Dworkin theory of law as integrity

In Law's Empire, Dworkin has distinguished three legal conceptions: conventionalism, pragmatism and " law as integrity"[1], by criticizing conventionalism and pragmatism, Dworkin concludes that " law as integrity" is the most plausible and defensible. However, criticism to Dworkin's argument-" law as Integrity"---can be seen in various academic works.

In this essay, first and foremost, we will briefly discuss the basic arguments of Dworkin's theory of " law as integrity" then we will go on to criticize Dworkin's theory in light of relevant legal theories.

Introduction of the Theory of " Law as integrity"

Conventionalism & Pragmatism

In the theory of conventionalism, legal rights can only emerge from existing law, including precedents and legislation. Conventionalism also holds the view that judges must follow the law and should make decisions only based on existing statutes and more importantly, judges must respect what convention deems binding law.[2]

According to the theory of pragmatism, assignments of legal rights and responsibilities must be consistent with past decisions. Moreover, the pragmatist theory holds the view that adjudication is not really constrained by the law. Hence, pragmatism argues that judges " should decide what decision will, according to them, be best for the community as a whole."[3]This means that for reasons of strategy judges must sometimes act " as if" they are applying pre-existing legal rights.[4]In the meanwhile, in accordance with pragmatist theory, to some extent, the behaviour of a court in making decision of certain case is not constrained by the existing law.

These two legal theories are highly criticized by Dworkin. As Dworkin points out that " assumes that judges sometimes invent law, which means that they act in an unconstrained manner. Pragmatism also assumes that judges are hardly constrained when adjudicating cases. It thus cannot account for why judges are so concerned with precedents and statutes when they decide hard cases."[5]

Dworkin then provides a third theory of law, which he believes not only better represents what actually happens when judges decide cases but is also a morally better theory of law.

Law as Integrity

The concept of Law as Integrity is a key to Dworkin's Constructive Interpretation of legal practice.[6]According to Dworkin, judges should identify legal rights and obligations on the basis that all the rights and obligations are crated by the community as integrity, and all those rights and obligations express the community's conception of justice and fairness.

In accordance with Dworkin, the only way to understand legal practice seems to be that---taking the interpretative perspectives of the participant into consider in the practice. Dworkin claims that when judges (as well as lawyers) consider which way is the best to solve a legal issue, they should not simply identify exactly what positive law is applicable in a certain case, but taking an interpretative approach to law as social practice. Dworkin emphasizes that a solution to a certain case is always sought out through a matter of interpretative practice. Dworkin's perspective here is quite against that of conventionalists, the conventionalists insist that in dealing with a

certain case, the judge only should identify exactly what law is applicable. Furthermore, Dworkin points out that in the debate of a certain case, different opinions and arguments are raised by lawyers, and under this circumstance, the decision of what law is applicable in the case is usually based on what opinion the law amounts to in a particular matter rather than what conventions apply. Participants in such a debate thus do not attempt to link the facts of a case with the supposedly posited law applicable but rather interpret the law in light of a general normative justification or moral point expressed in it. " A participant interpreting a social practice [i. e. the law], according to that view, proposes value for the practice by describing some scheme of interest or goals or principles the practice can be taken to serve or express or exemplify."[7]

Dworkin argues that " network of political structures and decisions of his community"[8]must always be called on by a judge when the judge goes about adjudicating. For instance, legislation and case law which must be identified in a " pre-interpretative stage" Then in the following stages, the judge must always question himself whether his interpretation of this network " could form part of a coherent theory justifying the network as a whole. No actual judge could compose of anything approaching a full interpretation of all of his community's law at once. But an actual judge can (...) allow the scope of his interpretation to fan out from the cases immediately in point to cases in the same general area or department of law, and then still farther, so far as this seems promising."[9]In accordance with Dworkin's arguments, the interpretation of law should not only fit into the legal system but also be the best normative justification of law as such, this

means that not only must the interpretation of the judge's be consistent with the law identified at the " pre-interpretative stage", but also the law must be interpreted in a way which is the best in the participants' mind. Moreover, according to Dworkin's theory, both the judge and any other participant should adjust his own sense of " of what the practice really requires so as better to serve the justification he accepts at the interpretative stage."[10]

We notice that, in accordance with Dworkin, morality affects the whole process of adjudication of cases. By contrast, he dose not express the view that a certain case should be adjudicated and resolved on the basis of sole considerations of justice. Dworkin claims that the moral standards should be derived form the explicit and existing legal practice and contrary to positivists, Dworkin believes that " moral principles that cohere with past legal practice are valid propositions of law as well-so much so that these principles can and should go beyond what legal conventions teach us the law is."[11]

In Dworkin's theory, there are two basic elements of law, one is a retrospective element, which he calls " fit", and the other is a prospective element, which he calls " justification".[12]Furthermore, Dworkin points out that in exercising the function of these two elements, judges are required to construct a theory of law which can both fit past legal decisions and makes the law as good as possible. In doing this, the judges are required to search out legal principles which have been previously mentioned in the historical and social characteristics of the legal system and then improve the law for the future by " making it more coherent"[13]. Hence, we can say that according to Dwokin's theory, in dealing with a certain case, the judge

should try to interpret the law in a way which promotes the coherence of the legal system as well as possible. In other words, it is to say that an interpretation--which is the most coherent to legal system--is much better than an interpretation-which makes the legal system less coherent. This implies that when interpretation is concerned, there exists a certain tension between " what is presented by the existing " positivist" material and what is the best way to interpret such material from a moral point of view."[14]

From the view of Dworkin, a judge is like an author in writing a novel," in that case a new author is bound by what another author has written in a previous chapter, but the new author will subsequently attempt to continue the novel in the best possible way."[15]A judge should view his or her role in a chain in law, he or she is not purely independent, but is indeed independent to some extent," He knows that other judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgement of how to make the developing story as good as it can be."[16]In other words, Dworkin holds the view that law is not arbitrary but rather the expression of an underlying attempt at forming and clarifying a coherent legal consciousness of society.[17]Hence, in interpreting certain legal text, a judge is not completely free. The judge is not allowed to inject any personal morality into the interpretation of the legal document. More essentially, a judge is required to interpret with the purpose of establishing coherence based on the integrity of existing law.

Furthermore, decision making by the judge " will depend, that is, not only on his beliefs about which of these principles is superior as a matter of abstract

justice but also about which should be followed, as a matter of political fairness, in a community whose members have the moral convictions his fellow citizens have".[18]Dworkin also explains this in more general terms: " There are two possibilities. Someone might say that interpretation of a social practice means discovering the purposes or intentions of the other social participants in the practice (...). Or that it means discovering the purposes of the community that houses the practice, conceived as itself having some form of mental life or group consciousness. The first of these suggestions seems more attractive because less mysterious. But it is ruled out by the internal structure of an argumentative social practice, because it is a feature of such practices that an interpretive claim is not just a claim about what other interpreters think. (...) [A] social practice creates and assumes a crucial distinction between interpreting the acts and thoughts of participants one by one, in that way, and interpreting that practice itself, that is, interpreting what they do collectively. It assumes that distinction because the claims and arguments participants make, licensed and encouraged by the practice, are about what it means, not what they mean. (...) [An interpreter must therefore] join the practice he proposes to understand (...)."[19]

Criticism of Dworkin's Legal Theory

Moral to full extent

According to Michael Sandel[20], Dwokin's legal theory begins with the principles of freedom and equality that justify the institutions of democracy and law. However, as Stephen Guise points out that " the claim that democracy is just and that law is part of democracy is a claim about a moral ideal."[21]If we go further, that is to say, in a moral level, the world without

democracy is better than a democratic world. Since in a democratic world, laws are enacted and enforced but laws may be substantively unjust.

Stephen Guest criticizes that " The theory of Dworkin's is moral to the full extent. Interpretation is therefore is not 'constrained' by facts even though it makes use of facts. It does not follow that his theory is 'subjective', because his moral views - like all moral views - are subject to revision, correction and, in short, reason."[22]Stephen Breyer says that constitutional standards " keep subjective judicial decision-making in check".[23]In my mind, it is right, but not purely right, that is because, this statement implies that there exists some external checking fact on these judicial " subjective" judgments, more importantly, this statement demonstrates that judges should not formulate applicable constitutional standards. In the theory of Dworkin's, " interpretation is something close to the end-product of moralizing with others who are largely in agreement and who endorse true propositions of modality."[24]This means that the origin of Dworkin's legal theory is moral proposals concerning equality and freedom.

" Dworkin cannot explain the 'extraordinary rigidity' of the U. S. Constitution, in particular the way that entrenched provisions of the Constitution conservatively constrain judges by imposing the 'dead hand' of the past"[25]. In Dworkin's perspective, there is no categorical distinction between distinction 'history' and 'substance', although there is an argument of 'fit', as we mentioned before, this is merely another form of argument of 'substance'. So in Dworkin's theory, there is no way of identifying historical facts about the Constitution distinct from its moral substance. The only arguments are moral arguments and as we mentioned in the first part,

Dworkin expresses the idea that entrenched positions can be interpreted morally, in terms, for example, of the protection of democratic decision-making.

So law is a form of moralizing that is also an integral part of democracy. If we genuinely believe in equality of respect, we naturally end up with endorsing representative democracy, which means legislative activity through delegated agency. It is not just that the legislature represents my view through legislation but, merely in its existence, it expresses my conviction that I respect others equally. Since I do, I must allow that their convictions count, too, and so I must abide by whatever the procedural outcome is of this respect I owe to others.

Moral convictions and objectivity.

There is a conflict in Dworkin's theory, on one hand, Dworkin emphasizes objectivity in decision making, on the other hand, Dworkin put decision onto a moral basis. As Duncan Kennedy[26]claims that "...the judges should not choose the interpretation that applies their 'own moral and political convictions'. I personally don't see what else they could apply..." Furthermore, as Waldron points out that "...These are convictions, not whims, and even where there is nothing else but one's own convictions to follow, no-one thinks that it means those convictions are right..."[27]So it is rare or even impossible that a judge will not take personal moral convictions into the process of adjudication or interpretation.

Unclear about Justice

By holding the same view with Waldron, Smith[28]supposes that Dworkin's idea or justice is not clear since Dworkin has argued that justice depends on " recognizable" principles. Furthermore, Smith questions that " why should a principle of justice have to be 'recognizable'?"[29]For principles of justice will surely gain moral recognition - if they do - because they have force independent of recognition. Someone has to do the recognizing first.

How to achieve ideal integrity?

Susan Hurley[30]defends Dworkin's perspective against a claim by Kenneth Kress[31]that Dworkin cannot provide a coherent consideration of law in circumstances where there is an intervening judicial decision between a set of facts that ground litigation and the litigation itself. Does the judge decide on the basis of the previous law, or the 'intervening' law? Hurley concludes that if the intervening decision is right, then there is coherence, therefore, there is no problem; if it is wrong, it is a mistake, and need not count. A question may be raised here that--although it may have created further rights, say, to reasonable expectations being met, which will cohere with integrity? Moreover, Hurley[32]sees the problem " in terms of overall moral coherence untrammeled by worries about 'descriptive facts'". So Hurley usefully broadens the picture by pointing out that coherence is determined as much by hypothetical facts, those that test the limits of principle (and which judges often use), as they are by judicial decisions.

Furthermore, as we mentioned before, in Dworkins' legal theory, when dealing with a particular case, a judge should interpret and apply law in light of the whole legal system, and make interpretation which is consistent with

the integrity of the legal system. However, is this really applicable in practice?

In accordance with Waldron[33], it is a challenge to Dworkin's 'descriptive optimism' that the facts of the American legal system could make it impossible to give an overall account of American law that would remain true to integrity. But as Stephen argues that there is no such tension between 'facts' and moral 'optimism' as he appears to envisage. The 'facts' are either incorporated into the argument that makes for integrity or they are discounted. " There is the possibility that the American legal system has become so dysfunctional that no moral case for integrity can be made for it, but that seemingly remote possibility would not be an embarrassment for Dworkin's theory."[34]Waldron's comments seem to imply that there are facts that determine law independently of interpretation. And so it has the general form of: 'Imagine a legal system where integrity might not apply; what then?' " Dworkin's reply can only be - and it is his reply - that 'We cannot be sure, before we look', because nothing in his legal theory requires that all legal systems display integrity"[35].

Finally, Dworkin must allow that, by making best sense of an existing legal practice, we may still conclude that the practice failed the ideal. Take the fugitive slave Acts for instance.[36]What should the judges do when they are legally required to send captured slaves back to the South? In order to maintain the integrity of legal system, the judges should send those slaves back but to achieve the goal of justice, judges should set the slaves free. Hence, the outcome of the judgment represents a serious conflict between integrity and jusitice. A positivist will deal this case by distinguishing legal

justice and real justice, but in Dworkin's theory, this is criticized. According to Dworkin's theory, the relevant ideal here is the ideal of integrity; it is through bad legal argument that one fails to meet that ideal, and it is bad because it hasn't made maximal use, in the circumstances of actual practice, what that actual ideal of integrity requires. So interpretivism produces an ideal, but it is not the outcome that would be the best in all possible worlds, which is how we ordinarily think of ideals. But maybe this doesn't particularly matter. We have the ideal solution in integrity and this differs from the ideal solution in justice. At times both fairness and efficiency require following precedents, but integrity is different, although it will serve both those values as well. Nevertheless, the ideal of integrity appears to be constrained by existing practices in a way that the ideal of justice is not. Or, by its nature, it seems, interpretation is only possible within the existing world, which suggests it is not an ideal at all. A cruder way of putting this point is that 'making the best sense of' existing legal practices is no more than adequately characterizing equity deficits, that is to say characterizing how far these practices fall short of the ideal.

If the Legal System is Wicked

Obviously, a consequence of Dworkin's views is that the legal system itself may not contain too many mistakes. That is because in Dworkin's theory, the normative dimension feeds on the law itself, and more importantly, Dworkin emphasizes the relationship between local politics and law. As a matter of fact, Dworkin's theory is constructed on the presupposition that the integrity of the legal community is in a large measure reflected in its law. So if the justification of law is to flow from society's political decisions (in the form of

law), it follows that these decisions must also be justifiable as such; but this is obviously not always the case, as the examples of Apartheid South Africa and Nazi Germany show. " Why would we make racism 'the best it can be?' Dworkin's argument here is circular in that it presupposes, in his case, the existence of a liberal democracy"[37]

We also note that Dworkin's theory does not require abandoning the history or anthropology of wicked legal systems. As we mentioned before, Dworkin holds the view that law should be treated as conventional, because that is a theory that clearly has a moral point[38]. " There is no need to talk in terms of 'the Hart-Dworkin debate'"[39]Stephen claims, " especially as they barely debated these questions. The debate should instead concern the theoretical question of the identification of the conditions according to which propositions of law are true. That debate is important because it concerns, amongst other matters, our moral obligation to conform to law. And so while it is right that we move away from the 'Hart- Dworkin' debate, it would be wrong to move from questions concerning the identification of law, because these are at the core of our moral obligations to the community."[40]It is true that there will be occasions when the law requires something the moral force of which grates with a judge's personal convictions. There will therefore be occasions when it may be morally right for the judge to lie - where justice trumps integrity. But I don't see how any of this affects Dworkin's theory unless, yet again, one supposes that some descriptive fact defeats the moral judgment. Both the systems of apartheid and Nazism contained elements of good that could be put to use through 'integrity'. Since these systems regularly enforced equality in some spheres, and morality says that the

racial classifications are wrong, then the laws promoting the immoral policies can be made out as dysfunctional, perverted, or even mistaken and, so, not creative of moral obligations. However, if there is no articulated and public structure that, as Dyzenhaus says, " citizens have been encouraged to obey and treat as a source of rights and duties",[41]it is difficult to see what is left. Where there is such a semblance of law, of an articulate public structure of rights and duties, citizens' acquiescence forms something of a legitimizing base, which, incidentally, Fuller called the 'external morality' of law.[42]

What will be interpreted cannot be distinguished from the interpretation itself

It is not very clear in what respect an analogy can be drawn between law and literature in that legal texts constrain judges in their interpretative activities. Some argue that legal texts themselves are texts as well and thus also must be interpreted. In other words, what is to be interpreted cannot be distinguished from the interpretation itself. " There is no such thing as a text out there"[43], and meaning is derived from interpretation. From that point of view, a previous legal text as such does not put any constraints on its interpretation but rather on the shared understandings that live within the interpreting community.

Conclusion

As we have discussed throughout this essay, although Dworkin tried to provide a theory of law, which, at least in his opinion, not only better represents what actually happens when judges decide cases but is also a morally better theory of law. It seems that his work is unsuccessful.

Dworkin tried to avoid the shortcomings of both conventionalist theory and pragmatist theory. In the theory of " law as integrity", when comes to interpretation of law, on one hand, Dworkin expects to make the judge constrained by law by arguing that the interpretation of law should follow the step of former decisions and be coherent with the existing legal system, on the other hand, Dworkin tries to make the judge creative, and emphasizes on the moral issues in the process of interpretation. Moreover, Dworkin connects law with other social elements, such as politics and local community, and enlarged the conception of " integrity".

In conclusion, we see Dworkin's theory of " law as integrity" is good in a moral level but bad in a legal level. As we have discussed in this essay, Dworkin's theory of " law as integrity" lacks applicability, if a theory only sounds good but could not be applied in practice, this theory is not a good one. In addition, as a legal theory, Dworkin's theory of " law as integrity" fails in the following essential aspects. Firstly, this theory made its sole concept " integrity" conflicted with the concept of " justice" under certain circumstances. Secondly, when Dworkin makes law closely related to politics, actually, more problems have been raised rather than solved.