

The Unbearable Lightness of Adjudicating Hard Cases: Hart, Dworkin and the Institutional Control of Legal Interpretation

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Abstract: The main idea of this paper is to discuss the phenomena that populate the space between uncontroversial cases and discretion in the case of Hart's account of legal adjudication, i.e. between uncontroversial cases and principles, in the case of Dworkin's account of legal interpretation. In the first part of the paper, the methodology of legal theory proposed by Hart and Dworkin is examined in order to ascertain whether their methodological projects were carried out successfully in the domain of adjudication. I argue that there is room within Hart's theory to accommodate a descriptive account of adjudication that leaves less room for discretion. Giving such an account doesn't necessarily entail developing a normative, justificatory or interpretivist theory. In the second part of the paper I make the initial steps in developing the idea of *institutional control of interpretation* to account for interpretative practices and standards in the process of legal adjudication that are not adequately explained by discretion (Hart), nor by resorting to principles and institutional history (Dworkin). Non-formal sources of law, inter-judicial dialogue and legal science are discussed *exempli causa* as instances of institutional control of legal interpretation.

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Introduction²

H.L.A. Hart explained the difference between easy and hard cases in terms of a distinction between the core uses of a concept-term and penumbral uses of the concept-term in adjudicating cases. The difficulties in interpretation and adjudication are a function of language used to decide cases. In Hart's view, legal language is necessarily indeterminate due to the simple fact that it utilizes general terms:

Even when verbally formulated general rules are used, uncertainties as to the form of behaviour required by them may break out in particular concrete hard cases (Hart, 1994, p. 126).

Adjudication and interpretation become a practical problem that arises in applying norms to factual settings because the boundaries of the relevant concept-terms are not clear. While taking the cognitivist stance³ when it comes to cases in which rule formulations are "clearly applicable", Hart takes a sceptical stance⁴ when it comes to the classification of cases in which the application of a legal rule is cognitively unascertainable.

Hart's views about the differences between easy and hard cases can be understood by reference to the distinction between subsumption, which results in propositions with the general structure "N is applicable to C", and interpretation, which results in propositions with the general structure "L means N". Hart's basic claims in regard of easy and hard cases are for the most part related to subsumption. When there is a C on which

²I own a special thanks to Kenneth Himma, Miodrag Jovanović and Bernardo Sanchez for commenting extensively on earlier versions of the paper. Much of the arguments have been reworked and refined in line with their helpful advice.

³"Cognitivism" is used to denote the idea that there can be a right answer to the legal dispute, which can be obtained by application that doesn't involve discretion.

⁴"Skepticism" is used to denote the idea that there is no right answer to the legal dispute so that the judge cannot reach the decision on the basis of the rule formulation. That leaves the decision to the will of the judge.

the application of N is cognitively unascertainable (if the case falls within the penumbra of a concept-term) or unresolvable (if there isn't a rule pertinent to the case, i.e. if there is a gap), a judge in Hart's view resorts to discretion, i.e. to choice that cannot be eliminated by appeal to principles of interpretation traditionally termed canons:

Canons of interpretation cannot eliminate, though they can diminish, these uncertainties; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation (Hart, 1994, p. 126).

If we take Hart's position further, it seems that there is no decisive rational procedure that can aid us in resolving cases that are not subsumable under a general rule. The lack of constraints on adjudication can theoretically be minimal to such a degree that even a coin toss could suffice as the method of choice in the decision making process.⁵ This implies that in the penumbral cases subsumption isn't entirely dependent on interpretation of the legal formulation, but on the judge's intellectual abilities, his ideological positions, canons of interpretation, even whims or any other extra-legal concerns. If we fully develop Hart's view on adjudicating cases that fall into the penumbra of the concept-term, it is difficult to escape the conclusion that the adjudication of hard cases can be easier for the judge.

The account of adjudication and interpretation that Ronald Dworkin proposed as an alternative to Hart's account of easy and hard cases, served as one of the starting points of Dworkin's conception of "law as integrity," based on a particular interpretivist methodology. Dworkin's views on interpretation and adjudication have changed over time. In the first stage of his criticism of Hart in *Hard Cases*, the difficulty in interpreting and adjudicating is not dependant on the generality of legal language, but on the justificatory coherence in the context of a legal system. In the second stage of criticism in *Law's*

⁵ This is obviously not the case in the majority (if not all) of the municipal legal systems, as there is little or no chance that the rule of recognition would allow a decision to be grounded on a toss of the coin. It remains, however, theoretically possible.

Empire, Dworkin is explicit in saying that there is no need for a separate methodology in deciding easy and hard cases (hence, the easiness of cases is not a function of the meaning of words used to express the norms into which a case is subsumable).⁶ He is explicit in saying that “Hercules does not need one method for hard cases and another for easy ones” (Dworkin, 1986, p. 354). In both stages of his work, Dworkin was quite concerned to account for the fact that judges have a hard time deciding cases that Hart calls hard. Dworkin’s theory of interpretation, based on the systemic character of the legal system and its innate coherence, leads to the conclusion that legal formulations ought to be interpreted with regards to institutional history, the aims of the legal rules enacted by the legislator, and the general aims of legal acts.

In this article 1) I examine the methodology of legal theory proposed by Hart and Dworkin in order to ascertain whether those projects were carried out successfully in the field of adjudication. 2) I argue that there is room within Hart’s theory to accommodate a descriptive account of adjudication that leaves less room for discretion. Giving such an account doesn’t necessarily entail developing a normative, justificatory or interpretivist theory. 3) Finally, I make the initial steps in developing the idea of *institutional control of interpretation* to account for standards in the adjudication process that are not adequately explained by discretion (Hart) nor by resorting to principles and institutional history (Dworkin).

1. Methodology of legal theory and adjudication

a. Hart’s methodology of legal theory

The methodology of legal theory adopted in *The Concept of Law* (TCL) was meticulously carried out and applied to the majority of jurisprudential problems including

⁶By the end of his career, Dworkin developed this approach into a full blown methodology of law, ethics and other fields in which interpretation is applicable (leaving out science as the first of two great domains of human knowledge) (Dworkin, 2011, p. 123).

adjudication.⁷ Those methodological positions are stated in a concise manner in the following passage of the Postscript:

My aim in this book was to provide a theory of what law is which is both general and descriptive. It is general in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense “normative”) aspect. This institution, in spite of many variations in different cultures and in different times, has taken the same general form and structure, though many misunderstandings and obscuring myths, calling for clarification, have clustered around it [...] My account is descriptive in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.

By sticking to generality, structure, and description legal theory differentiates itself from legal policy, which is concerned with the criticism of existent law, and other parts of jurisprudence. The descriptive character of legal theory is by far its most important feature, emphasizing the importance of epistemic values of “truth, clarity, evidence, logical and terminological consistency, empiricism” (Chiassoni, 2011, p. 59). The “description” element means primarily that the enterprise of this domain of jurisprudence should be “a venture of *explanatory* elucidation” but it also expresses Hart’s view that legal theory is not justificatory in the sense that is dependent on moral evaluations. Hart’s entire discussion of adjudication and interpretation in hard cases was grounded in certain features common to all general and descriptive terms. Having in mind the brief summary of his project in the domain of methodology of legal theory, it can be said that Hart in *TCL* discussed adjudication and interpretation within the boundaries of *generality and descriptiveness*.

⁷Quite aptly, Pierluigi Chiassoni calls the meta-theoretical stances of Hart the *forth issue* that *The Concept of Law* tackles, along with the questions of the concept of law, rules, coercion and the relation of law and morality (Chiassoni, 2011, p. 55).

i. Adjudication and hard cases

In chapter VII of TCL, Hart deviates from the traditional models of legal interpretation⁸ establishing what will become the theoretical basis for the discussion on legal adjudication in the second half of the XX century. Hart's initial intention in the chapter is to dissolve the prejudice that communication by "authoritative general language" as a guide for conduct has the property of certainty compared to the "authoritative example" as a guide for conduct. The very nature of language is, according to Hart, a problem for the definite linguistic determination of conduct. The generality of language and the multiplicity of cases on which an expression supposedly refers to, produces a crucial difference between cases that can be solved by the expression given in an instance of authoritative general language and cases that cannot be solved by that same expression.

What makes a case easy according to Hart is not, strictly speaking, the fact that the language used in the formulation of the rule is unambiguous or precise. What makes a case easy is the fact that the adjudicating body habitually adopts a certain resolution of the case by application of general language used in the source of law. Adjudication in these cases is "automatic" and "constantly recurring in similar contexts", and the lack of trouble in deciding a case is a function of "general agreement in judgments as to the applicability of the classifying terms".

⁸On the assumption that the general standards of conduct can be communicated because "general terms would be useless to us as a medium of communication unless there were such familiar, generally unchallenged cases", the procedure of adjudication within a legal system is traditionally described either as a cognitivist endeavour or as a voluntarist endeavour. The cognitivist description of legal adjudication is on the right track if and only if the rule of conduct for a particular case can be derived from the text of a source of law (e.g. statute or previous case). If the determination of the relevant rule for the case at hand is not given in the source of law, the process of adjudication is necessarily a matter of the will of the adjudicating subject, and is thus not constrained by the text of the source of law. Those two positions in the description of legal adjudication in relation to legal texts can be called (and are called in certain jurisprudential traditions) formalist and sceptic views on legal interpretation.

When there is a lack of “general agreement” or “crisis in communication”, adjudication cannot be resolved by sole reference to a general instance of language used in the source of law.⁹ There are no inherently simple and hard cases, there is just disturbance in the habitual behaviour of deciding cases, which can, in the event of a crisis of agreement or a crisis of communication, be hard to adjudicate, but can also, in the case of a stable agreement on the proper way of adjudicating, be easy to adjudicate.

Andrei Marmor in his *Interpretation and Legal Theory* points out that the use of terms easy and hard in the description of cases in the Hartian sense is rather “unfortunate”. Marmor argues:

One cannot overemphasize the warning that the terms ‘easy’ and ‘hard’ cases are potentially misleading. The distinction has nothing at all to do with the amount of intellectual effort required in order to decide a legal case. As Raz once pointed out, deciding an easy case in, for example, tax law, might be much more difficult than deciding many hard cases. If any distinction were to be drawn between more or less easy applications of rules, it would pertain to the complexity of the operations required by the rule, and not to the distinction between easy and hard cases, in the sense being used here. An ‘easy’ case, as I understand the term here, means that the relevant legal norm can simply be understood, and applied to the particular case without the mediation of an interpretation of the norm; we just understand what the law says, and know that it applies, or not, to the case at hand (Marmor, 2005, p. 97).

Of course, this does not exclude the constellation of circumstances in that same case that brings into question the very same standard application of a rule expressed by general language. In other words, meanings might change over time, so that a case that is hard at

⁹ Mind that Hart at this point uses the word ‘case’ to denote the same case that was denoted before, and I mean the exact same case that was previously solved by the employment of the very same general language.

one point might be easy at another point. When the meaning is settled at a given point in time, the case is easy. Should the meaning become unsettled, it becomes a hard case.

When the criteria of agreement are not met, irrespective of the reason, the subject of adjudication is left with a choice on how to adjudicate a case. But before any discretion is exercised, there has to be a prior identification of the case as resembling previous non-problematic cases solved by the very same general language. In other words, cases have to be analogous based on criteria that are, according to Hart, not a subject of a general theory of law, but are dependent on "many complex factors running through the legal system and on the aims or purpose which may be attributed to the rule" (Hart, 1994, p. 127).

Precisely formulated, in the situation in which the conduct of the adjudication is not determined by the general language used to express the rule, the official is left to decide not on how the case should be adjudicated, but if the case should be adjudicated in accordance with the former standard instances of adjudication. If we take adjudicative statements to be of the general form of "L is applicable to C" and interpretative statements to be in the form of "L means N" it can be concluded that the interpretation of the rule is reserved for cases that fall under the penumbra of the concept-term. Furthermore, adjudication doesn't necessarily rely on interpretation even in these situations, as there is no legal criteria to determine what L means.

Chapter VII, often viewed as the statement of Hart's theory of interpretation and adjudication, is therefore concerned primarily with subsumption, in the sense that it offers an account of adjudication when there is no significant disagreement on how the case should be decided.¹⁰ It is not so much the case that Hart doesn't give a normative theory of interpretation in TCL, as much as it is the case that he doesn't give a theory of interpretation at all.

¹⁰Andrei Marmor does a great job of dispelling the common misconceptions in regards of Hart's exposition in chapter VII of CL (Marmor, 2005, p. 97).

ii. Jumping to discretion

If we follow Hart's methodological standpoints and argue for a descriptive theory of law that is general in scope, it is hard to escape the conclusion that discretion is introduced too hastily in the description of judicial behaviour in cases that do fall in the penumbra of a rule formulation introduces.¹¹ The entire process of interpretation is left out of the equation of adjudication in hard cases, on the assumption that either it falls under a broadly conceived rule of recognition that can incorporate canons of interpretation, or it requires normative and parochial considerations. Cases that cannot be adjudicated according to the legal rule fall under the broad category of hard cases, that may be adjudicated based on extralegal criteria, whatever those may be. In an effort to further elucidate his positions and eventually mend this possible outcome, Hart writes in the Postscript:

It is important that the law-creating powers which I ascribe to the judges to regulate cases left partly unregulated by the law are different from those of a legislature: not only are the judge's powers subject to many constraints *narrowing his choice* from which a legislature may be quite free, but since the judge's powers are exercised only to dispose of particular instant cases he cannot use these to introduce large-scale reforms or new codes. So his powers are *interstitial* as well as subject to many substantive constraints. None the less there will be points where the existing law fails to dictate any decision as the correct one, and to decide cases where this is so the judge must exercise his law-making powers. But he must not do this arbitrarily: that is he must always have some general reasons justifying his decision and he

¹¹ "Hart has consistently taken the view that, as a conceptual matter, what constitutes a question of law as hard is that the pre-existing law is *substantively indeterminate* with respect to that question in the sense that the content of the law is, as an objective matter, insufficient to determine a uniquely correct answer. As the matter is sometimes put, hard cases are hard because there is a "gap" in the coverage of pre-existing law. Since, in such cases, there is no uniquely correct decision, it follows, on Hart's view, that judges must decide hard cases by creating new legal content that renders determinate (or fills the gap in) the law on the issue" (Himma, 2003, p. 346).

must act as a conscientious legislator would by deciding according to his own beliefs and values. But if he satisfies these conditions he is entitled to follow standards or reasons for decision not dictated by the law and may differ from those followed by other judges faced with similar hard cases (Hart, 1994, p. 273).

Extra-legal standards of adjudication become, in fact, crucial for adjudicating the case as soon as the case falls under the domain of the conceptual penumbra. Sadly, Hart doesn't give an account of what those extra-legal standards are.

Having in mind the plausible accusation of uncharitable reading, the exposition begs the question of what prevents the toss of the coin to be the dominant extra-legal standard of adjudication. Hart in fact states that the discretion left to the judge "by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice" (Hart, 1994, p. 127). It is of course highly unlikely that such an arbitrary decision-making "methodology" could serve judges well in adjudication,¹² and in the Postscript Hart indeed mentions a reasonable way to proceed in those situations. He engages in normative considerations by stating that judges are in fact supposed to act as conscientious legislators and as obliged to give general reasons which exclude adjudication by resort to trivial approaches.

The coin toss problem is not merely a rhetorical exercise, because it brings forward a serious issue about the scope of the discretion, and the range of extra-legal criteria that can reasonably be used in deciding the cases that are called hard. Leaving out such a wide area of adjudication outside of a theory of law that purports to be general and descriptive is certainly not accidental. In TCL, when talking about hard cases in which interpretation plays a crucial role, Hart resorts briefly, before ending the exposition on adjudication, to normative considerations. The same is true of the Postscript, in which Hart apparently

¹²The rule of recognition could reasonably include "a general expectation or social norm shared by the officers and people that judges don't decide cases arbitrarily" as Ken Himma points out. The fact is that Hart doesn't make that theoretical move on this important subject neither in CL nor in the Postscript.

makes a significant concession to Dworkin's idea that a normative theory of interpretation is a necessary part of a theory of law.

It seems reasonable at this point to question whether a theory of law that is general and descriptive necessarily excludes substantive considerations about judicial interpretation. From this perspective, Hart's account of adjudication seems lacking in at least two ways: 1) It leaves open the possibility of coin-toss adjudication in hard cases, and in that sense it doesn't seem to provide for a satisfactory account of cases which are hard from the internal perspective, in the sense that they give rise to problems in adjudication that are hard to solve from the perspective of the judge; 2) It gives up on description of adjudication and interpretation in the situation in which rules don't provide us with a clear-cut decision in a case. Constraints on interpretation and adjudication are left entirely to the contingent content's of the rule of recognition or to arbitrary normative standards like "reasonable legislator".

b. Dworkin's Methodology of Legal Theory

Already in *Taking Rights Seriously* (TRS), Dworkin's methodology of legal theory differs significantly from Hart's, in the claim that a general theory of law "must be normative as well as conceptual" (Dworkin, 1977, p. vii). In the interdependence between conceptual and normative elements, jurisprudence is constituted by a 1) theory of legislation, a 2) theory of adjudication, and a 3) theory of compliance. Even though interpretation doesn't have the overarching methodological value in jurisprudence like in his later works, the theory of adjudication plays an important role in this early account as a bridge between the conceptual and the normative parts of legal theory which aims to put forward an alternative to the theory of adjudication proposed by Hart (Dworkin, 1977, p. xiv). From the perspective of the criticism of Hart's approach, the normative element of legal theory tackles the problem of discretion, by emphasizing the fact that "judges characteristically feel an obligation to give ... 'gravitational force' to past decisions" (Dworkin, 1986, p. viii). Discretion in the strong sense, which Dworkin is interested in,

means that in deciding a case a subject is not bound by an authority (Dworkin, 1977, p. 32). The problem with Hart's view of adjudication is that the move to discretion is made without considering legal standards that are, according to Dworkin, binding not because of their source, but because of their content.¹³ Any legal theory that purports to do justice to legal practice must take this into consideration.

Interpretational issues that arise from the problem of hard cases, become in Law's Empire the common ground for a unified view on legal reasoning. Every instance of legal reasoning is now an instance of constructive interpretation and legal theory is the interpretative refinement of "the initial, uncontroversial interpretation" that "provides our concept of law" (Dworkin, 1986, p. 94). By doing jurisprudence we are interpreting a legal practice, and interpretation is for Dworkin a matter of "proposing value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify" (Dworkin, 1986, p. 52).

With normativity taking the place of descriptivity, and interpretation taking the place of generality, it is obvious that Dworkin's methodology of legal theory leads to a conception of adjudication and interpretation that are quite different from Hart's.

i. Interpretation and hard cases

¹³Dworkin makes clear his problem with the alleged success of Hart's description of law. In *The Model of Rules I* he accuses positivism, taking Hart's theory as the main illustration, of wrongly describing the law. In particular, he ascribes to positivists at least three contentions: 1) Law is identified exclusively by resort to the procedure of adoption or development of rules; 2) The clearly identified rules are the only legal source for adjudicating a case; 3) Legal obligations are constituted only in the presence of such explicitly stated rules (Dworkin, 1977, p. 17). The basic idea behind the criticism is that "the law of a community consists not simply in the discrete statutes and rules that its officials enact but in the general principles of justice and fairness that these statutes and rules, taken together, presuppose by way of implicit justification" (Dworkin, 1975, p. 1437). Most of the Dworkin's criticisms were successfully and definitely answered in the *Postscript*, and within the positivist camp only a few theorists have in recent times taken some of the criticisms, like the theoretical disagreement argument from LE, to be valid and sound (Shapiro, 2007).

Coherence and holism with respect to the conduct of interpretation and its results became the main epistemic values in Dworkin's later work. As noticed by Andrei Marmor, coherence is an "instrumental value of political morality" which is required by the political value of fairness (Marmor, 1991, p. 391). In LE, it is a crucial moral value, dictating that every object of constructive interpretation should be presented in the best light, determined by the regional discipline in which the interpretation is undertaken (i.e. by a genre). Constructive interpretation should, according to the epistemic value of coherence, always be guided by the value of integrity, which is distinct to law as a regional interpretative practice. Integrity itself means that the judges should "assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process" (Dworkin, 1986, p. 243)

Adjudication in hard cases, characterized by discretion, is in the positivist outlook unbound by legal standards and therefore subject to judges' discretion that is understood in terms of a legislation-like process of making new legal rules (Shapiro, 2007, pp. 10-12). Dworkin's basic idea is that judges never invent new rights (Dworkin, 1977, p. 81), but resort to arguments of principle, in order to show "that the decision respects or secures some individual or group right" (Dworkin, 1977, p. 82). In order to do just the personal morality of the judge and the institutional morality of practical and theoretical jurisprudence come into interaction, in a way that the novel decisions on rights are based on decisions of the past (Dworkin, 1977, p. 87). The answer to the problem of discretion in TRS is that, even in situations in which rules are not sufficient to reach a decision, judges are in fact bound by principles, in the sense that their decision is not an exercise in discretion but an exercise in interpretation of concepts used in the formulation of principles: "Lawyers and judges, in arguing and deciding lawsuits, appeal not only to such black-letter rules, but also to other sorts of standards that I called legal principles." (Dworkin, 1977, p. 46). In LE the central idea is that there is, more often than is explicitly evident, theoretical disagreement on the grounds of law among judges, which gives rise to serious problems for the positivists and can be resolved by resorting to constructive interpretation guided by integrity. Both of Dworkin's criticisms of positivism are important

from the perspective of adjudication because they describe problems in adjudicating cases that are called hard in a way that actually makes them hard from the perspective of the judge, i.e. through the problem of interpreting the principle that is used to decide a case, or through the interpretative resolution of the grounds of law for the case at hand in the case of theoretical disagreement.¹⁴

In cases that are hard in the sense that there is theoretical disagreement on what the law is, judges are supposed to act in a way that gives not only the best interpretation of the linguistic formulation of the legal standard, but also to interpret the rule in the context of institutional history and from the perspective of certain fundamental principles whose conceptions constitute a coherent political theory. In short, they should do the Herculean work that is comparable to that of a chain novelist. But in LE, Hercules doesn't really need another method for adjudicating easy and hard cases (Dworkin, 1986, p. 354). There should in fact be no easy and no hard cases, as legal interpretation is not a function of legal language, but of fitting and justification of a decision in the institutional history:

Legal reasoning is an exercise in constructive interpretation, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be (Dworkin, 1986, p. vii).

If the distinction is still there, the easiness of a case it is not a function of consensus like in TCL, but is a function of coherence. According to Dworkin, an easy case is one where there is only one minimally coherent interpretation of the law; a hard case occurs when there is more than one and the choice must be made by recourse to the moral standards that would best justify use of the coercive force to back the law. Dworkin's description of the procedure of adjudicating hard cases from the perspective of the judge, since it excludes

¹⁴Despite the successful rebuttal of many of Dworkin's criticisms by positivist scholars, some fundamental insights can still serve as the starting point of even some purportedly positivist accounts of law. One such project was undertaken by Scot Shapiro, who built his theory of law on the critical assumption that the criticism from theoretical disagreement still holds, provided that it is carefully separated from the semantic string argument.

the troubling possibility of coin-flip decision making, grounding the adjudication process in a normative account of interpretation, understood as the elaboration of present legal practices in the best possible light.

Dworkin's idea of adjudication is not only that principles are crucial for a coherent interpretation of the social practice of law. What is more important here is his contention that description of adjudication proposed by Hart leaves too much space for decisions that are not backed up by standards of the legal system, the most important of those being principles. With Dworkin, and contrary to Hart, principles became not just a possible argumentative point in adjudicating cases that do not fall clearly within the explicitly stated rule of the legal system, but something that the judge *has* to take into consideration when adjudicating the case.

ii. Jumping to principles

Dworkin's criticisms from TRS have, among other things, identified a shortcoming of the development of Hart's project in legal theory when it comes to adjudication. Upon encountering the problem of hard cases, Hart stops his analysis in a quasi-sceptical manner and leaves the legislator-like rule making to judges.¹⁵ One solid reason for doing this is that by going further into analysis Hart would have had to introduce a discussion that he thought of as normative. The brief methodological clarification in the Postscript makes it quite clear that he didn't intend to have anything to do with justification, and thus, he excluded a normative theory of adjudication from the text of CL. In Hart's view, from the perspective of description and generality, little can be said about the process of adjudication and interpretation. So little in fact that even Dworkin was ready to admit that

¹⁵ The identification of this problem with Hart's theory could be countered by claiming that positivism holds that the judges' duties are defined by the rule of recognition (with variable content) and that is little more to be said as a conceptual matter (Ken Himma). The main concern of this paper is not, however, to keep things in the metaphysical realm, but to identify the phenomena between easy cases and discretion (Hart), and easy cases and principled interpretation (Dworkin).

he actually developed a parochial theory, concerned with the explanation of the functioning of the US legal system.¹⁶

By noticing this omission in Hart's theory of adjudication, Dworkin opens an entire field for himself and introduces standards of adjudication that express certain peculiarities that have not been elaborated in TCL. Hart elaborated in quite some detail the idea that the rules set by an authority bind the judges to decide in a certain manner, but he also stated that in cases in which we reach the area of open texture all we can do is suppose what the courts will do in that situation (Hart, 1994, p. 147). Dworkin's insights have led to the idea that a crucial part of the work of jurisprudence is the "study of different modes of argumentation that legal participants actually use when engaging in legal reasoning" (Shapiro, 2007, p. 28).

It seems reasonable to concede to Dworkin that attributing discretion in the strong sense to judges is not an adequate answer to the issues of adjudication in hard cases, one of the main being that judges in fact do not decide cases arbitrarily. If the decisions are not reached in a coin-toss manner, the legitimate and important task of jurisprudence, has to be giving an account of the way in which those decisions are made.

Yet, Dworkin's idea that in order to give such an account we must necessarily take a normative stance and resort to justification from principles, purposes, as well as to an unachievable normative standard of Herculean adjudication. The main reasons for doubting the way in which Dworkin proceeds are: 1) The practice that is supposed to be interpreted by the judge is not a "raw practice", void of value, goals, coherence or integrity. The values of a community, and especially a community of jurists, are already embedded in the practice that Dworkin mostly views as pre-interpretative. 2) While it could be the case that the pre-existing values of this practice are subject to principled

¹⁶In Law's Empire Dworkin states that the principled argumentation in favor of a right depends on the idea of basic principles - "someone whose convictions about justice and fairness were very different from ours might not find that question so easy; even if he ended by agreeing with our answer, he would insist that we were wrong to be so confident." (Dworkin, 1986, p. 354).

interpretation by the judge, Dworkin's account of interpretation and adjudication is descriptively limited in the sense that judges often resort to the interpretations that preceded them. Autonomous principled purposive interpretation occurs in situations in which the institutional history doesn't aid the judge enough in reaching the decision. Even in these cases there are (and I will try to show that in the next part of the article) guidelines for adjudication that are not derived from political morality.

Dworkin's account of adjudication, thus, seems inadequate because 1) It fails to describe adjudication of most cases in front of most courts (granted that it could be possible to proceed in a Herculean manner in certain, more or less imaginary circumstances); 2) It overemphasizes political principles as principles that are integral to the legal system, and should therefore be used as a guide to achieve unity in interpretation by means of adjudicative construction of institutional history in the best moral light; 3) It disregards legitimate influences on the adjudication of courts that are often explicitly acknowledged in courts' opinions, that will be elaborated in the next part of the paper. Dworkin still manages to convey the process of adjudication as dominantly a process of interpretation that is in fact hard for the subject of adjudication, i.e. the judge.

2. Institutional control of interpretation

The main question to which I turn now is whether Hart's account of methodology of legal theory has to be renounced in favour of justification as an essential part of the theoretical and practical work in jurisprudence, in order to remedy the shortcomings of the account of adjudication given in the chapter VII of CL. Without dwelling on methodological issues and plausible benefits of Hart's methodological stance in jurisprudence, a reasonable question to be asked from the positivist perspective is the following: Is there anything more to be said about adjudication, without endangering generality and descriptiveness, i.e. without deviating from Hart's meta-theoretical positions?

Before resorting to the herculean method of adjudication, Dworkin mentions an indicative and important, but unelaborated, idea. He talks about “normal intellectual inertia” that operates in legal “paradigms” or “quasi-paradigms of the day” (Dworkin, 1986, p. 89). The interpretative task of adjudication (and jurisprudence) starts from the practices that can be identified as legal within a community. The possibility that I would like to explore involves the concept of *institutional control of interpretation* proposed in the domain of literary theory by Frank Kermode.¹⁷ In his seminal article, which largely went unnoticed out of the field of literary hermeneutics on the European continent, Kermode writes:

“No person can go about the work of interpretation without some awareness of forces which limit, or try to limit, what he may say, and the ways in which he may say it” (Kermode, 1979, p. 72).

It is important to notice that in the above citation we are already in the domain of hard cases, as the work of interpretation and discretion is, according to Hart, operational only under the condition of the penumbral reference of the rule to the case at hand. Kermode states forcefully that the process of interpretation is limited even when there are no clear rules to guide it. According to him, the possibilities of interpretation are limited factually in the sense that interpretations are evaluated not on the basis of coherence, holism or a principled stance on unity that the community doesn’t necessarily have to share, but are limited institutionally.

The first sense in which Kermode uses the word institution is as an “organization of opinion which may either facilitate or inhibit the individual’s manner of doing interpretation, which will prescribe what may legitimately be subjected to intensive interpretative scrutiny, and determine whether a particular act of interpretation will be regarded as a success or a failure, be taken into account in licit future interpretation or

¹⁷Incidentally, Frank Kermode is the first person that Dworkin thanks in the preface of *Law’s Empire*, and credits him for reading a draft and giving comments on a substantial part of *Law’s Empire* (Dworkin, 1986, p. ix).

not" (Kermode, 1979, p. 72). The institution in this sense is a medium of pressures and interventions that do not have to be explicit or formulated as standards of behavior (rules and principles), but that the individual still adheres to if his interpretation purports to be of any significance in the specific regional context in which it is undertaken.

The community, which forms the set of opinions that comprise the institution, thereby limiting interpretation, is in principle determinate or determinable. It is primarily "the professional community that interprets secular literature and teaches others to do so". This community "has authority (not undisputed) to define (or indicate the limits of) a subject; to impose valuations and validate interpretations". (Kermode, 1979, p. 72). The given authority is not an authority in the strong sense, insofar as it cannot enforce interpretative standards, but is the dominant set of opinions, which by strength of argument or habit (and even, trivially but nevertheless worth mentioning, the denial of promotion within the field), limits individual interpretations.

Now, the very idea of a community limiting interpretative endeavours in the descriptive sense limits Dworkin's claim that the conduct of constructive interpretation is subject to the adherence to the "objectives of the system". If there is institutional control of interpretation in the domain of law, those purposes and principles are often already interpreted within the community of institutions and legal professionals. Constructive interpretation in which the judge, according to Dworkin, engages upon encountering a problem in adjudication is rarely based directly on a raw principle, a concept that isn't elaborated in a conception that is dominant within a professional community. The idea that an almighty judge adjudicates by construing an entire theory of law and a political theory that is coherent, is a strange idea for the vast majority of judges. It has major flaws both as a description, and as a prescription for the process of adjudication. "No judge" says Dworkin "could compose anything approaching a full interpretation of all of his community's law" (Dworkin, 1986, p. 245).

Grounding a decision on political and moral principles, or even on a coherent political theory, is highly contested in continental (but not only continental) theory of law,

as it rests on the idea that judges are allowed to give political arguments of their decisions. Michel Rosenfeld in an article that compares constitutional adjudication in Europe and in the U.S. writes: "The constitutional judge as a negative legislator may invalidate law only to the extent that they contravene formal constitutional requirements and, therefore, may remain largely apolitical" (Rosenfeld, 2003, p. 636). There is of course an important difference between statutory adjudication and constitutional interpretation in that the role of constitutional courts has been extended in some case to the extent that they resemble positive legislators, as well as between the common law and civil law constitutional adjudication. Nevertheless, the perception of impartiality of the work of a judge often rests on the premise that a political argument can eventually be settled by appeal to legal arguments, and can thus be brought to conclusion by applying the law. Even in situations in which principles are used to adjudicate cases, the exercise of constructive interpretation is often already done before the judge even confronts the case that can be deemed hard (in the sense that there is no clear standard of adjudication). Jurisprudence and legal science often exercise the kind of institutional control of interpretation that I call informal (external or weak), insofar as it doesn't have power to "enforce compliance" (Kermode, 1979, p. 73).

There is at least one compelling reason to broaden the sources of constructive interpretation – constructive interpretation should not only offer a decision based on any kind of argument from purpose, but is indeed compelled to offer a plausible argument that is based on some common argumentative grounds which a community shares (not necessarily in the sense that it adheres to them, but in the sense that it is aware of a possible line of legal reasoning). The plausibility of the argument and the circle of arguments that are "acceptable" or "plausible" is determined by a definite community (not necessarily *one* community, but nonetheless a *definite* community). Legal texts are available to the public, but are not authoritatively interpreted by the public at large. This community is certainly the community of lawyers, comprising primarily of legal scholarship, legal

teaching, in general.¹⁸ It is important to notice that the means of external control of interpretation provide judges with a repository of constructive interpretations, that are often used as interpretations or arguments that are adequate to decide the case in question. This doesn't in fact exclude legal principles from the equation, but it somewhat changes their position as standards of adjudication and allows for a differentiation within the corpus of principles within a legal systems.

The above-mentioned institution is of course, not entirely adequate as a description of limits of interpretation and adjudication in law. The institution that is crucial for law is in Kermode's view "better-defined and more despotic" (Kermode, 1979, p. 72). To differentiate further this type of institution, closely connected to education, universities, academia and so on, it is important to differentiate between the *institutional control of interpretation in the weak sense*, which doesn't allow the institution(s) to invalidate deviant interpretations, and *institutional control of interpretation in the strong sense*, which gives the possibility to the institution to invalidate the interpretation. I will make an attempt, by relying on contemporary practice of adjudication, to show how some of the instances of institutional control of legal interpretation in the strong and in the weak sense can be used to describe the process of adjudication of cases that usually fall under the umbrella term 'hard'.

a. Non-formal Sources of Law

Formal control of interpretation in law or institutional control of legal interpretation in the strong sense is, of course, highly dependent on the political or constitutional structure of a society. This modality of influencing the process of adjudication is in most jurisdictions exercised through a process that is called *review*, which entails the power of a higher institution (court) to invalidate or overrule (set aside the authority of another decision) the decision of a lower court.

¹⁸Herculean decisions that Dworkin theorizes about would, most certainly, be quickly repelled in most continental jurisdictions that are familiar to me, on the account that they give non-acceptable arguments.

Similar to the process of review is a possibility of supreme courts in certain continental jurisdictions to issue what is often called a *general legal opinion*, or a *general legal statement* aimed at the standardisation of legal interpretation and adjudication. The Supreme Court of Italy exercises something that is called in legal theory “funzione nomofilattica” that comprises of 1) the duty to adjudicate a case according to the law, and more importantly 2) the possibility to give nonbinding interpretative opinions which serve as a guide in interpretation and adjudication, and ultimately aid the uniform application of law (article 65 of the Judicial Order Statute from the 30th of January 1941/R.D 30 gennaio 1941 n.12).¹⁹ The Supreme Courts of Slovenia, Spain, Serbia, Montenegro, and other European countries also have the possibility of issuing “general legal opinions which are important for the uniform application of the law”.²⁰ These opinions are not formulated as rules, nor are they explicitly mentioned in Constitutions that in civil law systems often prescribe the sources of law. They are nevertheless factually binding for the lower courts. A decision of the lower court that doesn't concur with the general legal opinion of the Supreme Court will most certainly be invalidated in the process of review.

What may be the most significant trait of formal institutional control of interpretation is the fact that the process of review has to come to an end. This is dictated by reasons of legal certainty – at one point the adjudication process has to end in order for the litigants' rights and duties to be authoritatively ascertained. Given that “the holding of the [highest] Court establish the content of the law” and that, according to some influential theorists, the decision of the highest court doesn't necessarily legally obligate officials to act according to the decision (Himma, 2009, pp. 105-108), institutional control of interpretation could in principle account for the general acceptance and the enforcement of decisions within a legal community. Even if we suppose that a judge from a lower court employs Herculean methodology of adjudication, the arguments that the judge makes based on political

¹⁹The opinions of the Supreme Court of Italy are not binding for the lower courts nor are they binding to the Supreme Court.

²⁰In this case the opinions are binding for the civil and criminal departments of the Supreme Court and can only be abolished in plenary sessions (article 110 of the Statute on Courts/ Uradni list RS, št. 94/07).

morality, that deviate from the opinions of higher courts, would be overthrown in the review process.

b. Inter-judicial dialogue

The best recent examples of institutional control of interpretation in the weak sense within the community of courts are the relations of the European Court for Human Rights (ECHR) and national courts of the European Union (EU) members states. Now days, the communication between international courts is usually called "inter-judicial dialogue".

The communication between courts on the national level occurs in the judicial review process. But, even without a formal obligation, the tendency of even lower national courts to follow decisions of The European Court for Human Rights developed more that 15 years ago (Slaughter, 2000, p. 1103). What is even more striking from the perspective of weak institutional control of interpretation is the fact that national courts of states that aren't even parties to the European Convention on Human Rights, regularly cite the decisions of ECHR and use its arguments.

In the case of *State v. Makwanyane* (1995 SACLR LEXIS 218, at *1; CC June 6, 1995) the South African Supreme court declared the death penalty unconstitutional by resorting not only to the Constitution of South Africa but also to ECHR decisions. The Constitutional Court of Jamaica, making use of the ECHR decision in *Soering v. United Kingdom*, transformed the death penalty into life imprisonment (Slaughter, 2000, p. 1110). What in these cases, in which courts are not exercising discretion in the strong sense and are not devising a principled argumentation for a certain interpretation, is called *persuasive authority* is just another name for the process of institutional control of interpretation in the weak sense that was described above.

By referring to interpretative methodologies of ECHR, courts draw from a repository of arguments developed within judicial practice that doesn't bind them in any formal way. To describe this in terms of discretion would be to simply disregard the process of

argumentation and interpretation guided by rules and procedures with pervasive force within a professional community. From a dworkinian perspective, the entire process revolves without the components of institutional history that the judge is supposed to take into account, and is not guided by principle in any explicit way.

The Supreme Court of the United States, or at least certain present and past justices, also has the tendency to rely on “foreign materials”. Even originalists, like Antonin Scalia, agree that there “are so many ways in which foreign law influences law in the United States Supreme Court and the other courts” implicitly or explicitly.²¹ In this weak sense of the concept of institutional control of interpretation, the arguments and decisions made by foreign courts are not binding by formal authority, but are an important source of informal authority. Justice Breyer explains:

“I usually think, and I think Justice Scalia does too, that in the United States, and this is perhaps unique to the United States, or almost, law is not really handed down from on high, even from the Supreme Court. Rather, it emerges. And we're part of it, the clerks are part of it, but only part. And what really survives every time is the result, I tend to think of a conversation. I think that's the right word, conversation among judges, among professors, among law students, among members of the bar, because you need people to put things together, you need people to decide cases, you need people to tell you how it works out in practice. And out of this giant, messy, unbelievably messy conversation emerges law. And that means you have to have the conversation. And then I think we participate it, even at a general level, not just when we're deciding cases.”²²

²¹Justice Breyer tells the story about the conversation with a congressman in which he declares that he will probably learn something from the opinion of a foreign judge that decided on a similar case. The congressman replies that he definitely should read it, but that in no way should he cite it.

²²U.S. Association of Constitutional Law, *Transcript of Scalia-Breyer debate on Foreign Law*, January 13, 2005

In the case of inter-judicial dialogue that involves the Supreme Court of the USA, institutional control of legal interpretation in the weak sense is exercised by the sheer force of the arguments used in cases that have appeared in front of Supreme Courts in other parts of the world.

c. Legal science

The institution that encourages a certain outcome of adjudication is often not only a community of courts. Legal science, advancing legal arguments, often serves as an important guideline in adjudication.

A highly controversial case before the Constitutional Court of Montenegro involved the possibility of a presidential candidate to run for office for the third consecutive time. The Constitution of Montenegro in the article 97 explicitly states: *The same person may be elected the President of Montenegro maximum two times*. One can hardly imagine a provision less ambiguous and/or vague. The Constitutional Court ruled that the current president of the country could not only run for office for the third time (the right to run for office is, strictly speaking, not barred by this provision), but also to hold office in the third term. The arguments of the Court stressed the fact that Montenegro became an independent country in 2006, after a referendum on the dissolution of the Union of Serbia and Montenegro, and adopted a new Constitution in 2007. That fact alone is certainly not enough to allow someone to be the president for the third time, and the argumentation of the Court was in fact not based on that fact but on the legal consequences of those facts that have been developed by constitutional scholars. Those scholars in Montenegro and in the region have in previous decades developed the idea of *constitutions of discontinuity*. The key feature of these constitutions is that they either establish a state order different from the one established by the previous constitution, or are adopted contrary to the procedures provided in the previous constitution. The Court relied heavily on the doctrine of constitutional law, even to the point to decide contrary to the “plain” meaning of the constitutional rule.

It could be argued that the arguments from legal science are in this case rather weak, and that it was used to ground a political agenda of the Court. Just the fact that the argument could be used, confirms the idea that the process of adjudication relies regularly on institutional interpretations that are already at hand within a legal community, rather than on principles or purposes. The institution that exercised control of interpretation in the weak sense in this case is legal science, which is often considered a source of thoughtful analysis and interpretations of constitutional provisions. If there were not such an explicate theoretical founding of the decision, generally accepted by the legal community, the arguments given by the Court would have been considered bunk, and most probably would have not been endorsed at all by the Court.

3. Tentative conclusions

Judges may never achieve the level of cleverness and patience that Dworkin attributes to Hercules (Dworkin, 1986, p. 317), but the practice of courts, legal science and jurisprudence certainly do achieve it. The standpoint of institutional control of interpretation doesn't necessarily have to be moral and principled, and the above-mentioned cases show that often isn't.²³ It seems, thus, that in the cases that were mentioned discretion and/or constructive interpretation aren't the best explanatory tools (especially if one wants to adhere to the methodological positions in legal theory introduced by Herbert Hart). The main idea of this paper was to discuss the phenomena that populate the space between uncontroversial cases and discretion, in Hart's case, and principles, in Dworkin's case. If we take into account the concept of institutional control of interpretation in the strong sense (that could have a bearing on the positivist theory of law) and the weak sense (that could have a bearing on a social theory of law as part of jurisprudence) it seems reasonable to claim that Hart's methodological project in the domain of jurisprudence can be developed further when it comes to adjudication and interpretation, by taking into account the formal and non-formal institutional boundaries that have been described under the name of institutional control of interpretation. From

²³ See: Chiassoni, 2011, p. 58.

this same perspective, it could also be asserted that the process of adjudication can be subject to an explanation by a descriptive and general theory of law in terms of institutional control of interpretation in line with Hart's idea of rules as social-facts and without resorting to the kind of justificatory procedures envisaged by Dworkin in LE.

The exposition of the process of judicial review, formally non-binding general legal opinions of Supreme Courts, inter-judicial dialogue and the references to the interpretative and argumentative positions repository of legal science are indicative of the fact that the resolution of cases, especially cases that present judges with difficulties, depends on the authority of a determinate community of legal theory, legal science and legal practise. Adjudication and interpretation, under the assumption of formal or informal institutional control of interpretation, are by no means easy, as a matter of cognitive procedures that are required in order to adjudicate a case. It often involves the knowledge, collection and the review of arguments that are acceptable from the perspective of this definite community before and even instead of a critical evaluation and justification that revolve around principles and purposes.

Dworkin's contribution to the normative aspects of adjudication and interpretation are impressive. His theory of constructive interpretation is not an accurate description of the process of adjudication, but is one of the most elaborate normative accounts of interpretation in recent jurisprudence, and most certainly unprecedented in scope and influence. He offered a compelling normative account of the process of interpretation and adjudication that is based on certain fundamental principles that judges *should* reasonably take into account when deciding on cases. The fact is that for the most part (if at all) the process of adjudication and interpretation is not conducted in a manner that is even remotely similar to the methodology of Hercules. Institutional control of interpretation brings to fore the fact that interpretation and adjudication are often already settled, even before the interpretation and adjudication take place in cases that are usually called hard. In this respect, Scot Shapiro is right in arguing that the interpretative methodology doesn't in fact have to be viewed as "an exercise in moral and political philosophy". Yet, his

conclusions that a positivist interpretative methodology should rely on the empirical ascertainment of political objectives of a legal system are questionable, to say the least (Shapiro, 2007, p. 43). He states in a Dworkinian fashion that "the proper task of the legal interpreter, I would like to suggest, is to impute to legal practice the political objectives that the current designers of the legal system sought to achieve" (Shapiro, 2007, p. 44).

Institutional control of interpretation doesn't exclude the possibility of ascribing legislative political objectives to legal practice by the courts. It warns against the belief that courts ascribe those objectives independently of identifiable legal and extra-legal criteria. There is an entire field of study between alternatives in adjudication and herculean adjudication that could be fruitfully covered with the idea of institutional control of interpretation. It could be easily imagined that the authoritative institutions in the domain of legal interpretation and adjudication allow legislative policy arguments to be used by courts.

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