

Hard Cases

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Abstract

On the one hand, legal doctrine seems indeterminate, but it may be maintained that even in “hard cases”, judges only “constantly talk about the answer they already knew in advance.” Legal philosophers are divided in this respect. Dworkin provided a very convincing answer for the “one answer” model, whereas both inclusive and exclusive positivists and Critical Legal Studies and legal realists presented plausible responses to the “no one answer” model. This article provides a new insight into legal reasoning by linking Dworkin’s theory with French existentialism. It tackles with most common criticisms of Dworkin’s argument and states which facets of this criticism are most cogent.

I. Introduction

Is legal doctrine really indeterminate? In other words, do judges have discretionary power to use legal doctrine as they wish? Or, even in “hard cases”, do judges only ‘constantly talk about the answer they already knew in advance’?¹ Indeed, the answer to this question can have a tremendous effect in relation to lawmaking. Is new law created in the courtroom each time a judge decides a case without a precedent or do judges only administer what is to be dispensed? Legal philosophers are divided in this respect. Dworkin provided a very convincing answer for the latter, whereas both inclusive and exclusive positivists and Critical Legal Studies (CLS) and legal realists presented plausible responses to the former. In this article, I will assess those theses and answer the difficult question whether in “hard cases” judges make law by enforcing their political and moral judgments or only state the underlying principles that are known already. I will spread my analysis to smaller themes, such as the political nature of adjudication and the language.

¹ Albert Camus, *The Fall* (Penguin Books 1957) 107.

II. The ambiguous concept of a “hard case”

First, I will examine the term “hard case”. Different theories adopt different interpretations of this term. I will start with the positivistic approach. Twining and Miers² define a “hard case” as a case in which a judge (i) thinks the letter of the statute is clear (whether this is due to the fact ‘that the text or the underlying intent), and (ii) has significant reservations about the application of the statute so interpreted.’³ They distinguish a “hard case” from a “difficult case”, where the latter case is such in which the judge thinks the letter of the statute (however regarded) is not clear.⁴ A slightly different approach is taken by Dworkin, who, in reference to positivism, defines a “hard case”, as follows: when a certain case cannot be resolved by the use of an unequivocal legal rule, set out by the appropriate body prior to the event, ‘then the judge has, accordingly to that theory, a ‘discretion’ to decide the case either way.’⁵ Dworkin, however, does not identify the characteristics of a “hard case” and he does not provide a judge with instructions on how to decide whether the contentious case is a “hard” one.⁶ He merely provides very broad guidelines, such as “hard cases” arise when “both in politics and law, ... reasonable lawyers ... disagree about rights”;⁷ “no established rule can be found”;⁸ etc. In the light of the aforementioned, we can distinguish Dworkin’s two types of “hard case”: a) a case without a rule and, b) a case with a rule which offers ‘incomplete,

2 William Twining and David Miers, *How to do Things with Rules* (3rd edn, Weidenfeld and Nicolson 1991).

3 John N Adams and Roger Brownsword, *Understanding law* (4th edn, Thomson Sweet and Maxwell 2006) 102.

4 *ibid.*

5 Roland Dworkin, *Taking Rights Seriously* (Duckworth 1978) 81.

6 Alan C Hutchinson and John N Wakefield, ‘A Hard Look at “Hard Cases”: The nightmare of a noble dreamer’ (1982) 2 *Oxford J Legal Studies* 86, 88.

7 Dworkin (n 5) *xiv*.

8 *ibid.*, 44; Hutchinson and Wakefield, (n 6) 86, 91.

ambiguous or confliction guidance'.⁹ However, this typology may differ according to the American Realists, who casted a doubt upon the fact whether precedents could ever restrict the application of a legal rule. As they pointed out there were always factual differences that could be distinguished further.¹⁰ The illustration of this mechanism is given by Schlag, who compares two interpretations of the term "vehicle". According to Hart, an automobile was clearly a vehicle.¹¹ However, this assumption neglected the fact that the word "vehicle" has a fundamental meaning, 'separate from and independent of the rest of the sentence - is just that - a legal move'.¹² Even if, as put forward by Hart, there is such a fundamental meaning, it is subject 'that this core meaning is or should be determinative of the meaning of the ordinance'.¹³ This was supported by Fuller, who advocated that Hart's atomistic approach to interpretation of presumption that the term "vehicle" has meaning in and of itself¹⁴ is pointless. It can result in illogical interpretations of the rule. This semantic approach utilised a legal matter. Fuller's purposive analysis of the legal rule was aimed not only on Hart's semantic grounds, but primarily on the premise advocated by Hart that atomistic word parsing would spoil 'a purposive "structural integrity"...of the law'.¹⁵ Probably, those theoretical problems dissuade Hart from giving a classic definition of a "hard case" and to merely to give an example of it. The concept of "hard case" is too vague to be neatly put in words. For the convenience of this

9 Herbert LA Hart, 'Law in the Perspective of Philosophy: 1776-1976' (1976) 51 NYUL Rev 538, 547.

10 Michael DA Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Thomson Sweet and Maxwell 2001), 1387.

11 Herbert LA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv. L. Rev. 593, 607 and 615.

12 Pierre Schlag, 'No Vehicles in the Park' (1999) 23 Seattle Uni L Rev 381, 387.

13 *ibid.*

14 *ibid.*

15 *ibid.*; Lon L Fuller, 'Positivism and Fidelity to Law -- A Reply to Professor Hart' (1958) 71 Harv L Rev 630, 663.

essay I will, nevertheless, adopt a classic definition, close to the one given by Twinig and Miers.

III. Adopted approaches

The question whether in “hard cases” judges make new law by an exercise of moral and political judgments is inevitably interlinked with the version of sources of law adopted. According to Kennedy, in reference to sources, we can distinguish six different approaches: deduction and judicial legislation (Hart), judicial legislation (Unger), deduction, limiting rules and judicial legislation (Raz), deduction, coherence and judicial legislation (MacCormick), deduction, coherence and personal political theory (Dworkin), deduction and coherence (Civilians).¹⁶ From the above, only Dworkin and Civilians do not accept that judges make new law. All the others are concurrent on the point that judges, while adjudicating cases, do make new law. The only difference between the rest of the theories is the *way* they make new law, meaning the scope of discretion they possess and the nature of judgments by which they are influenced (whether they are political or moral).

The concept of a hard case intertwines two completely different underlying notions - the ideal vision of law in an idyllic world, where every case is heard by Hercules, an ideal judge with all wisdom and knowledge,¹⁷ and the dull, painful reality, where law is created and applied by humans, driven by their weaknesses.

IV. The “no one answer” approach

I would like to start with the realistic vision of adjudication, where law is indeterminate, judges have a wide discretion, and they are ordinary mortals. The good insight into this world is given by CLS. The movement was

¹⁶ Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press 1997) 37.

¹⁷ Michael BW Sinclair, ‘Hercules, Omniscience, Omnipotence, And the Right Answer Thesis’ (2003) 46 *New York Law School Law Review* 447.

internally inconsistent. Therefore, I will restrict my analysis to the American branch of the movement, primarily to Kennedy and Unger.

First, I will discuss the judge's actual state of mind. An insightful study of psychology of law was provided by Unger. He advocated that this novel approach to the nature heads to an antinomy in the comprehension of the relationship between the mind and the world.¹⁸ He also believed that this antinomy has common trails with the pivotal problems of liberal psychology and political theory.¹⁹ There are three non-exhaustive principles: the division between understanding and desire, the postulate that desires are arbitrary and the stipulation that knowledge is acquired by a mixture of 'elementary sensations and ideas'²⁰, which metonymically indicates that the acquisition of knowledge is basically "the sum of its parts".²¹ If we agree that the law is imperfect, ambiguous, indeterminate and sometimes unjust, we ought to consider the state of mind of the adjudicator, i.e. this is what Hart called the 'internal point of view'²² that depends on the state of the mind. We may think differently in the particular moment and this can affect our judgments. Each person has a different state of mind and this can vary from an individual to another one constantly or can change in response to certain events. Kennedy maintains we do not know 'what judge's actual state of consciousness of the issue of neutrality may be.'²³ In another words, the contention is that there are elements of legal debate that imply 'ideological

18 Roberto Unger, *Knowledge and Politics* (Free Press 1976) 30.

19 *ibid.*

20 *ibid.*

21 *ibid.*

22 Herbert LA Hart, *The Concept of Law* (2nd edn, OUP 1997) 242; Peter Winch, *The Idea of a Social Science and its Relations to Philosophy* (Routledge, 1958) ch 2; Ludwig Wittgenstein, *Philosophical Investigations* (2nd edn, Blackwell 1958) 197-241; Max Rhenstein, *Max Weber on Law in Economy and Society* (Harvard University Press 1954) 11-12; Neil MacCormick, 'On the "Internal Aspect" of Norms' in Neil MacCormick (eds) *Legal Reasoning and legal Theory* (OUP 1994).

23 Kennedy (n 16) 134.

influence even in the absence of any showing of ideological preferences or intentions, conscious or unconscious, in the person doing the argument.²⁴

The second area discussed by the movement is language. Kennedy provided an insightful study to the ideology of the language. The language itself is a source of political interpretation. As he notices, every language has a temporal (diachronic) and synchronic structure. Vocabulary and grammar change constantly over the years, as the concrete language is subjected to foreign influences, responses to “material” developments like technological and scientific innovations and is intentionally adjusted by users ‘who see it as a locale for the playing out of conflicting social projects (Negro, black or African American? Stewardess or flight attendant?).’²⁵ These linguistic findings apply also to legal disputes²⁶, particularly hard cases. The choice between literal and purposive approach is a political decision.

Those concepts, advocated by CLS are very insightful and they certainly push the theoretical debate forward. Lucy, in reference to *The Critique of Adjudication*²⁷, said that ‘[t]he book is rich in ideas and engagingly written.’²⁸ But, conversely, CLS’s concepts are too “descriptive” and they do not offer any robust vision. Perry contrasted this realistic conception of adjudication with its institutional counterpart. He favoured the latter, because he considered the process of adjudication as ‘the essence of law’²⁹, which distinguishes it from ‘the phenomenon of positive law’³⁰. Some connection between natural law and

24 *ibid*; Hilaire McCoubrey and Nigel D White, *Textbook on Jurisprudence* (3rd edn, Blackstone Press 1999) 232-233.

25 Kennedy (n 16) 134.

26 *ibid*.

27 *ibid*.

28 William Lucy, ‘What is Wrong with Ideology?’ (2000) 20 *Oxford Journal of Legal Studies* 283, 300.

29 Stephen R Perry, ‘Judicial Obligation, Precedent and the Common Law’ (1987) 7(2) *OJLS* 215, 216.

30 *ibid*.

positive law is necessary,³¹ and, therefore, ‘both fiat and reason ... [are] necessary elements of law’.³² Furthermore, certain concepts advocated by CLS could be easily encompassed within the mainstream. For instance, MacCormick persuaded us that judges in “hard cases” need to apply a moderately political discretion³³. Therefore, Lucy believed that the “reductionist”³⁴ account offered by CLS lacks ‘a single, unified “enlightenment project”’³⁵. He advocated that in order to accept the novelties proposed by CLS, some reference to ‘the problematic nature of representation, truth, and the human sciences is required.’³⁶

This is very close to the account of the movement offered by MacCormick, who thought that ‘normative order’³⁷ is not an outcome of a natural course of things, but ‘a hard won production of organizing intelligence.’³⁸ He believed in the usefulness of the fact that ‘the materials are themselves produced through rational activity, at least partly informed by previous dogmatic reconstruction’³⁹. This is the reason why Lucy called the movement ‘heretical’⁴⁰. Nevertheless, at the same time, MacCormick agreed to a certain extent with CLS that ‘hard-case adjudication ultimately rests upon subjective, incommensurable, consequentiality value-choices’.⁴¹ My reading of these two very close accounts of the movement is that judges do not

31 John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980).

32 Perry (n 29) 217, Lon L Fuller, ‘Reason and Fiat in Case Law’ (1946) 59 Harv L Rev 376; Lon L Fuller, ‘Forms and Limits of Adjudication’ (1990) 92 Harv L Rev 353, George P Fletcher, ‘Two Modes of Legal Thought’ (1981) 90 Yale LJ 970, 979.

33 MacCormick (n 22) chs 5-8; Lucy (n 28) 283, 299.

34 *ibid* 298.

35 *ibid*.

36 *ibid*.

37 Neil MacCormick, ‘Reconstruction after Deconstruction: A Response to CLS’ (1990) 10(5) Oxford Journal of Legal Studies 539, 558.

38 *ibid*.

39 *ibid*.

40 Lucy (n 28) 283.

41 *ibid* 299.

always make new law in “hard cases.” Certainly, some judges may fall prey to ideology and personal sense of morality, but there are still judges, who can stand above those difficulties and who can conform with the letter of law, or if the letter of law is lacking, they can conform to uniform standards expressed by legislature and approved by the society. I would also like to criticise the movement on the ground of the method of research adopted. Although CLS’s observations of the structure of legal system, based on logic and ideology of the movement, are justifiable and plausible; their empirical account of the ideology of the judge’s mind cannot be accepted and justified on scientific grounds. It is not based on Process-Product research and as noticed by MacCormick it lacks theoretical underpinning. It misunderstands the nature of adjudication and cannot in scientific context be considered as fact.⁴²

What may result from everyday experience is either (a) common sense understanding of trial and error generalisations, which work more or less, or (b) question which puzzle us enough to stimulate some scientific endeavor, i.e. questions that may eventually *lead to* some scientific research. Before science comes into existence, there has to be, as already mentioned, a “rape of the senses” or a “breaking with everyday experience”.⁴³

For those reasons, I do not agree with the CLS’ account in psychology of adjudication.

V. The “one answer” model

Despite the merits presented by CLS, we have always to bear in mind the purpose of the law. The underlying aim of adjudication is more than to just provide *an* answer to a controversial issue. Adjudication is part of a larger system.

⁴² John H Chambers, *Empiricist Research on Teaching: a Philosophical and Practical Critique of its Scientific Pretensions* (Kluwer 1992) 145.

⁴³ *ibid* 169.

Therefore, to deny the idea that in every “hard case” there is only one correct, unique answer is going against the purpose of the system. The assumption that judges *make* new law and they do it differently each time entails negative implications on adjudication. It also demythologises the vision of a judge as a just Hercules. Even, if we assume that some judges pass wrong judgments, we cannot condemn them as a social group. Arguably Sartre’s ideas are applicable in the case of adjudication. Therefore, each judge is not ‘fully determined’⁴⁴: each judge has a moral choice.⁴⁵ In principle, the CLS’ thesis of constant ideological questions which have to be answered is wrong. In my opinion, a judge, like any other being, in their ‘human reality’⁴⁶ has the power ‘to choose... [themselves]; nothing comes to...[them] either from the outside or from within it can receive or accept.’⁴⁷ This is more apparent in strictly legal writing:

There is the universal conviction that something noble and fundamental is at stake when judges decide cases. It is doubtless platitudinous, but not less true, to observe that judges, unlike Rabelais’ Judge Bridlegoose,⁴⁸ do not decide cases simply on the throw of a dice. Instead, judges strive conscientiously to reach conclusions which are manifestly explicable in terms of previous decisions.⁴⁹

In order to pursue this, they provide reasons for their decisions. Their judgments are never made *in vacuo*. Northrop noted that despite the fact that most judges do not unequivocally express their method of reasoning, the

44 Jean P Sartre, *Being and Nothingness: An Essay on Phenomenological Ontology* (Methuen & Co 1972) 440.

45 Joseph Singer, ‘The Player and the Cards’, (1984) 94 Yale LJ 1, 13; William Lucy, *Understanding and Explaining Adjudication* (OUP 1999) 93; Philip Pettit, *The Common Mind* (OUP 1996), part II.

46 Sartre (n 44), 440.

47 *ibid*.

48 Francois Rebelais, *Gargantua and Pantagruel* (Penguin 1993), Chaps 37-43.

49 Hutchinson and Wakefield (n 6) 86.

functioning of some method is mandatory. In that sense, Filmer maintained that, 'in law, as in all other things, we shall find that the only difference between a person without a philosophy and someone with a philosophy is that the latter knows what his philosophy is'.⁵⁰ The idea of equal importance is apparent in adjudication. Practitioners are concurrent on the point that the judges bear the responsibility to 'maintain the law and apply it in deciding cases'.⁵¹ Nevertheless, the judge, in order to resolve what *the law* on the contentious issue is, must first decide on the point what *law* is.⁵² This point takes us back to the real beginning - that is - the dull reality of the incompleteness of law, governed by imperfect judges. However, it is important here to distinguish two different theoretical approaches,⁵³ notably that whose remit extends beyond mere description; their aim is to present a normative that:

[t]here are...jurists, such as...Cross⁵⁴ ,...Levi⁵⁵ and...Murphy⁵⁶, whose principal concern is to describe the patterns of reasoning characteristically used by judges; their vantage-point is expository and analytical, rather than critical and evaluative...[Alternatively], there are jurists such as...Horwitz⁵⁷ and...Wasserstrom theory of how judges ought to decide cases and their stance is exhortatory.⁵⁸

50 Filmer SC Northrop, *The Complexity of Legal and Ethical Experience* (Little, Brown & Co 1956) 6.

51 Hutchinson and Wakefield, (n 6) 86.

52 *ibid*.

53 Richard A Wasserstrom, *The Judicial Decision* (Stanford University Press 1961).

54 Rupert Cross, *Precedent in English Law* (3rd edn, Clarendon Press 1977).

55 Edward H Levi, *An Introduction to Legal Reasoning* (University of Chicago Press 1977).

56 Walter F Murphy, *Elements of Judicial Strategy* (University of Chicago Press 1977).

57 Donald L Horwitz, *The Courts and Social Policy* (The Brookings Institute 1977).

58 Hutchinson and Wakefield (n 6) 86.

I will focus now on the latter approach. My aim is to distinguish it from CLS and primarily to answer whether within this approach judges have discretion to apply their own political or moral values. Singer believed that the absence of a rational foundation to legal reasoning as advocated by CLS does not prohibit us from ‘developing passionate moral and political commitments. On the contrary, it liberates us to embrace them.’⁵⁹ If none of the judges could stand above mankind, the purpose of the legal training and judicial career would vanish. The fact that some judges are unable to stand above mankind certifies the fact that they were wrongly selected. The adjudication is a too important social activity to be undertaken by ignoramuses.⁶⁰ A further point, flamboyantly expressed by Lucy, is the fact that judgments would no longer maintain such an important place in society if judges explicitly express the nature of the conditions that ‘have influenced their reading of the law. And, even if judges are explicit in this way, their assessments can be set aside if determined by ideology (in the critical sense) or if judges are, as Kennedy would say, in “denial”.’⁶¹

If we assume that, nevertheless, judges make new law in hard cases, we ought to consider the further issue, which is finality and infallibility of such law. In this respect, Hart made important observations. A supreme court, while deciding “hard cases”, has the power to resolve disputes conclusively. It is irrelevant, whether it made it wrong or right. Nevertheless, such decisions can be denied legal effect by legislation.⁶² The fact that judicial decisions in “hard cases” are final and infallible indicates that they form new law. However, since they are subject to a legislative change, they must be considered as inferior to statutory law. This is evidenced in the *Snail Darter* case⁶³. Therefore, in “hard

59 Singer (n 45) 9.

60 HC 52-II (1995) 130.

61 *ibid*.

62 Hart (n 22) 153.

63 *Tennessee Valley Authority v Hill* (1978) 437 US 153.

cases”, judges ‘exercise a creative choice in interpreting a particular statute which has proved indeterminate.’⁶⁴ Hart supported this formalist approach by *Rex v Taylor*⁶⁵, where the court decided that it always has an inherent power to depart from a binding precedent. However, this rigid standpoint, as noticed by Hart, is always open to reconsideration by the simple fact that the choice in deciding whenever a particular statute is incomplete could always be considered as discovery.⁶⁶ This vein, apparent in the case law⁶⁷, could also support Dworkin’s theory that even in “hard cases”; judges do not make new law.

Therefore, it could be argued that, ‘[i]f the judges make new law, the *power* to do so will be taken away from them’.⁶⁸ Such a standpoint was advanced by Lord Scarman in *Duport*,⁶⁹ where he said that if the general public and parliament come to the conclusion that the judicial power is only constrained by the judge’s sense of what is right and appropriate ‘(or, as Selden put it, by the length of the Chancellor’s foot)’;⁷⁰ confidence in the judicial system will be substituted with the anxiety of it becoming not clear and biased in its applications. Society will then be prepared to apply parliamentary powers to curb judicial powers. Their powers to do so will become more limited in a legal development than it should be or is currently.⁷¹

Sometimes, judges hypocritically support their wide discretion in the adjudication, which justifies Hart’s theory.

64 *ibid.*

65 *Rex v Taylor* [1950] 2 KB 268.

66 Hart (n 22)153-154.

67 *Fisher v Bell* [1961] 1 QB 394 [1960] 3 WLR 919 [1960] 3 All ER 731 (1961) 125 JP 101 (1960) 104 SJ 981 1960 WL 18689; *Smith v Hughes* [1960] 1 WLR 830 [1960] 2 All ER 859 (1960) 124 JP 430 (1960) 104 SJ 606 1960 WL 18710.

68 John Snape and Gary Watt, *The Cavendish guide to mootings* (2nd edn Cavendish Publishing Limited 2000) 153.

69 *Duport Steels Ltd v Sirs* [1980] 1 All ER 529, 521.

70 *ibid.*

71 *ibid.*

This can be illustrated by the approach taken by Lord Denning. In *Congreve*.⁷²

when Roger Parker ... made a similar prediction [to this of Lord Scarman in *Duport*⁷³] in his submissions to the ...[CA], Lord Denning ...stated: 'We trust that this was not said seriously, but only as a piece of advocate's licence.' Mr Parker subsequently apologised if anything he said sounded like a threat.⁷⁴

Nevertheless, judges' hypocrisy can also have a different dimension. It can be aimed to cover judicial legislation. This is evidenced in *Royal College of Nursing*⁷⁵, where Lord Diplock departed from the literal meaning of the Abortion Act 1967 and adopted an interpretation inconsistent with law and Parliament's intention. He ruled that nursing staff who after 'the initial surgical intervention of the doctor in the abortion by prostaglandin'⁷⁶, actively involved in the remainder of the process came within the scope of "medical practitioner", anticipated by the 1967 Act. This interpretation, however philanthropic in intent, clearly reveals the hypocrisy of the judiciary, who while making new law in "hard cases", disingenuously claim that they merely apply existing rules. I think that such an approach, however duplicitous it may appear, supports Dworkin's theory, as judges strive to do the best of the legal system by the correct *application* of rules and principles.

⁷² *Congreve v Home Office* [1976] QB 629.

⁷³ *Duport Steels Ltd v Sirs* [1980] 1 All ER 529, 521.

⁷⁴ Stephen H Bailey and Michael J Gunn, *Smith and Bailey on The Modern English Legal System* (3rd edn, Sweet & Maxwell 1996), 256; *The Times* (London, 6 and 9 December 1925); Snape and Watt (n 68) 153; John Snape and Gary Watt, *How to moot: a student guide to mooting*, (OUP 2004) 177.

⁷⁵ *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 [1981] 2 WLR 279 [1981] 1 All ER 545 (1981) 125 SJ 149 1981 WL 187265.

⁷⁶ Michael Davies, *Textbook on Medical Law* (Oxford University Press 1998) 281.

Judges have always a moral choice.⁷⁷ Singer supports this theory by the reference to Checo:

Man is the builder of a historical edifice: the House of man. He is the brick and the firm foundation of his own project...Man is the player and the cards; he is at stake but he repeats with Oedipus: "I will search out the truth."⁷⁸

Although, Dworkin, due to imperfections of legal system, was incorrect in that there is always one correct answer, his thoughts about the judges' discretion and approaches are insightful. Even though, Hercules' supernatural attributes cannot be seen in every judge, there are judges who come close to this ideal. Therefore, although, I agree with the criticism of Dworkin's theses of his idealistic vision of the legal system, I also see the point advocated by Altman, who acknowledges strengths of Dworkin's jurisprudence in its potential to adopt 'the realist indeterminacy analysis to his advantage'⁷⁹. It may be arguable that Dworkin's arguments are not that compelling, but it is plain that

Hercules...adopts a cavalier attitude towards rules. However, merely to establish that he enjoys such a freedom does not provide an answer to the equally important question of what he ought to indulge in this freedom...[H]e must decide whether in the case before him the disagreement between the parties is genuine and, therefore, makes it into a "hard case". The only reason that Hercules...would wish to avoid a rule-dictated result is his anticipation that such a

⁷⁷ Singer (n 45) 1.

⁷⁸ Marcel Pallais Checa, 'Sketches on Hegel's Science iv' (June 1977) (unpublished manuscript on file in Sawyer Library at Williams Collage, Williamstown, Mass).

⁷⁹ Andrew Altman, 'Legal Realism, Critical Legal Studies and Dworkin' (1986) 15(3) *Philosophy and Public Affairs* 205, 212, Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton University Press 1950).

result would in some way be undesirable or unacceptable.⁸⁰

Nevertheless, Altman in the cited article misunderstood Hart's theory, who implicitly in *The Concept of law*⁸¹ and explicitly in its "Postscript"⁸² accepts incorporationism.⁸³ Therefore, since Hart comes close to the Dworkin in the "Postscript", I believe that both theories provide a useful alternative to extremes advocated by CLS.

Unfortunately, in this more ambitious concept that judges do not make new law in "hard cases", we can find incoherence, which questions whether judges make new law. However, the incoherence is not the result of the adopted supernatural vision of the judge, but the imperfection of the concrete legal systems as such.

The only plausible criticism that can be aimed to the vision of the judge in "one answer model" is the structural incoherence in his moral convictions. In relation to Dworkin theory, Kennedy points out incoherence in the lack of "metacriterion" between the choice of political theories and the notion of coherence advocated. According to Kennedy, the only possible "metacriterion" is the judge's *personal* conviction, which is the only way to decide among the possible theories.⁸⁴ Such vision of this "metacriterion" significantly undermines Dworkin's notion that judges do not make new law.⁸⁵ Langemeijer advocates that the coincidence between "judicial intuition"⁸⁶ and "consensus value"⁸⁷ is to

80 Hutchinson and Wakefield (n 6) 99.

81 Hart (n 22).

82 *ibid*, 250-254; Brian Bix, 'Inclusive Legal Positivism and the Nature of Jurisprudential Debate' (1999) 12 Canadian J of Law and Jurisprudence 17.

83 Freeman (n 10) 334; Hart (n 22) 250-254; Joseph Raz, 'Authority, Law and Morality' (1985) 68 *Monist* 295, 295-324, Scott J Shapiro, 'On Hart's Way Out' (1998) 4(4) *Legal Theory* 469, 469-507; Jules L Coleman, (1998), 'Incorporationism, Conventionality, and the Practical Difference Thesis' (1998) 4(4) *Legal Theory* 381, 381-425.

84 *ibid*, 36.

85 Roland Dworkin, *Law's Empire* (Hart Publishing 1998) 6-11.

86 John Bell, *Policy Arguments in Judicial Decisions* (Clarendon Press 1983) 199.

only possible solution to “hard cases”. Raz also spots incoherence in Dworkin’s theory, namely the advocated by Dworkin postulate that ‘[r]ules that do not pass the test of integrity are not part of the law’⁸⁸ and the fact that ‘the courts ... [cannot] compromise justice and fairness for the sake of integrity.’⁸⁹ Raz believes that this inconsistency of two principles shows that, probably all the time in “hard cases”, courts cannot decide cases according to law.⁹⁰ A similar viewpoint is taken by MacCormick.⁹¹ Conversely, Lucy, while referring to Kennedy’s critique of Dworkin, says that the conclusion that “hard-case” adjudication ‘turn upon considerations of fit and arguments that show the law in its best moral and political light ... is [itself] uncontested.’⁹² I believe that this degree of uncertainty is acceptable. Nevertheless, an interesting trial in resolving this incoherence is given by McDowell⁹³ and Hurley⁹⁴, who indirectly referring to Wittgenstein’s idea of a ‘form of life’⁹⁵, persuade us ‘that meaning does not come from self-interpreting entities, but that it derives in part from the practices, customs, and institutions in which the speaker participates.’⁹⁶ Furthermore, I think that the matter could be successfully resolved by the existential conception of ‘a choice of being’⁹⁷:

87 *ibid.*

88 Joseph Raz, (2004) ‘Speaking with One Voice: On Dworkinian Integrity and Coherence’ in Justine Burley (eds) *Dworkin And His Critics* (Blackwell Publishing 2004), 287.

89 *ibid.*

90 *ibid.*

91 MacCormick, (n 22) ch 5-8.

92 Lucy (n 28) 299.

93 John McDowell, ‘Non-Cognitivism and Rule-Following’ in Steven Holtzman and Christopher M Leich (eds), *Wittgenstein: To Follow A Rule* (Routledge 1981), 160.

94 Susan L Hurley, ‘Natural Reasons: Personality and Polity’ (1990) 65(254) *Philosophy* 528, 528-530.

95 Wittgenstein (n 22), secs 185-7.

96 Brian Bix. (1993) *Law, Language and Legal Determinacy*, Clarendon Press, Oxford, 53-59.

97 Jean P Sartre, *Notebooks for an ethics* (The University of Chicago, 1992), 559.

‘The master’s caprice will be condemned by the virtuous slaveholder...In this moral hierarchy, perfection is to know one’s place.’⁹⁸

The greatest problem with Dworkin’s theory is probably his vision of the legal system and his insistence that the law is determinate. This notion of determinacy is indispensable if we ever try to assume that judges merely apply the law in “hard cases”.⁹⁹ He seems to misunderstand one fundamental issue - the difference between a pair of two *substantially* diverse concepts and the distinction between a pair of *logically contradictory* concepts (F and \sim F). The former occurs when two concepts

are mutually exclusive...[but] they are not jointly exhaustive, so that there will be a logical gap between their boundaries. And it might be the case that some pairs of legal concepts are of that kind, so that, e.g., it is both false that a particular contract is valid and false that it is not, both false that a particular act constitutes a crime and false that it does not, etc.¹⁰⁰

Dworkin always incorrectly considers the latter, when, in reality, judges, while judging “hard cases” usually face the former. Therefore, if we assume that most of the time, in hard-case adjudication, judges do face such a logical gap then it is a misunderstanding to maintain that they merely apply the law, because in such scenario there is no law at all. This problem cannot be successfully answered.

The second aspect that undermines Dworkin’s thesis that judges do not make law in “hard cases” is the structure of precedent itself. Judges have discretion over the holdings in “hard cases”; therefore, as Altman argues they can generate

98 *ibid*, 565.

99 Joseph (n 45) 12.

100 Anthony D Wozzley, ‘No Right Answer’ (1979) 29 *The Philosophy Quarterly* 25, p 26; Wilfred Hodges, *Logic: an introduction to elementary logic* (Penguin 1986), p 17-38; Jeffrie G Murphy, (1967) ‘Law Logic’, 77(3) *Ethics* 193, 193-201.

different rules of law capable of producing conflicting results in the same case.¹⁰¹

The issue of logical gap is interlinked with the doctrine of precedent.

Dworkin's notion that principles, alongside rules, are part of the legal system does not avail him a lot, because as pointed out, by Hart and subsequently by MacCormick, there is no rigid distinction between rules and principles. In relation to Dworkin's postulant that there is a difference of conclusiveness between principles and rules, namely that rules applies in an all-or-nothing fashion, whereas principles are non-conclusive¹⁰², Hart advocates that Dworkin cannot be coherent and that 'a principle will sometimes win in competition with a rule and sometimes lose', which shows that rules do not operate in all-or-nothing mode, as postulated by Dworkin. Ironically, Hart illustrates this observation on the case used by Dworkin to illustrate the operation of the principles - *Riggs v Palmer*¹⁰³. In this case,

the principle that a man may not be permitted to profit from his own wrongdoing was held notwithstanding the clear language of the statutory rules governing the effect of a will to preclude a murderer inheriting under the victim's will... Even if we describe such cases (as Dworkin at times suggests) not as conflicts between rules and principles, but as a conflict between the principle explaining and justifying the rule under consideration and some other principle, the sharp contrast between all-or-nothing rules and non-conclusive principles disappears.¹⁰⁴

101 Altman (n 79), 209.

102 Dworkin (n 5) chapter 2, Perry (n 29) 223.

103 *Riggs v Palmer* 115 NY 506, 22 NE 188 (1889); Dworkin (n 5); Dworkin (n 85) 15.

104 Hart (n 22) 262.

This point is also supported by Raz¹⁰⁵ and Waluchow¹⁰⁶. Therefore, since Dworkin's notion for the distinction between rules and principles is at least incoherent, there is little justification in supporting his theory in "hard cases", where both rules do not have direct application and principles come into play. Even if we accept his inclusive theory, which in acknowledging principles does not differ a lot from 'inclusive positivism'¹⁰⁷, the problem of the interrelation between principles and rules is still present. His notion that rules operate in all-or-nothing fashion and that principles are non-conclusive simply does not work. Therefore, I cannot accept the idea that judges in cases such as *Riggs v Palmer*¹⁰⁸ do not make a new law is simply unrealistic. Nevertheless, I see Dworkin's point in his response to those criticism that when the judge is acting to achieve some "purpose" and 'his ambitions are complex and competing...[,] he must sometimes neglect one to serve another.'¹⁰⁹ Therefore, I would not incline to reject his theory completely on the ground of imperfection of the system.

VI. Conclusions

Due to the incompleteness of the legal system, the fact that judges occasionally make law in "hard cases" is undeniable. The question that needs to be resolved is the actual process by which they engage in making new law. However, the fact that the judges make new law in "hard cases" is only the result of the indeterminacy and imperfection of a legal system, which has been aptly noticed in the logic account of CLS. Those observations significantly

105 Joseph Raz, 'Legal Principles and the Limits of the Law' (1972) 81 Yale LJ 823, 823-4.

106 Wilfred J Waluchow, 'Herculean Positivism' (1985) 5 Oxford Journal of Legal Studies 187, 189-92.

107 Freeman (n 10) 334.

108 *Riggs v Palmer* (1889) 115 NY 506, 22 NE 188; Dworkin (n 5) 23; Roland Dworkin (n 85) 15.

109 Justine Burley, *Dworkin And His Critics* (Blackwell Publishing 2004) 361.

undermine Dworkin's theory. However, the movement should never be justified empirically. The reverted nature and purpose of adjudication, even in "hard cases", cannot be based on *a priori* knowledge. The simplest notion of experience does not presuppose anything other than experience. That is why, '[a]s the principle of individuation Kant took time and space, for no object, he insisted, can be considered as existing of both or either. [sic.]'¹¹⁰ This postulate can be aptly applied to the adjudication of "hard cases", where a superior aim is invoked. Simple observations of human nature will not suffice. Empirical scrutiny of the psychological judicial approach towards adjudication cannot be justified on firm scientific grounds. The consecrated nature of adjudication requires a more holistic approach, and it cannot be blemished by quasi-empirical generalisations. In this respect, Dworkin's theory of adjudication in "hard cases" remains firm and can be supported by existential accounts.¹¹¹ Lucy suggests that we need to draw a line between orthodoxy and heresy. Such a distinction could only be made if we make certain assumptions. Lucy refers as to the assumptions advocated by Dworkin on the face of knowledge implicit in the community's institutional political morality¹¹², that is firstly, that the kingdom of the 'political' surpasses party politics or interest group disagreements; secondly that the kind of higher degree or more abstract political preferences judges make does not trespass upon the law/politics divide or the prerequisite of judicial impartiality.¹¹³ Therefore, it should not be surprising that Altman called Dworkinian jurisprudence a more advanced answer to realism than that

110 Olin McKendree Jones, *Empiricism and Intuitionism in Reid's Common Sense Philosophy* (Princeton University Press 1972) 1.

111 Georg Cohn, *Existenzialismus und Rechtswissenschaft* (1959) 53(3) *The American Journal of International Law* 718, 718-719; Matthew L Williams, *Empty Justice: One Hundred Years of Law, Literature and Philosophy – Existential, Feminist and Normative Perspectives in Literary Jurisprudence*, (Cavendish Publishing 2002).

112 Lucy (n 28) 299.

113 *ibid.*

advocated by Hart.¹¹⁴ Furthermore he acknowledged that Dworkin's "soundest theory of law" is the most justifiable ethical and political theory that fits together and explains the norms and choices adherent to the law already decided. The consistency does not have to be ideal, for Dworkin agrees that some of the decided legal judgments may be considered as mistakes. But consistency is necessary with a considerable dose of the decided case law. In the lack of a single, overarching theory that deals with the decided law – and Dworkin believes that there will often numerous theories in hard cases – then most appropriate theory is the one that is both fit and ethical adequate.¹¹⁵ There is truth in the postulate that there is a social and moral need in the assumption that judges, even in "hard cases" merely apply the law and they are far from creating new law by referring to moral and political judgments, but since the law is indefinitely indeterminate, it is unfortunately true that, as Singer says, our legal system will never come close to this aim.¹¹⁶ But it is too hasty to agree with him that 'the traditional goal is false or irrational.'¹¹⁷ The judges' approaches, both truthful (*Duport*¹¹⁸) and hypocritical (*Congreve*¹¹⁹, *Royal College of Nursing*¹²⁰), show that such an unobtainable goal is right and sound. When, single judges get it wrong, it does not mean that the aim is hopeless, but merely that society has rather blemished.¹²¹ Camus justified this goal in reference to 'the noble profession of lawyer'¹²². He believed that 'we ... [are] of the same species. Are we not all like, constantly talking

114 Altman (n 79) 207.

115 Altman (n 79) 35-36.

116 Singer (n 45) 13.

117 *ibid* 8.

118 *Duport Steels Ltd v Sirs* [1980] 1 All ER 529, 521.

119 *Congreve v Home Office* [1976] QB 629.

120 *Royal College of Nursing of the United Kingdom v Department of Health and*

Social Security [1981] AC 800 [1981] 2 WLR 279 [1981] 1 All ER 545 (1981)

125 SJ 149 1981 WL 187265.

121 Camus (n 1) 6.

122 *ibid*.

and to no one, for ever up against the same question although we know the answer in advance?’¹²³ I think that those words clearly support Dworkin’s vision of adjudication in “hard cases”. In order to achieve this, judges while judging “hard cases” try to escape the bad faith of personal political and moral values by ‘trying to make oneself nothing but the role demanded by society - to be *only* a waiter or a conductor or a mother, *only* an employer or a worker,’¹²⁴ only a judge.

123 *ibid.*

124 Jean P Sartre, *Existential Psychoanalysis* (Philosophical Library 1953) 30.

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