for Hart is a social rule. It exists because it is reflected in official practices and is accepted and practiced from an internal point of view.[12] Thus, the "social" status of the rule of recognition is grounded on its acceptance in official practices and its status as a "rule" on the fact that the rule of recognition is accepted from the internal point of view by such officials.

An important point which has persistently figured in the discussion of the rule of recognition is its nature as a secondary rule. For Hart, secondary rules are categorized by the special function it performs in the legal system. The Rules of Change for example confers powers on certain legal officials to bring about certain changes in primary rules as and when it is required.[13] In similar breath, the rule of adjudication confers power upon judges to settle any question pertaining to primary rules.[14] Hart was convinced that in the absence of secondary rules the legal system would be just a chaotic playground of primary rules only. This led him to make one of the most revered statements in the field of legal philosophy that a legal system was made by the confluence of primary and secondary rules.

The, rule of recognition was conceived by Hart as a duty-imposing rule, which is ironical, given that only the Primary rules are duty-imposing in nature. Indeed, it is only in the sense of a duty–imposing norm that the rule of recognition possesses normative

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12 *Id.* Unlike Kelsen who presupposes the validity of Grundnorm, Hart does not "presuppose the validity of the Rule of Recognition". For Hart the rule of recognition is a fact and it does exist in factual terms in official practices. Hart thereby avoids the validity conundrum which Kelsen faced with respect to the Grundnorm. According to Hart: "No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way. To express this simple fact by saying darkly that its validity is 'assumed but cannot be demonstrated', is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct".

13 *Id.* at 94.

14 *Id.* at 95.

qualities. And since normativity itself is grounded on the behavior of the officials it gives the rule of recognition its inherently normative character.[15] It would be proper to recall here that Hart had criticized Austin's habit of obedience on the ground that habits are non-normative in nature. Habits of obedience do not give rise to rights and obligations and moreover they do not furnish reasons for action.[16] If habits of obedience are insufficient to justify normativity, Dworkin argued, how official practices can justify the normative claim of rule of recognition in terms of its nature as a duty imposing norm.[17] The question which baffled Dworkin most was how do the fact that certain officials acting in a particular convergent manner give rise to a normative claim that others also ought to act in similar way?[18]

In effect, a rule of recognition which is normatively inert would not be able to perform one of the most important functions which a rule is supposed to perform in a legal system, namely that of guiding human conduct. The fact that I am reprimanded by the traffic police for not wearing a helmet can hardly be justified on the grounds that others are wearing one and I ought to follow them. However, a reference to a traffic rule, which lays down proper traffic behavior for pedestrians, may bail out the police from the dilemma. Such a rule would not only guide his behavior but can also be used as a standard of evaluating the act of other non-helmet users. Hart, as most of us would know, built upon a theory of human conduct in terms of the standard incorporated by a rule, and it was the paradigm of rule controlled social behavior that made it possible for him to differentiate rules from mere convergence of behavior based on a habit. However, as the above discussion shows Hart somehow falls within the same trap which he used against Austin's "habitual obedience" as a source of law's normativity.

Mortality and Social Convention

The idea of a rule of recognition was introduced by Hart to mark the difference between primitive legal systems from a modern one.[19] A primitive community, may not have a legal system as we understood it today, still it had a system consisting of primary

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15 In the absence of an official practice (the conventional thesis) it would be hard to draw conclusions regarding the epistemic value of a norm. This also constitutes the first condition of Hart's rule of recognition.

16 HART, *supra* note 7, at 22.

17 S. Shapiro, *What is the Rule of Recognition (And Does It Exist)?*, 181 PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES 13 (2005).

18 *Id.*

19 HART, *supra* note 7, at 91.

rules only.[20] Being a system punctuated with duty–imposing rules only, such a system according to Hart would ultimately face some important problems. For example:

1) Lack of procedure to settle doubts either by reference to an authoritative texts or to the declaration of an official whose declaration is binding.[21]
2) The static character of the rules which could only be changed "by the slow process of growth". A society governed entirely by primarily rules will have no means of "deliberately adapting the rules to changing circumstances".[22]
3) Thirdly the "inefficiency of the diffuse social pressure by which the rules are maintained", by which Hart meant the lack of a determinate authority who could authoritatively determine whether a primary rule has been violated or not.[23]

For Hart, such a chaotic situation could only be remedied by the introduction of what he referred to as the Secondary Rules to work on the Primary Rules.[24] The presence of these secondary rules-the rules of change, the rules of adjudication and the rule of recognition-is what differentiates a primitive system from a modern one.

So far as the rule of recognition is concerned, it plays the important role of helping people identify valid legal rules from spurious ones without making them engage in useless deliberation as to the identity of certain norms. The rule of recognition in effect puts an end to any controversy that surrounds the identity of any norm as a legal norm. The possession of some qualities by a norm as attributed to it by a rule of recognition is enough to mark its identity as a legal norm. The rule of recognition in this sense contains a "mark of authority" that helps people identify a legal norm form those that are not.

As pointed earlier, the effect of the introduction of a rule of recognition is to put an end to useless deliberations as to the identity of a norm by providing a mark of authority the

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20 Hart refrained from using the word system but instead used the word standard. *Id.* at 92.
21 *Id.* at 91.
22 *Id.*
23 *Id.*
24 *Id.* at 92.

"possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts".[25] Any discussion on the rule of recognition therefore cannot be complete without understanding the mark of authority which it possesses. The mark of authority or more popularly the criteria of legality is what give the legal system the semblance of unity. In Hart's own words:

> "By providing an authoritative mark it introduces, although in embryonic form, the idea of a legal system: for the rules are now not just a discrete unconnected set but are, in a simple way, unified."[26]

Seemingly therefore, there is nothing wrong about a rule of recognition which consists of morality as a criterion of authority, as long as there is no controversy as to the status of the criteria itself. Apparently this also seems to be the position taken by Hart and Coleman.[27]As mentioned earlier such claim may have its merits but it also has its share of drawbacks as well. Shapiro and Dworkin both question the viability of such a stance, though for reasons that are exclusive to their own theories. For instance, the rule of recognition was introduced with the sole aim of dissuading people from engaging in useless deliberations as to the identity of legal norms. Any rule of recognition which recognizes, morality or moral principles as a mark of authority would be relying on the content of a norm rather than pedigree as a relevant criterion which in itself is a matter of controversy. Thus, a rule which was introduced for the purpose of doing away with deliberation as respect the status of rules cannot be a subject matter of deliberation itself.[28]

The repercussion of such a criterion, according to Dworkin, reflected in the status of the rule of recognition as a "social rule". To recollect our previous discussion, the rule of recognition claims the privilege of a social rule because of a convention, which exists among officials to treat a criterion of legality as a common standard of official behavior and to accepting the standard with a "critical reflective attitude". Any standard which incorporates morality as a criterion of legality can never give rise to a social convention, as the officials themselves would be unsure as to the proper standard of conduct. Since morality by nature is essentially controversial, incorporating morality as criteria of

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25 *Id.* at 94.
26 *Id.*
27 *Postscript* to THE CONCEPT OF LAW, HART, *supra* note 8, at 249.
28 Shapiro *supra* note 17, at 149.

legality can never lead to a social practice. Identifying a norm on the basis of its pedigree is one thing as the procedure of identification does not involve deliberation; and even if it does, it does not involve deliberation on the content of such a norm. However, a moral principle bereft of any pedigree cannot be identified except by a process of deliberation on the content of such a norm. Therefore, for Dworkin, any rule which incorporates morality as a criterion of legality can never be a rule of recognition as the positivists understood it.[29]

The reason why the rule of recognition is a rule is because it is based on the convergence of behavior of officials. The very idea of a rule of recognition connotes the existence of a convergent official practice. To recollect our previous discussion, official practices as justification of normativity would fail for the very reason habitual obedience would fail to justify normativity. For Dworkin therefore, the fact that judges do resort to moral reasoning when legal rules are vague or ambiguous is nothing but a normative moral stipulation that they ought to resort to such reasoning when confronted with legally controversial situation. For Dworkin, if at all there is rule of recognition, its normative justification as a duty–imposing norm can only be grounded on critical morality and not conventional morality. Thus, for Dworkin the ultimate authority of law is a matter of morality, not convention.[30]

The Epistemic and Semantic Sense of the Rule of Recognition

Consider a rule of recognition which states that "all amendments to the Constitution shall be null and void to the extent it is repugnant to the basic structure of the Constitution".

Unlike a Hartian rule of recognition, the rule of recognition as mentioned above is negative, since it does not prescribe any attributes the possession of which will render an amendment valid. However, there is nothing in Hart's theory to challenge a negative rule of recognition so long as the "mark of authority" is explicit and clear. Following *Keshavananda* Bharati *v. State of Kerela*[31], a judicial practice has developed in India by which any constitutional amendment which is inconsistent with the basic

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29 DWORKIN, *supra* note 1, at 43.

30 Positivism's commitment to judicial discretion is neither sufficient nor appropriate to counter the critical morality claim of Dworkin. So either they have to accept Dworkin's claim or come out with an alternative argument. *Id.* at 31.

31 Keshavananda Bharati v. State of Kerela, A.I.R. 1973 S.C. 1461.

structure has been declared void.[32] While what actually constitutes the content of the basic structure is still a vigorously debated subject, it has nonetheless come to be accepted that there is such a thing called the basic structure and all constitutional amendments have to made in conformity to it.[33] A point of importance here is that the basic structure is not a rule, at least not in a sense the positivists understand it, but on the contrary it resembles a principle in every sense as Dworkin described principles. It can also hardly be argued that the basic structure is not a part of the constitution. Thus, if basic structure is part of the Constitution and if it is not a rule, an important positivistic conundrum is inevitable-can criteria of legality be a part of the law itself? The fact that most of the constitutional documents contain reference to moral principles–for example the requirement of reasonability under the clause of reasonable restrictions-indeed makes it mandatory for judges to engage in moral discussions while deciding on the validity of a law seeking to restrict the freedoms of citizens.

The positivists' answers in two ways depending on the ideology they subscribe to. For the exclusive legal positivists such a clause do not lead to the incorporation of morality into the law instead it provide judges with a directed power to invalidate a statute or precedent which, prior to the exercise of this power, is perfectly valid.[34] In another word a statute having been duly made by the Legislature is perfectly valid howsoever immoral it may seem on the face of it and the validity is not dependent on the criteria of legality as identified by the constitution. The question of validity arises only when the same is taken before the Court but until it

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32 Reference in this regard can be made of Article 31C, which was introduced by The Constitution (Forty-Second Amendment) Act 1976, sectio 4. Section 4 was declared to be invalid in Minerva Minerals v Union of India, A.I.R. 1980 S.C. 1789, on the grounds that it violates the basic structure of the Constitution. So is the last clause of Article 31C: "and no law containing a declaration that it is for giving effect to such policy be called in question in any Court on the ground that it does not give effect to such policy" in Keshavananda Bharati v. State of Kerela, A.I.R. 1973 S.C. 1461. There are numbers of instances where the basic structure has been used to invalidate constitutional amendments, for the purpose of my discussion the above instances would suffice.

33 *See* THE SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM (Pran Chopra ed., Sage Publications, 2006).

34 Kenneth Himma, *Final Authority to Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism,* LAW AND PHILOSOPHY, vol. 24, no. 1, 1-45 (January 2005).

happens it is perfectly valid. In one sense, it is similar to the difference between a void and voidable contract.[35]

For the inclusive legal positivist, the fact that morality serves as the criteria of legality does not affect their theory in any way as the criteria can be attributed to its having been accepted by the rule of recognition. The criteria may be based on moral considerations but the rule that identifies the criteria is still based on a social convention. Inclusive positivists therefore deny that the incorporation of a criterion of morality may lead to controversy as the same cannot be attributed to the criteria of legality. The fact is that judges do agree on a criterion of validity and it is sufficient therefore, to constitute the relevant social convention for a rule to develop.

This leads Coleman to develop what is known as the epistemic and the semantic versions of rule of recognition. According to Coleman a standard which helps us to determine whether something is a legal norm or not is not necessarily the standard which helps us to identify whether it is determinate. To put it another way, a standard which tells the judges that basic structure is the criteria of validity, does not mean that the same criterion can also enable the judges to identify its content.

A semantic version of the rule of recognition deals with the membership test for certain legal system. The rule of recognition in the semantic sense lays down the truth condition for singular propositions of law in a legal system. In the usual form "it is the law in C' that P" where C is a particular community and P a putative statement of law. In terms of the basic structure analogy it would be like this, “it is law in India that a constitutional amendment is true only if it is consistent with the basic structure doctrine”. The epistemic version is the procedure by which individuals identify or discover laws in a legal system. As in logical positivism, where the legality criteria of a norm can only be understood in respect of a superior norm granting it legal validity, the questions concerning the validity of legal norms under analytical positivism can also be solved by finding out whether it

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35 W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM (Oxford: Oxford University Press, 1994). Also as pointed out by Himma, when courts declare a law void on the grounds of its supposed nonconformity to the requirements of the moral criteria of legality, the law is actually void on grounds of what courts think is the requirement of morality rather than the actual (objective) requirements of morality. Such a claim for Himma justifies how controversial decisions like A.K. Goplan; or Roe v. Wade can still be valid though seemingly repugnant to the criteria of morality.
Id.

conforms to the mark of authority of the rule of recognition. For Coleman therefore, the fact that a particular mark of authority is controversial does not necessarily conclude that the controversy is with respect to the mark of authority. Controversy, if any, is whether a norm possesses the mark of authority which in effect can render it legal.[36]

Conclusion

When judges decide cases, an invisible constraint, not found in statutes or precedents always works on the adjudication process expressing its demand in the form of "fairness" and "reasonableness". If *Riggs* v. *Palmer* had been decided in favor of the murderer, we would have found enough reasons to criticize the judgment, and the criticism would have been justified not on the grounds of "posited" rules or precedents but rather on being contrary to the demands of "fairness" and "unreasonableness". A couple of issues, however, need to be tackled before one can jump to the conclusion that there is a legal duty among judges to endorse the claims of reasonableness and fairness. Take for example the decision of the Supreme Court in *A.K. Gopalan v. State of Madras*[37], where the Supreme Court refused to read "due process of law" in interpreting "procedure established by law" under Article 21 and instead read the words as it appeared in the text.[38] The following conclusions can be drawn from the Supreme Court's decision one of which is wrong and other is correct.

a) Assuming that there is such a legal duty it can be argued that the Supreme Court's decision in *A.K. Gopalan v. State of Madras*[39] was wrong because in interpreting the law as it is, the Court did not give emphasis on the claims of reasonableness and fairness?-Wrong conclusion
b) Empirically, though, howsoever one looks at the decision in *A.K. Gopalan*, it stood as a valid law for a very long period of time until it was overruled in *Maneka Gandhi v. Union of India*?-Correct conclusion.

This would mean that even if there is a duty to abide by the principle of justice and good conscience–which sometimes finds expression in statutory pronouncements-it does not necessarily follow that disobedience entails illegality. Given that a decision

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36 For a criticism of the semantic and epistemic version of the rule of recognition, *see* SHAPIRO, *supra note* 17 at 150, 151 and 152.
37 A.K. Gopalan v. State of Madras India, *available at* http://indiankanoon.org/doc/1857950/ (visited on 14/05/15).
38 *Gopalan*, *supra* note 35 at 19.
39 *Id.*

would continue to be law, howsoever bad or wrong it might be, this can only mean that the duty is in essence a moral duty and not actually a legal duty in itself.[40] Moreover, the duty to endorse morality cannot empirically entail incorporating an objective criterion of morality which in itself is practically impossible. Thus all judicial consideration of reasonableness and fairness are actually instantiations of the judges' own perception of reasonableness and fairness which makes it a strong candidate for the Source thesis.[41] In other words it is the source (which in this case is the judge) and not the objectivity criteria of morality which determines the validity of a law. The requirement of just, fair and reasonable procedure, for example, is a moral construction which is entirely dependent on how a judge constructs the morality of the rule in question. A judicial declaration that a rule is morally valid, does not say more than that the rule is valid according to standard of morality as decided by the judge. Since an objective standard of reasonableness is objectively untenable, the content, if any, of moral criteria has to be determined by an institutional or human source.

In conclusion, it follows therefore, that even if a rule makes it mandatory

1) To consider moral factors in deciding the validity of a law and
2) makes it obligatory on the judge to do so.

The rule does not become valid by reason of its moral content. It is valid for the reason that it has been made by a human authority. Thus a law which is seemingly void for reason of falling short of a constitutional requirement is still a valid law until declared otherwise by the Court. Also the duty to endorse morality lies not because of morality itself but because of a posited rule which requires the judge to consider morality. The absence of any such rule may entail a moral duty on the part of the judges to consider claims of morality but a failure to do so does not render the decision illegal.

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40 See, how Jules Coleman has tried to negate this claim by arguing that even in controversial cases, the recourse to moral principles can be justified on the theory of social convention. He claims that the general practice of judges to recourse to moral principles in a controversial case, in itself constitutes a rule of recognition. Therefore, the duty of judges to go beyond law for a viable solution is a legal duty, normatively based on the fact that is such situation there is a judicial practice to take recourse of moral principles.
See COLEMAN, *supra* note 3, at 77.

41 For a powerful argument in support of the claim *see supra* note 34.