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A DISCOURSE ON CONSTRUCTIVISM IN RONALD DWORKIN'S JURISPRUDENCE

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Abstract

The current focus of legal debate is the proper role of the courts in the interpretation of statutes and the constitution. Are judges to look at naked language of enactments, or to decide otherwise in their applications to cases? This paper examines Ronald Dworkin's constructive interpretation of pre-existences legal statutes. The aim of this research is to discourse the constructivism in Dworkin's jurisprudence. Objectively, this paper would (a) emphasis on Dworkin's notion on law, (b) it would expose Dworkin's constructivism, (c) it will discuss Dworkin's law as integrity (d) to elaborate on nature of interpretive stages, and (e) to proffers solution to the gap in knowledge in Dworkin's constructivism. This research will be limited on Dworkin's constructivism especially as it were discussed in his legal philosophies. Using the qualitative design in this research, this work holds that Dworkin's constructivism, to some extent, can close the gap that leads to judicial deficiencies if applied through the regard of societal values and the court sees themselves as an observer.

Keywords: Law, Integrity, Legal Liberalism, Interpretation.

Introduction

Law is a set of rules created by social or governmental institutions to guide human behaviours.. Ptah-Hotep viewed Ma'at as good, right and the opposite of bad. He posits that Ma'at is the basis for good governance in his fifth instruction. If you are a man who leads, a man who controls the affairs of many, then seek the most perfect way of performing your responsibility so that your conduct will be blameless (Asa, 18). We find normative elements in the writing of Ptah-Hotep that explain what law 'ought' to be rather than what law 'is'. For Aristotle, who sees reason as the best possible law of human behaviour? In his views, "a virtuous man is a man guided by 'the rule of reason'; which is 'the right rule'" (Aristotle, 16). Bentham argues that the purpose of government is to provide "the greatest happiness of the greatest number" and that government should be judged on that basis" (Bentham, 1). Therefore, Bentham believes that the test of government is its usefulness. Austin, like his master Bentham, conceives law as command backed by sanction. He rejects the view held by the natural lawyers that law exists independent of human enactment. However, following Bentham, Austin thinks that both the legislator and the citizens should have need of some utilitarian morality (Austin, 21). This is a morality which claims that an action is judged right or wrong according to the tendency it has to augment pleasure and reduce the pain of the greatest number. For H.L.A. Hart, Law for him is essentially a system of rules, and a legal system is the union of primary and secondary rules (Njoku, 2007:187). Ronald Dworkin was Hart's most renowned critics. He was not satisfied with Hart's version of the law, as a set of rules. Dworkin began his legal theorizing by criticizing the positivists' theory of law. He challenged Hart's views that the concept of law was exhausted by the concept of rules, that is, rules as the key to the science of the jurisprudence. For Dworkin, the law is not simply the application of rules, for there are extra-legal standards that are applied in

courts and which cannot be ignored as Hart posited in his notion of law as rules. Dworkin posited that there are also standards but not only rules. These standards are for Dworkin principles, policies and other sorts of standards. Thus, he argued that, “in hard cases where legal rules give no clear directives to Judges on how cases should be decided, Judges resort to these other standards which are not legal rules, “but operate differently as principles, policies, and other sorts of standards” (Dworkin, 1977:43). Dworkin set ground for justice through his law as integrity as the basis for justice against the union of rules as law by H.L.A. Hart, and also the different principle and fair equality of opportunity by John Rawls’. The different principle argues “that the social and economic inequalities should be structured to benefit the least advantaged members of society. This principle allows for inequalities in wealth and income, as long they contribute to improving the well-being of the most vulnerable individuals” (Emejulu,34). Njoku notes that,

people would prefer a situation that they have equal rights with others, a situation giving them as much basic liberty as possible as those others would enjoy, people would want social burdens or inequalities to be arranged in such a way that they will be to everyone’s advantage that is, spread to all offices who are open to all (Njoku, 2019:451)

Dworkin sees law as a legal exercises which deals with be consistency in interpreting the moral fabrics of a giving society and that is what he considers law as integrity which serves as his basis for justice. From here, let us consider his notion of rules, principles and policies as the basis for interpretation.

On Rules, Principles, and Policies

Dworkin argues, had generally assumed that the law of a political community comprises a set of special rules, whose primary function is to specify the forms of social behavior which are to be liable to the coercive sanctions inflicts by the governmental authority (Nigel,2018:288). The positivists had further assumed that rules of law were always identifiable by special criteria of legal validity, where these criteria stood as tests or standards concerned not with the substantive content of such rules, but with their *pedigree* that is, with the manner in which the rules were originally prescribed or adopted by the judicial and political institutions of a given community.

Dworkin argues that, the positivist jurists had neglected the status and function in law and adjudication of standards, like *policies* and *principles*, which were distinct from legal rules (Roversi, 2018:432). For him, policies articulated the economic, social and other political goals of a community, and in doing so, provided a basis for the judicial interpretation of the explicit terms of the particular body of statutory legislation through which these publicly defined objectives were realized by that community. Principles, however, articulated the general requirements of fairness and justice underpinning the law and its administration. Such fundamental principles of law were typified (Dworkin, 1975: 1057). Despite these contrasts between rules and principles, Dworkin insisted that principles formed an integral part of the modem legal system and this truth undercut the conceptual claims of legal positivism (Dworkin, 1059).

For Dworkin, Legal principles offer a justification for the rights and obligations enforced in hard cases, which remain roots in the existing law of a community. In this way, adjudication in terms of legal principles answered to the expectations of the parties in a hard case that they were entitled to a judicial determination of their legal rights and obligations

and not merely to a discretionary decision of the substantive issue at stake in their particular dispute (Roversi, 447).

Principle stands out as the central thesis of Dworkin's legal theory that civil adjudication was guided by arguments of principle rather than policy and that judicial decisions in hard cases were governed by principles of legal and political morality, which defined the rights held by individuals. The ultimate justification for the determination of concrete rights in hard cases, he argued, "was based in the reasoning of judges about the implications of the *abstract*, or *background*, moral and political rights to which their community was committed throughout its legal and institutional arrangements" (Roversi, 450).

For Dworkin, the construction of this schema required that judges should seek to formulate nothing less than a general theory of law in any society, which engages with the principles of political morality of their community at the very highest level of philosophical self-consciousness. It was in this sense that Dworkin contended that civil adjudication unavoidably involved reflection upon controversial questions of political concern. From here, Dworkin's ideas on the theory of law's one right answers thesis of law emerged after his clarification on what rules, policies, and principles are to the judiciary.

Dworkin's One Right Answer Thesis

Dworkin's one right answer thesis in the light of his constructive interpretive (and even argumentative), evaluative and integrative model. However, let us recall first its appearance and development. At the core of his criticism of legal positivism, Dworkin cautioned: To say that someone has a 'legal obligation' is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something (Dworkin, 271).

In the process of defending the one right answer thesis, on the one hand, in the center of "Hard Cases", Dworkin constructs an imaginary judge named Hercules. He argues:

A lawyer of superhuman skill, learning, patience and acumen, whom I shall call Hercules... a judge who accepts the main uncontroversial constitutive and regulative rules of the law in his jurisdiction...that is, that statutes have the general power to create and extinguish legal rights, and that judges have the general duty to follow earlier decisions of their court or higher courts whose rationale... extends to the case at bar (Beever, 2021: 412).

On the other hand, in the core of "Can Rights be Controversial? He continues with his defensive move: "My arguments suppose that there is often a single right answer to complex questions of law and political morality. The objection replies that there is sometimes no single right answer, but only answers"(Lee,2019:81). Dworkin believes that the one right answer is possible through the constructive interpretation of our preexisting legal materials.

Law as Constructive Interpretation

Dworkin uses the terms *Fit and Justification*; he offers a view of interpretation to distinguish between easy cases, where the legal sources did the work as legal formalists would argue, and hard cases, in which judges were required to move beyond the rules that were explicit in legal texts (such as constitutional provisions, statutes, and cases) and resort to principles (Dworkin, 2011:120) At this stage, Dworkin explicitly distinguished between the criteria of "fit" and "justification," and suggest;

A two-step process, step one: identify the set of possible legal rules that fits the existing institutional history (e.g., the texts of the authoritative legal materials). If there is only one rule that fits, or if all the rules that fit favor the same resolution of the case, then we need not proceed beyond step one. Step two: select from among those rules on the basis of the principles or values that provide the best justification for that institutional history (Dworkin, 1975: 1059)

The reading of *Hard Cases* may be controversial, though supported by the text. For example, in introducing the idea of a hard case, Dworkin states, “if the case at hand is a hard case, when no settled rule dictates a decision either way, then it might seem that a proper decision could be generated by either policy or principle” (1960).

In *Law’s Empire*, Dworkin uses the term *Law as Integrity* where he offers a more fully developed and systematic theory of the law, which he called ‘law as integrity’; this theory is an application of the more general method that he calls “interpretivism.” This theory seemed to differ from the theory offered in *Hard Cases* in several ideas, but for our purpose, one of these (seeming) differences is particularly important. In this second stage of development, interpretation begins with construction of the normative theory that best justifies the institutional history, including the texts of the authoritative legal materials. The theory then tries to supply the content of the law. Of course; “fit” still plays a role in a certain sense. The normative theory is a theory that provides the best possible justification for the institutional history of a particular community, and that history includes constitutional provisions, statutes, and court decisions as well. Thus, the normative theory must “fit” the institutional history.

Thus, we might call the moral theory that Hercules constructs the second-best moral theory. The objection then concludes that law as integrity requires judges to adhere to the second-best moral theory in hard cases when it is plain that in such cases, our best theory of morality would require that the judge act directly on the basis of the first best moral theory itself. But there is a problem with the execution of this strategy; in *Law’s Empire*, because he fails to offer a comprehensive theory of morality. This leaves us with the fourth possibility, which will set the stage for our discussion of the view of interpretation that has emerged in *Justice of Hedgehogs*.

In the *Justice for Hedgehogs*: Dworkin introduced *The Unity of Interpretation*. This brings us to the third stage in the development of Dworkin’s theory of interpretation. In *Justice for Hedgehogs*, he argues that “both law and morality are interpretive” (Dworkin, 2011: 253). That is, he further posited that interpretation is a general normative practice and that law and morality, as well as a variety of other human activities, are best understood as instances of interpretation. Therefore, law as constructive interpretation shows integrity from the adjudicators, which is the basis for justice in any sovereign state. And this leads us to the next view on law as integrity: the basis for justice.

Law as Integrity: Basis for Justice

Dworkin develops a complex and fascinating account of integrity that was presented in *Law’s Empire*, 1986, where he submits that judges interpret the law; hence, legal practice as a whole is an exercise in constructive interpretation. For Dworkin, constructive interpretation of judicial decision-making is in three stages or steps. He argues:

The first, the pre-interpretive stage that deals with the rules and standards that hold relevance to the case at hand are tentatively identified. The second, the interpretive

stage, the judge formulates a general theory of the motivations and rationales underlying the elements of practice identified in the previous stage. And the third stage, post-interpretive stage. The judge forms a view about what decisions of the prevailing social practice requires in the present case, taking into the account of the general framework of justification posited at the preceding stage (Dworkin, 1986: 65-68).

Dworkin's *integrity* in his *Law's Empire* was derived from a parallel ideal of personal morality, for him, even when someone disagrees on moral or ethical issues, we admire them if they stick with their principles, acting "according to convictions that inform and shape their lives as a whole, rather than capriciously or whimsically"(52). Then, that ideal, which is distinct as it is, can be transferred from moral rectitude to the political realm. Integrity, for him, becomes a political ideal when we make the same demand of the state or community taken to be a moral agent, when we insist that the state act on a single, coherent set of principles even when her citizens are divided about what the right principles of justice ... really are (Burley, 411).

In Dworkin's opinion, Integrity is a distinctive political value. He views it as a legal decision-making, from two dimensions: integrity in legislation and integrity in adjudication. Integrity in legislation requires the legislature to make the laws morally coherent, bearing in mind a set of overarching values (Dworkin, 1986: 13). It is a quality expected of a legal mind and community. On the other hand, integrity in adjudication requires judges to treat the law "as expressing and respecting a set of coherent principles" (Dworkin, 2006:9). He argues that integrity in legislation is so much part of our political practice that no competent interpretation of that practice can ignore or leave it out. For Dworkin, the value of integrity in adjudication is best explanation to judicial practice. The adjudicative principle of integrity is a kind of judicial virtue expected of a judge, and then the exercise of this principle is dependent on what the judge recognizes as law. And these lead us to Dworkin's ideas on law as integrity: myth or reality?

An Evaluation/Conclusion of Dworkin's Constructivism

Throughout his works, unlike many other legal theorists, Dworkin emphasizes that judges are not free simply to read their own political preferences into the constitution. A Marxist judge could not properly declare for example, that the best conception of equal protection requires a radical redistribution of wealth. Rather, judge is "disciplined, under the moral reading by the requirement of constitutional integrity" (Dworkin,1996:10) Integrity, according to Dworking, constrains judges in several ways. First, it requires that judicial decisions be consistent with the dominant lines of constitutional precedent and with the structural design of the constitution as a whole. Second, it insists that judges decide constitutional case on the basis of principle, not policy or political accommodation. Third, it also demands that judges will be willing to apply the relevant principle consistently in other case in which it is fairly implicated. In this way, Dworkin remarks that law is made steadily more coherent, and political morality is brought into the heart of constitutional law. Meanwhile, as a follower of Dworkin from the liberal perspective, we observed the followings as his deficiencies in law as integrity as the basis for justice. First, Dworkin fails to separate law from interpretation. For him, consistency in interpreting societal values paves ways for law as integrity which will guarantee justice in any sovereign state. But the question is, being consistent in interpreting moral fabrics to like as likes and unlike as

unlikes', does it upholds justice in any state. The answer to this question should be that Dworkin's ideas of consistency will also lead to double standards or different principles, which will aid injustice in our society.

Second, Dworkin noted that the personal morality of anyone is as important in law as integrity; by this, he has reduced judges being consistent in their interpretation of individuals' personal integrity. He fails to consider the judge of integrity and the judge with integrity; the judge of integrity is a judge who argues for the betterment of preserving the future of the judicial system no matter the circumstances surrounding him before the bar. Judge with integrity are judges who do not care about the future of their judicial system but rather the rulings that will favour their personal gain irrespective of whatever happens. From the readings of Dworkin's works, he never defined what integrity is in itself. And therefore, we do not know what he conceived integrity to be.

Third, Dworkin's ideas of law as integrity fail to consider the society which the interpreter may come out from and the roles of the government in power to the judiciaries as well. Having pointed out some of the gaps in Dworkin's ideas on law as integrity. In reformation of Dworkin's law as integrity, we therefore proposed *Akurukam theory of law* as the basis for justice against the notion of Dworkin. First, we define law as the political activities of any sovereign state against the notion of Dworkin, who defines "law as the judicial activities of any sovereign state" (Churchill, 78). In Akurukamism, we introduced three grounds which will tackle the deficiencies in Dworkin's law as integrity.

First: *Sociological point of view*, Dworkin fails to consider society in his idea of integrity because judgment is relative depending on the society. This means that in considering integrity in any judicial issues then, society must be considered because no one will talk about the community which he is not part of. Secondly, We argue from the anthropological point of view that integrity has to do with man, and we should ask what kind of judge is involved because he is a human as well. Dworkin argues that the issue of integrity involves personal morality; for him, personal integrity deals with one principle towards dealings on a daily basis and, by so doing, has reduced integrity to individual affairs but not judges' affairs. Recall that ethics serves as a guide to judge people's actions and behaviour in society. Oluwadunsin et al. pointed out that "ethics and morals seem to be synonymous terms; the difference is that ethics relates to individuals while morality relates to social conduct" (Oluwadunsin et al., 41). Secondly, Dworkin fails to set out a realistic view of the kind of human being who should qualify to be accepted as a judge, but he is considered an imaginary judge, whom he calls *Hercule*. And this leads us to what we consider a judge with integrity and a judge of integrity. Judge with integrity means a judge who is consistent in interpreting elite cases as elites and consistent in interpreting peasant classes as peasant, as documented in the bible in Ecclesiastes chapter 5: 8-9, which argues, Don't be surprised when you see that the government oppresses the poor and denies them justice and their rights. Every official is protected by someone higher, and both are protected by still higher officials, and even a King depends on the harvest, which mostly happens in third world countries like Nigeria. A judge of integrity is a judge who is superhuman, who has the knowledge that an individual's legal right is one and must be protected, is a judge who does not see any man be more important than others. Therefore, he interprets the institutional and legal history of such a sovereign state. We, therefore, endorse the use of judges of integrity in any judicial system against judges of integrity, which Dworkin fails to distinguish from. Third: We argue from *bad man point of view of law*. Law is viewed



from the consequences that the judge argues for or against. We argue from two perspective: one, law is considered from the end product of the society which means to keep the integrity of the future of our legal system and two, the negative implication which it should caused to the judge who rules over against what is entrust in him, because legal liberalism argues that, the confidence in the ability of courts to change society for what judges believe is the best for the society. We also recommended for dead penalty against any judge who inconsistently interprets legal terms for her gains against the protection, reservation of the future of our judicial system for the better of our legal system.

References

- Aristotle. *Politics*, Transl. With an Introduction notes and Appendixes by Ernest Barker. Oxford: Oxford University Press, 1958.
- Austin John. *The Province of Jurisprudence Determined*, (ed). Wilfrid Rumble. UK: Cambridge University Press, 1995.
- Bentham Jeremy. *Of Law in General*, (ed) by H.L. A. Hart. London: Athlone Press, 1945.
- Beever, Allan. *Law's Reality: A Philosophy of Law*, USA: Edward Elgar Publishing Limited, 2021.
- Burley Justine. *Dworkin and his critics: with replies by Dworkin*. UK: Blackwell Publishing Ltd, 2004.
- Churuchill Robert P. "Dwrkin's Theory of Constitutional Law". *Hastings Constitutional Law Journal*, Vol.8, No.3, 75-86 (1980).
- Dworkin Ronald. "Hard Cases", *Harvard Law Review*. Vol. 88, No. 2, 105-19. (1975).
- Ronald Dworkin. *Is Law a System of Rules, The Philosophy of Law*. Oxford: University Press, 1977.
- Dworkin Ronald. *Justice for Hedgehogs*. Cambridge: Harvard University Press, 2011.
- Dworkin Ronald. *Law's Empire*. Cambridge: Harvard University Press, 1986.
- Dworkin Ronald. *Freedom's Law: The Moral Reading of the American Constitution*. Oxford: Oxford University Press, 1996.
- Dworkin Ronald, *Justice in Robes*. Cambridge: Harvard University Press, 2006.
- Jennifer Emejuju. "A Rawls Intervention On Ethnicity, Social Justice And Development In Nigeria", *Sapientia Journal Of Philosophy*, Vol. 19, 30-39 (2023)
- Hilliard Asa G. 111 et al. (Eds), *The Teaching of Ptah-Hotep*. Egypt: Blackwood Press, 1987.
- Nigel , Simmonds. *Central Issues in Jurisprudence*, UK: Sweet & Maxwell, 2018.
- Njoku, O.C. Francis. *Studies in Jurisprudence: A Fundamental Approach to the Philosophy of Law*. Owerri: Claretian Institute of Philosophy, 2007.
- Njoku, O.C. Francis. *Introduction to Social and Political Philosophy*, Nsukka: University of Nigeria Press, 2019.
- Oluwadunsin et.al, "A philosophical Analysis of the basis of Morality in the African Thought System". *Sapientia Journal of Philosophy*. Vol. 19, 40- 53 (2023).
- Roversi, Corrado. *Law as an Artifact*, Oxford: University Press, 2018.
- Youngwon, Lee. (eds) . *Research Handbook on Natural Law Theory*, USA: Edward Elgar, 2019.