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Dworkin's interpretivism and the Indian jurisprudence

Umang Pathak

INTRODUCTION

The paper aims to provide an analysis of the legal interpretivism concept by Ronald Dworkin with the help of the landmark supreme court judgments on various disputes in India. PART I of the paper shall provide a comprehensive understanding of Ronald Dworkin's thesis on principles and morality playing an imperative role in the content of a law. Furthermore, it also bring forth the rights thesis purported by Dworkin in *taking rights seriously* on resolving hard cases where there is no clear law under a statute and decision shall depend upon the judge's discretion, which shall also include the understanding of Judge Hercules, doctrine of political responsibility and articulate consistencies[1][1]. Part II of the paper shall attempt to situate Dworkin's concepts in the purview of some landmark Supreme court decisions. Part III of the paper shall provide author's critical comments on the concept with the help of external literature and authorities cited.

PART I – DWORKIN'S THEORY ON LEGAL INTERPRETIVISM

The fundamental theory under Legal positivism is the existence of separability thesis, which states that morality and laws are conceptually distinct from each other[2][2]. Therefore, any consideration to morality while defining related notions of law, legal system or legal validity shall be inconsistent with the aforementioned thesis[3][3]. However, Ronald Dworkin's theory on pure, non-hybrid interpretivism would put forth a critique to this argument stating that, while defining the content of law, explanation of the morality and principles behind it is of paramount importance[4][4]. Since the premise of the law is based on institutional practices, customs and tacit agreements of the people as elucidated by Hart, Dworkin argues that principles and morality governs and dictates those institutional practice[5][5]. He argues that, there exists certain principles and values which formulates the content of the law, and enforcement of such a right is not legally, but morally enforceable right[6].[6]

Dworkin puts forth an argument that the mechanical practice of applying the established rules without invoking morality and principles is inconsistent with his theory of interpretivism[7].[7] He argues that, in any type of disputes, the judges have to invoke principles within an established constitution, and policy, which includes political decisions based on the idea of collective good

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1 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (2d ed., 1977).
2 John Finnis, *The Truth in Legal Positivism, The Autonomy of Law Essays on Legal Positivism*, 194–205 (1999).
3 *Id.*
4 Scott J. Shapiro, *The "Hart–Dworkin" Debate: A Short Guide for the Perplexed, Ronald Dworkin*, 22-25 (2010).
5 *Id.*
6 *Id.*
7 *Id.*

and social welfare[8].[8] This is important for adjudicating on hard cases, since Dworkin criticizes the idea of creation of new laws by judges according to Hart. He argues that, judges should not take up the roles of legislators when there exists no established statute for a particular dispute, rather should justify their political driven decisions with some principles invoked from established rules and regulations. For example, in the *Spartan Steel* case, the defendant's employee damaged an electronic cable of the power company which supplied power to the plaintiff's factory, due to which it had to shut down its operation until the cable was repaired.[9] The question before the court is whether the petitioner had a right to recover damages from such the negligent act by defendant. The court held on the pertinent issue that since the damage was very remote, the defendants didn't owe a duty of care to the plaintiff's factory.[10] The judges in this case emphasized on the principle that, any economic loss sustained by the plaintiff due to the defendant's negligence can only be accrued till the extent of their duty of care. No one has the right to recover damages which are outside the scope of duty of care.

On a policy based decision, there would've been an equal distribution of economic loss, if the petitioner had the right to recover damages in the first place. According to Dworkin, principles have to rationalize the policy based decisions by the judges, and those principles have to be consistent in application with respect to similar kind of disputes. This is called the doctrine of political responsibility.[11] Furthermore, judicial decisions should reflect the political rights of the past which is called as the rights thesis. Although there might be a compromise with a new, fairer decision, but the decision must be given in consideration with the political decisions of the past.[12] Finally, Dworkin presents his fictional alter ego, Justice Hercules, who has the ability to resolve hard cases with a substance and fit thesis, stating that, decisions have to made, on the basis of aforementioned theories and principles, called as the substance of the argument, which will perfectly fit the fundamental issue of a case, thereby achieving justice to either of the party.[13]

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[8] Barry Hoffmaster, *Understanding Judicial Decision*, 21-55 (1982).
[9] Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd, QB 27 [1973].
[10] *Id.*
[11] DWORKIN, *supra* note 1.
[12] *Id.*
[13] *Id.*

PART II – ANALYSIS OF INTERPRETIVISM IN LANDMARK SUPREME COURT CASES

In this section of the paper, the author shall attempt to analyse pure, non-hybrid interpretivism with the help of landmark Supreme Court cases.

BASIC STRUCTURE DOCTRINE

In the decision of *Kesavananda Bharti v. State of Kerela*, the supreme court by majority held that, "By virtue of art. 368, parliament could amend any part of the Constitution so long as it did not alter or amend the basic structure or essential features of the Constitution".[14] Before the case, under art. 368 the parliament had constituent power to enact laws and amend any part of the constitution, regardless of any restrictions imposed upon them. Justice Hercules, as according to Dworkin, would probably affirm this judgment as it conforms with the rights thesis. The concept of the basic structure was invoked by emphasizing on the morality within the constitution. Simply put, the principle in this case invoked by the judges was "no law or amendment could abridge or take away the fundamental rights guaranteed by the constitution".[15] Furthermore, this principle justified their policy based decision by ensuring that India does not lose its character and essence of being a democratic republic country. The political history of India was developed through the ideas of a free country after the colonial period, where the people would have the authority and the power to make the government accountable for its decision.[16] That is why, the decision collectively upheld the power of the people in a democratic society, by not allowing the government to turn democracy into dictatorship.[17] Clearly, the power of constitutional amendments were upheld since the government had the majority will of the people but morality invoked within the constitution limited their powers till extent to not altering the basic structure or abridge fundamental rights. In my opinion, this was a correct decision and Dworkin would also agree upon this, because the responsibility of the courts is to check and balances the actions of the executive. If it goes beyond their threshold, clearly violating the essence of the constitution, then the judges are mandated to adjudicate upon the issue. Lastly, this principle should be applied consistently with the similar set of facts and issues according to doctrine of articulate consistency, which it was in the decision of *Indira Gandhi v. Raj Narain.*[18]

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[14] Kesavananda Bharti v. State of Kerela, (1973) 4 SCC 225 (India).
[15] *Id.*
[16] Upendra Baxi, *A known but an indifferent judge": Situating Ronald Dworkin in contemporary Indian jurisprudence*, (2003).
[17] *Id.*
[18] Indira Gandhi v. Raj Narain, 1975 AIR 865 (India).

This decision struck down the 39th amendment which introduced art. 329A to the constitution. This article barred adjudication on any issues, discussion or complaints regarding the election of the prime minister and the speaker in any courts of law in India.[19] The decision invoked the previous principle of basic structure doctrine and regarded such action by the government to be unconstitutional. According to Justice Mathew, "a healthy democracy can only function when there is the possibility of free and fair elections, the impugned amendment destroyed that possibility and therefore violated the basic structure of the Constitution".[20] The principle, similar to the previous case, was whether there exists a right of the parliament to amend the constitution which fundamentally took away the essence of the Constitution. By majority, the answer to this was in negative, and therefore, Dworkin's doctrine of articulate consistency was also conformed with this decision.

VALIDITY OF SECTION 377

In the decision of *Navtej Johar v. Union Of India,* the Supreme Court of India held section 377 of Indian Penal Code to be unconstitutional to the extent that it criminalized same-sex intercourse violative of art. 14, 15, 19 and 21. [21] The draconian section 377 of the IPC criminalized "carnal intercourse against the order of nature", which basically implied that consensual same-sex intercourse was prohibited.[22] The court's decision primarily invoked the morality of the constitution, whether "choice" of any individual should be restricted on such an arbitrary ground of action being against the "natural order".[23] Dworkin would ask, whether there exists a right of the petitioner to have freedom to choose the practice of sexual intimacy on the basis of his sexual orientation within the constitution. Simply put, whether there can be an argument on the basis of morality within the constitution, which upheld the rights of the petitioner to have freedom to do whatever they would like to do, and not in consequence, be discriminated and criminalized due to a statute. Majority of the court held that, since the section arbitrarily discriminates against the LGBTQIA+ community, the choice of the practice of sexual intimacy and their sexual orientation, it goes against the principles enshrined in the constitution. The court held that, since the homosexual act is inherent to the dignity of the individuals belonging to the LGBTQIA+ community and this statute in specifically discriminated against their fundamental right to choose their sexual orientation and the practice of intercourse, therefore,

[19] *Id.*
[20] *Id.*
[21] Navtej Johar v. Union Of India, AIR 2016 SC 4321 (India).
[22] IPC s. 377.
[23] *Id.*

this section should be held unconstitutional.[24] Through Dworkin's lens, this sounds exactly the decision Judge Hercules would have made, if the dispute had to be resolved by him. This affirms the rights thesis in which Hercules also would have asked the question of principles and morality which can be invoked within the constitution, as mentioned above and politically, it upheld the civil rights of LGBTQIA+ community thereby also fulfilling its policy based objective of social welfare.

RELIGIOUS FREEDOM

In *Bijoe Emmanuel v. State of Kerala,* where the court held the order of expulsion of children of Jehovah's witnesses on the basis of not singing the national anthem in a school assembly, to be unconstitutional and violative of art. 19 and 25[25]. On Dworkin's perspective, the court should not apply the directive principle of state policy of Constitution without considering morality and principles. There exists a right of the individual to freely profess and practice their religion which comes from the principle that, the essence of a democratic society is the acceptance of diverse faith. This principle also should be invoked within the constitution, according to Dworkin, which is implicit under the fundamental right of article 25. Therefore, the majority of decision invoked this principle of acceptance of diverse faiths and practice and declared the expulsion to be unconstitutional. Furthermore, in a democratic society, individuals aren't necessarily obligated to speak or sing the national anthem of their country. The right to remain silent is the principle which is inherent under art. 19, and therefore, Judge Hercules would accrue this principle and the right under the constitution and shall declare any order that takes away that right unconstitutional.

PART III – OPINION AND CONCLUSION

In this segment, I'd like to provide with some critical opinions on the aforementioned theory. Dworkin states that, judges cannot take up the roles of deputy legislators and they necessarily have to invoke principles only within the constitution and based on the political history of the past. This essentially is a doctrine of separation of powers argument, which mandates a strict demarcation of roles to each organs of the state. However, in *Ram Jawaya Kapur v. State of Punjab*, the court has established that in India, there exists no strict separation of powers.[26] For example, in *Vishakha v. State of Rajasthan*, the court laid down general guidelines which were enforceable as

[24] *Id.*
[25] Bijoe Emmanuel v. State of Kerela, AIR 1987 SC 748 (India).
[26] Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549 (India).

laws for the prevention of sexual harassment against women in workplace.[27] However, the way purported by Dworkin, invoking morality within the constitution sounds reasonable to me. This is because, most of the rights, such as right to privacy[28] or right to essential religious practices are invoked through principles within constitution, which I believe is the most sound and logical approach. I further believe that Dworkin's emphasizes on some kind of morality behind a social practice, might not be true in all of the situations.[29] For example, if there is a social practice of drinking tea in the morning and the evening, there need not be any principle or morality behind it. Some social or institutional practices have been developed throughout continuous practice, it need not be explained through morality.[30]

[27] Vishakha v. State of Rajasthan, (1997) 6 SCC 241 (India).
[28] Justice K.S. Puttaswamy v. Union of India 2017 10 S.C.C. 1.
[29] Sudhir, *Dworkin's Theory of Interpretation and the Nature of Jurisprudence*, (2016).
[30] *Id.*