

Dworkin's Integrity as a Political Value: A Critique

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*Ronald Dworkin in his much-celebrated work, *Law's Empire* (1986), put forth a number of diverse ideas on law's inner morality including some ground-breaking and thought-provoking notions on jurisprudence. He predominantly used American examples such as the Congress and its procedures in law-making in the hypothetical scenarios he chose to make the readers comprehend the components and values that shape the law and its structure. Dworkin propagated his idea, political integrity, in this seminal work asserting that a state is more legitimate if it holds integrity as a political virtue as opposed to the one that does not; meanwhile he rejected the social contract theory and all forms of contractarianism promulgated by classical liberal theorists. Instead, he put forth the argument that political obligation is form of associative obligation which is owed to family, friends and neighbours. He promulgated that legislative integrity as a principle should override other factors while enacting laws, but also admitted the impossibility of bringing about all diverse set of laws under a single scheme of principle. He further enquired why checkerboard laws are rejected although there is no argument of justice against them. This article will thoroughly analyse and critically evaluate the values within Dworkin's political integrity and its justifications, if any, while prudently considering the academic debate surrounding the theory.*

Introduction

The American philosopher and constitutional law intellectual, Ronald Dworkin, is a liberal whose work ranges widely from legal and political theory to commentary on major political issues.² Dworkin developed his much discussed and well-known theory of integrity in his book *Law's Empire*. Integrity, according to Dworkin, has two aspects – political integrity and integrity in adjudication. Since the purpose of this article is to examine the political theory of Ronald Dworkin, discussion of integrity will be centered on political integrity.

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² Michael DA Freeman, *Lloyd's Introduction to Jurisprudence* (London: Sweet and Maxwell, 8th Edition 2010), 717.

Amongst the political philosophers, the issue of the origin and nature of political obligation – the obligation to obey the law, for example – has been a contentious subject of debate. The origin of political obligations are often sought in contract in the liberal tradition, but Dworkin's version is opposed to the contractual paradigm argument as established in the early social contract theory and the later theories as promoted by contemporaries such as Rawls.³ To Dworkin, philosophers have acted erroneously by attempting to stem political legitimacy from ideas like justice.⁴

Dworkin also rejects Rawls' fair play theory suggesting that it allows too much given its presupposition that receipt of benefits can impose or incur obligations irrespective of whether such benefit was sought or not which leaves "benefits" as a term gravely obscure.⁵ Dworkin wishes to avoid all forms of contractarianism and instead attempts to place his account emphasising social practices as no more than practices which helps citizens to ascertain the nature and scope of the political obligations through ordinary intuitive sense from communities in which they function.⁶

According to Dworkin, in order to uphold integrity, a government ought to speak in one voice coupled with acting toward all its citizens in a principled and coherent manner while applying the identical substantive standards of justice or fairness towards everyone⁷ without allowing for special treatment for some. Dworkin attempts to assert that integrity is inherent in our community and the political arena like other ideals such as fairness, justice and procedural due process that exist in our community and politics. By the end of this article, it would appear that integrity is not an independent value of its own to begin with. It is rather an illusion which needs other values in its support to claim its existence. In this article Dworkin's claims regarding integrity will be assessed in light of other legal theories and surrounding academic literature.

³ Sandra S Berns, "Dworkin's Account of Associative Obligations: New Clothes for an Old Theory?", *Western Australian Law Review* 21, (1991): 89.

⁴ Ibid.

⁵ Ibid.,90.

⁶ Ibid.,90.

⁷ Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986),165.

Rawls' Theory of Justice

Since Dworkin paid much attention to reject Rawls' theory, it is imperative to discuss Rawls' theory briefly at first. Central to Rawls' *A Theory of Justice* was the idea of "justice as fairness" which sets out substantively a version of democratic social justice. Rawls argues in favour of a more extensive state wherein the government is obliged to provide citizens with access to the needs that are basic to human life and also to look after the welfare of those who are least well off. This includes state provided welfare education and health services funded through taxation.⁸ By "justice as fairness" Rawls means, the set of principles that would be selected by persons in the "original position"⁹ from behind a "veil of ignorance"¹⁰ to the basic structure of society. According to Rawls, two principles would be selected in the original position:

- (a) *Individual citizens are entitled to an equal right to the "most extensive scheme of basic liberties compatible with a similar scheme of liberties for others"; and*
- (b) *"Social and economic inequalities are to be arranged so they are both –*
 - (i) *Reasonably expected to be to everyone's advantage; and*
 - (ii) *Attached to positions and offices open to all."*

Rawls' proposition of justice as fairness is abstracted from the social contract theory which he defends as the most reasonable and preferable conception of justice. His main theme is distributive justice which is concerned with the manner goods and freedoms should be shared in society. To Rawls, a distribution is just "if everyone is entitled to the holding they possess under the distribution."¹¹ He suggests that it is sometimes justified to treat people unequally where unequal treatment results in improvements for everyone. Furthermore, Rawls defends the obligation to obey the laws and the legitimacy of the government with his justification of "fair play" which maintains that someone receiving benefit under the standing of a political organisation is obligated to bear its burden that includes the obligation to not refuse the

⁸ Rachael Patterson, "The Minimal State v The Welfare State: A Critique of the Argument between Nozick and Rawls," *Southern Cross University Law Review* 9 (2005): 174.

⁹ The "original position" is a hypothetical situation in which rational but mutually disinterested individuals, mutually capable of sense of justice and concerned to further their interests, select, from behind a "veil of ignorance", principles of justice applicable to the basic structure of society.

¹⁰ The "veil of ignorance" means that persons in the hypothetical "original position" are unaware of such things as their wealth, intelligence, social standing or conception of good.

¹¹ Patterson, *The Minimal State*, 178.

political decisions of the organisation irrespective of whether the benefits were solicited or unsolicited and without having the need to consent to bear the burdens.¹²

Clearly, Rawls' idea of state and political organisation calls for an extensive state as opposed to the minimal state promoted by Nozick,¹³ for instance. In Rawls' extensive state, citizens might be offered some basic rights such as healthcare system and education funded by the state which would certainly have a positive impact on the lives of those living just above or under the borderline and those with an underprivileged and deprived background. However, it would come at the cost of being subjected to accept political decisions of the organisation perhaps without having a say on the matter. Rawls did not stop at that point though but indicated that once such benefits are received by citizens, the state does not require citizens' consent to impose any burden i.e. to accept all its political decisions. It may be argued that those living just above or under the borderline might be willing to accept the burden as they are receiving the benefit from the organisation, absence of which would not have allowed this section of citizens to have access to necessities and fundamental human rights such as access to healthcare and education.

On the contrary, the wealthy and well-off section of citizens of the same society might be opposed to the idea given they can effortlessly afford the necessities as aforementioned and would not want themselves to be subject to unsolicited burdens such as to accept all the political decisions of the organisation. It could also be that the wealthy would prefer private education and healthcare rather than the state funded services meaning that the political organisation lacks any sort of moral ground and perhaps legitimacy to impose their decisions or exert pressure on the wealthy. This is argued because the receipt of burden only came into place because of receiving the benefit. If a class of citizens are not receiving or decline to receive such benefit as offered by the political organisation, would it not be unconscionable for the organisation to impose any burden on them? Unfortunately, Rawls appears to have failed to address these competing issues.

¹² Dworkin, *Law's Empire*, 193-194.

¹³ Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974), 113.

Dworkin's Political Integrity

Dworkin advocates for integrity in state action and claims that a state has a better case for legitimacy if it embraces integrity as a political virtue than the one which does not.¹⁴ Integrity requires citizens to accept demands on them capable of reciprocally making demands on others which has the effect of “sharing and extending the moral dimension of any explicit political decisions.”¹⁵ Dworkin attempts to reject all forms of contractarianism such as the social contract theory propagated by the classical liberal theorists and the contemporaries like Rawls and Nozick. Dworkin is critical of Rawls’ “original position” and its justification of “fair play” and questions why such an obligation is special. Besides, the explanation of Dworkin’s account relies on community or fraternity.

According to Dworkin, political obligation is a type of “associative obligation”¹⁶ by which he indicates some biological or social groups observing special responsibilities attached through social practices by virtue of their membership akin to the responsibilities of family, friends or neighbours.¹⁷ To Dworkin, associative or fraternal obligations are special in that they are confined to members of the group, and non-consensual, because we do not choose the obligations we owe to friends or colleagues.

Similar to Rousseau, Dworkin recognises that if the concept of the “community personified” is to be a meaningful idea, providing the foundation for our political obligations cannot be confined to political community as such. Rather, Dworkin wishes to use “associative obligations” which, he suggests, arise within families and other biological and social groups as the foundation for his claim that certain sorts of political communities generate similar associative obligations.¹⁸

However, a community’s social practices give rise to “genuine” obligations provided certain conditions are satisfied in that the community must be “true” rather than “bare.” Dworkin argues that these obligations arise through social practices and a “bare” community turn into a “true” community provided four conditions are met: a) the members must regard the group's obligations as holding uniquely within the group; b) they must accept that these

¹⁴ Ibid., 191- 192.

¹⁵ Freeman, *Jurisprudence*, 729.

¹⁶ Dworkin, *Law's Empire*, 196.

¹⁷ Ibid.

¹⁸ Berns, “Dworkin’s Account,” 92.

responsibilities bind member to member (that is, apply between themselves rather than to the group as a whole); c) they must perceive these responsibilities as linked to a concern for the well-being of each of the members; and d) the members must believe that the practices of the group show equal concern for all its members.¹⁹

If the aforementioned conditions are met, then the community is regarded as a “true” community rather than merely a “bare” community which is characterised by Dworkin as fraternal. He further relies on the notion of reciprocity to explain “associative obligations.” In his words, “friend or family or neighbours need not agree in detail about the responsibilities attached to those forms of organisation,” but they must show “roughly the same concern” for each other.²⁰ To Dworkin, political obligation is a form of “associative obligation” such that a nation state that imposes obligations upon its members including the obligation to obey the law by virtue of membership of that nation “group” is a bare community.²¹ For the obligations to be regarded genuine, the community ought to hold the characteristics of a true community. Only a community that endorses the ideal of integrity which is regarded by Dworkin as “a community of principle”²² can claim the authority of a genuine associative community. Provided these conditions above are met, the political organisation can claim moral legitimacy owing to the fact that obligations are not based on bare power in the name of fraternity but the result of collective decisions.²³

Dworkin's Theory: A Critique

Dworkin emphasises that not only must the members show concern for the well-being of other members, but they must also believe that the practices of the group demonstrate equal concern for the welfare of each individual member. The exclusive emphasis upon equal concern marks a significant departure from Dworkin's earlier connection between equal concern and equal respect, both in the context of associative obligations and in the context of the responsibility of government generally.²⁴

¹⁹ Dworkin, *Law's Empire*, 199- 200.

²⁰ Ibid., 196.

²¹ Freeman, *Jurisprudence*, 731.

²² Dworkin, *Law's Empire*, 215.

²³ Ibid.

²⁴ Berns, “Dworkin's Account,” 93.

The language used by Dworkin suggests that the beliefs of participants in the practice are critical in assessing the legitimacy of the obligations asserted and that these beliefs are open to critical evaluation from outside the practice itself. Dworkin himself admits that genuine communities fulfilling the conditions discussed above might still be unjust or promote injustice either with respect to the members of the group or with respect to non-members. If it occurs that the so-called genuine communities act unjustly or promote injustice, should the defective features be compatible with the practice as a whole?²⁵ Are the injustices so fundamental that the unjust obligations created by the practice are void, or do they continue to subsist despite the injustice wrought?²⁶

Another commentator outlines, when Dworkin restricts self-governance in any way, one must ask whether he continues to respect the equally cherished individual. While majoritarianism may seem to run very much counter to the rights of minorities and individuals who are members of those minorities, Dworkin's particular rejection of majoritarian theory serves as a prime example of another problem.²⁷ Newman's point reminds Dworkin that democracy is not only government for the people, but of and by the people as well.²⁸ Under Dworkin's view, the ideal form of government would be a benign and even-handed trustee which would make all decisions in our interest showing equal concern to all and respect as a good trustee should.²⁹ This vision leaves something out: the idea of self-government or political liberty.³⁰

As regards Dworkin's "special" or "true" community, several problems may be identified. In elaborating the fourth condition (that being equal concern) for being a "true" community, Dworkin himself discusses the examples in the context of the family of a culture that expects parents to choose husbands for their daughters but not wives for their sons. Critiques argue that shared assumptions in a patriarchal family appear only to be superficially attended by differential levels of protection and by paternalism which appears appropriate when applied to women and girls but inappropriate when applied to men and boys?³¹ In our society the

²⁵ Ibid.

²⁶ Ibid.

²⁷ Dwight Newman, "Individual, Subnational, And International Identity: A Critique of Dworkin's Concept of Community", *Windsor Yearbook of Access to Justice* 17, (1999): 91, 92.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Berns, "Dworkin's Account," 93.

overall entitlements of women (and girls) remain less than equal precisely because of their familial roles and the economic inequalities attendant upon those roles.

Would it make a difference if Dworkin had, instead, imagined a family in which boys and young men were subject to stringent parental constraint upon the basis that due to the predisposition of young men to violent behaviour special protection was required until they were sufficiently mature to control their violent impulses? It is contended, that no existing families are organised upon this basis and that there is at least some empirical evidence to support the argument that men and boys are more likely to resort to violent behaviour and therefore such constraints, in our culture, might well appear wholly reasonable and grounded in empirical evidence.³² Given the social sanctions against violent behaviour, such constraints might reasonably be supposed to demonstrate equal concern.³³

Law-making and Political Legitimacy of the Government

Law-making and legitimacy of the government is already considered with associative obligation. Dworkin asserts, associative obligation is a form of political obligation and a community of principle that adheres to integrity has the best claim of legitimacy as a government and to deploy a monopoly of coercive force.³⁴ As Dworkin puts it, if the constitutional structure and practices of state are such that the duties it purports to impose through political decisions on citizens are general obligations of the latter to obey such decisions.³⁵

Besides, regarding the creation of law, Dworkin articulates that integrity pertains to principle wherein simple form of consistency is not requisite. But, it is necessary to conform to legislative principle of integrity which requires the legislative to give maximum effort to provide protection to everyone in line with what is ascertained as the moral and political rights of citizens reflecting consistent arrangement and structure of justice and fairness.³⁶ Dworkin's statement could be refuted by yet another statement of his own in order to show how contradictory his theories are. At another place in *Law's Empire*, Dworkin conceded that it was impossible to bring about all the diverse rules and other standards

³² Ibid., 94- 95.

³³ Ibid.

³⁴ Dworkin, *Law's Empire*, 191-192.

³⁵ Ibid.

³⁶ Ibid, 221.

enacted by the parliament under a single scheme of principle.³⁷ These contradictory statements of Dworkin are self-destructive in nature which would have the effect of extinguishing his already fragile and delusional theory.

However, Dworkin also admits that the legislature may decide to favour a particular group based not on the ideal of justice but only because benefitting that group happens to work for the general interest. Dworkin stresses, integrity is not violated if an individual or a group of people is given primacy over another for reasons of policy.³⁸ Does it not contradict the “equal concern” principle which he himself purport to have propagated? Furthermore, in case of policy-making Dworkin adopts the utilitarian concept that political decisions must be taken in a manner that advances or protects some collective goal of the community as a whole.³⁹ This notion once again contradicts his previous assertion that some individuals or groups could be given primacy over another.

Individual Rights as Trumps

Now the issue is whether Dworkin holds true to his promises to the individual, and the liberal commitment to the individual which amounts to a pledge that the individual is to be free to lead his or her life from the inside, based on his or her personal beliefs.⁴⁰ How is Dworkin going to justify these policies that may violate individual rights? What about his rights as “trumps” which serve to protect the individual against the encroachment measures which seeks to advance collective goals? Does Dworkin’s utilitarian policy not contradict with his rights as “trumps?” In addition, Dworkin himself is conflicting his “community of principle” with his two other communities mentioned in *Law’s Empire* namely – “de facto” and “rulebook” community as he is allowing others, i.e. legislatures to use some as means to meet certain ends. One could ask in what way is his “community of principle” adopting integrity better than the other two communities? Dworkin’s theories appear to hold enough profundity to provide solution to the hypothetical situations as posed above and rather seem to be contradictory.

³⁷ Ibid., 217.

³⁸ Ibid., 222.

³⁹ Ibid.

⁴⁰ Newman, “Individual,” 93.

Nozick possibly has a better answer as regards individual autonomy and individual rights. In general, Nozick contends that people are born with fundamental individual rights.⁴¹ These individual rights are paramount such that there is no need for a system to achieve moral equilibrium⁴² while rejecting all end-result theories, i.e. distributive theories. Nozick rather adopts the 18th century philosopher Immanuel Kant's principle of "individual inviolability" that cannot be violated as a means to achieve particular ends, meaning the significance of each person's possessions of self-ownership is that people should not be used as resources or as a means to achieving some end.⁴³ According to Nozick, it is wrong to treat people as if they are merely of instrumental worth or to sacrifice one person for another.⁴⁴ He claims that the rights of others determine constraints on our actions.⁴⁵

Value of Integrity in Legislation: A Critical Analysis

Dworkin's primary example in favour of the value of integrity in legislation concerns "checkerboard" laws that apply an arbitrary settlement to political disagreements.⁴⁶ He argues that integrity explains a current feature of our political practice – the rejection of checker-board policies. Why, he enquires, do we not organise decision-making so that each competing viewpoint on any given issue is reflected in the rules produced according to the numbers supporting it? For example, why not allow access to abortion to women born in even years and deny it to women born in odd years if the population is evenly divided about the morality of abortion?⁴⁷

Dworkin maintains that generally such solutions are rejected even though they are fairer and there is no argument of justice against them,⁴⁸ and integrity is needed to explain why. Dworkin argues that justice could condemn checkerboard policies only if it were likely that the

⁴¹ Asif Salahuddin, "Robert Nozick's Entitlement Theory of Justice, Libertarian Rights and the Minimal State: A Critical Evaluation," *Journal of Civil and Legal Sciences* 7, no. 1 (2018): 1, 3.

⁴² Ibid.

⁴³ Ibid; Patterson, "The Minimal state," 169.

⁴⁴ Patterson, "The Minimal State," 169.

⁴⁵ Salahuddin, "Entitlement Theory," 41; Patterson, "The Minimal State," 169.

⁴⁶ Dworkin, above n. 7, at p. 179; Robert Westmoreland, "Dworkin and Legal Pragmatism," *Oxford Journal of Legal Studies* 11, no. 2 (1991): 174.

⁴⁷ Dworkin, *Law's Empire*, 178.

⁴⁸ Ibid., 179.

chequerboard would produce more instances of injustice than it would prevent.⁴⁹ If one believes that there is a right to access to abortion, the chequer-board approach will be preferable to a total denial of access and from the point of view of the outcome, it is better to allow some women to have abortions than none.⁵⁰

A commentator argues that two questions need to be answered at this point; first, what is the reason behind politicians and activists not generally advocating for chequerboard policies.⁵¹ Reaume believes, it can be explained by principles of justice without appeal to integrity, although it does not entirely eliminate chequerboard policies as a possibility.⁵² Second, is there any other reason to reject checkerboard policies?⁵³ It is argued, to the extent that chequerboard policies are regarded with suspicion for reasons of justice and when these features are absent, chequerboard policies are not rejected.⁵⁴ Integrity, conceived of as independent of justice is not needed to explain this conundrum. Further arguments are not necessary to establish that it is integrity which requires the adoption of principles which is already achieved by a requirement to pursue justice. Indeed, activists must start from some position of principle, or they would have no basis for making a judgment about how to ensure the fewest instances of injustice.⁵⁵

As regards Dworkin's illustration of the torture victims, in which a rescuer, knowing that it is impossible to save all the victims from torture, must decide what to do. Given this fixed choice between saving none and saving only some, under such circumstances, it is argued that it would of course be absurd to argue that justice requires saving none because no one has any greater claim than any of the others.⁵⁶ Ordinary politics does not usually embrace chequerboard solutions as a positive alternative, because both competing principles of justice are live options – or so it seems to their supporters. Each principle itself treats compromise as a second-best solution. The fact that circumstances render it impossible to ensure that no one

⁴⁹ Ibid, 180-181.

⁵⁰ Ibid., 179.

⁵¹ Denise Reaume, "Is Integrity A Virtue? Dworkin's Theory of Legal Obligation," *University of Toronto Law Journal* 39, (1989): 396.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid., 397.

⁵⁵ Ibid.

⁵⁶ Ibid., 397, 398.

is tortured does not mean there is no objection in justice to the fact that only some are saved.⁵⁷

Conclusion

Dworkin's account of associative obligation is astoundingly sketchy given the importance attached to it and he has virtually conceded on this point.⁵⁸ One could rationally argue that, however convincing the account of associative obligations are in the contexts of friends, family, neighbours or colleagues (which seems unlikely), its place in explaining political obligations is not made-out. Ultimately political obligations rest on coercion – but in contrast neither family nor friendship does. It needs to be enquired whether Dworkin is of the view that a state which has to enforce its will upon recalcitrant citizens is not a “true” community? It would imply that a state which had to enforce laws by means of coercion was undercutting its own foundation, which rests on a relationship where there is obligation.

Moreover, in the context of family, do associative obligations really rest on reciprocity? Is this how members of a family or friends conceive of obligation? Can Dworkin explain the bonds that unite the Irish or Jews fund raising for Israel?⁵⁹ Are these bonds dependent on Dworkin's reciprocity principle? If Dworkin's ideal is so much based on reciprocity, then why does he complain of contractarianism and fair play? Why would not citizens be obliged to obey the law of a government and its institutions from which they have received benefits? Does reciprocity not mandate on the citizens that they obey such institutions from which they have received benefits?

Nonetheless, Reaume exposed Dworkin's arguments further asserting that integrity's existence depends on there being a reason of justice to reject compromise as a general strategy.⁶⁰ This argument establishes that integrity is an illusion and it is inconsistent with any particular principle of justice to accept a chequerboard alternative. It is safe to presume that everyone holds to at least some substantive principles of justice and that nobody generally endorses chequerboard approaches which reiterates that integrity.⁶¹ Since Dworkin has to resort to some other ideals to answer a question regarding integrity, it can never claim to be an independent ideal. A suggested ideal that can always be outweighed by the

⁵⁷ Ibid.

⁵⁸ Dworkin, *Law's Empire*, 197.

⁵⁹ Freeman, *Jurisprudence*, 732.

⁶⁰ Reaume, *Integrity*, 398.

⁶¹ Ibid.

existing ideals such as fairness, justice, political due process, and policy considerations among others both in politics and in adjudication as Dworkin concedes in *Law's Empire* on several occasions – a community would be better off without endorsing it. What sort of ideal is that which always needs to be justified and demonstrated by the standards of other existing ideals? The answer would unequivocally appear to be that integrity is not an independent ideal at all. Dworkin is rather attempting to assert nothing except for putting some new clothes on old theories.