Chapter 12
Legal Argumentation and Theories of Adjudication in the U.S. Legal Tradition: A Critical View of Cass Sunstein's Minimalism, Richard Posner's Pragmatism and Ronald Dworkin's Advocacy of Integrity

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Abstract This chapter aims at studying the theories of adjudication in U.S. law, beginning with a criticism against the old "justifying dichotomy" between interpretivism and non-interpretivism, which is still present in U.S. legal thinking. In a second moment, I will analyze alternatives to this gap envisioned by Cass Sunstein's judicial minimalism, by pragmatism, by Richard Posner's anti-theoretical movement and by Ronald Dworkin's Theory of Integrity. Finally, I will take a stand on this debate and provide an answer as to which of these theories is equipped with the best resources for the reaching adequate and correct legal judgments.

12.1 Introduction

Theories of legal argumentation usually work within different fields where legal arguments are at stake, of which two unquestionable examples can be mentioned: the legislative process and the enforcement of rules for the resolution of specific cases.

Legal theorists, particularly after the second half of the twentieth century, have been largely concerned with the discourses of adjudication, in a clear move to "strengthen" the role of the judiciary in resolving conflicts and "reasonable disagreements" existing in contemporary societies. The recurrent use of the expression

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"everything pours into the judiciary", or at least "almost everything", is no casualty either in Civil Law or in Common Law legal traditions.[1]

In this context, one can notice an increasing need not only to explain how decisions are formed, but also to justify them.

Theories of legal argumentation seek to unveil all the relevant aspects concerning the rational use of arguments to justify judicial decisions. Semiotics, legal logic, legal axiology, philosophy of language, rhetoric and theories of interpretation are some of the tools developed for this analysis (Bustamante and Maia 2008, p. 361).

But if modern theories of legal argumentation are largely characterized both by an explanation of the "use of arguments" and a normative account to determine the "value of these arguments" in the discourses that seek to justify a judicial decision and to make that decision rationally acceptable, how can we conceive this assertion in a tradition in which judicial decisions have long been justified according to the dichotomy "interpretivism versus non-interpretivism"?

This chapter aims at studying the theories of adjudication in U.S. law, beginning with a criticism against the old "justifying dichotomy" between interpretivism and non-interpretivism, which have been largely present in U.S. legal thinking.[2] In a second moment, I will analyze the alternatives to this gap envisioned by Cass Sunstein's judicial minimalism, Richard Posner's anti-theoretical pragmatism, and Ronald Dworkin's conception of "Law as Integrity". Finally, I will take a stand on this debate and provide an answer as to which of these theories is equipped with the best resources for the reaching adequate legal judgments.

12.2 The Dichotomy Between Interpretivism and Non-interpretivism

Until recently, American judges used to justify their decisions and have their arguments studied according to either "interpretive" or "non-interpretive premises". A magistrate or even a counsellor was classified on the basis of this duality. Let us analyse how those interpretive perspectives account for legal argumentation.

Interpretivists, on the one hand, advocate a conservative position – advanced by great exponents like Judge Robert Bork and Justice Antonin Scalia – according to which the interpreter, especially in constitutional adjudication, shall be limited to grasping the meaning of the explicit precepts or at least the meaning perceived as clearly implicit in the text, i.e. within its semantic texture. While interpreting the Constitution, one should have his eyes on the constitutional text that lies ahead, having as his farthest limit an opening to search for the original intention of the founders. They claim that taking a step beyond the frame of the text would subvert the principle of the Rule of Law, distorting it in the form of a judge-made law. This prudential attitude would prove essential in the judicial review of legislative acts,

[1] For a criticism of these opinions that strengthen the judiciary at the expense of Parliament, see the works of Jeremy Waldron, especially: Law and Disagreement (2009).

[2] For a straightforward characterization of this basic dichotomy, with a critical stance, see Ely (1980, pp. 43–72) and Dworkin (1985, pp. 34–38).

which should be limited by the constitutional framework, under the assumption that a decision which employs other methods would be in violation of the democratic principle, inasmuch as the laws under the surveillance of judicial review are enacted with the support of a majority of the members of a political community.

The non-interpretivist account, on the other hand, is more sympathetic to judicial adjudication of the rights enshrined in the Constitution, and is not satisfied with a formalistic or originalist interpretation, despite the great constellation of internal divergences within the advocates of this approach to interpretation. Principles such as justice, freedom and equality should speak louder composing the constitutional project of a self-respecting democratic society, rather than a blunt and strict subservience to the semantic reading the constitutional text. Thus, while interpretivists say that the constitutionally adequate solution to dilemmas and conflicts arising in the legal arena should be found in the lawmakers' opinion, non-interpretivists seek for answers in values (and traditions) arising from society itself.

Here, the criticisms of John Hart Ely, during the 1980s, are particularly appealing because they constitute a strong benchmark against something that was naturalized in U.S. legal doctrine until then.

As to interpretivism, which adopts a restricted notion adjudication, Ely acknowledges that strict adherence to the text of the Constitution itself requires a respect for the will of the majority expressed and interpreted in accordance with the law. Nonetheless, in spite of the fact that the majoritarian premise is at the centre of the American democracy, it is not, and should not be made, absolute. In this sense, he argued that minorities need to be protected against abuses that might occur in a representative democracy. Moreover, attachment to the wording of the Constitution is also problematic in the sense that the text is neither a closed framework nor a perfect product that can cover all of the possible situations of application (Ely 1980, pp. 07–52).

Non-interpretivism, on the other hand, has to face the problem of determining what modes of integration and complementation of the Constitution should be made available for judges. In other words, they must answer which sources of arguments may be deployed to supplement the constitution. Would it be from the natural law tradition, reason, consensus, principles or moral digressions? If any of these suggestions is accepted, the parliament borne democratic element (which stems from the principle of democratic representation) could be shaken, since legal judgments would depend on the subjectivity or even arbitrariness of judges that rely on criteria which are provided with certainty and security (Ely 1980, pp. 07–52).

From there comes the need for new theoretical conceptions that aim to overcome the old dichotomy between interpretivism and non-intepretivism. Ely himself was one of the first authors to develop a theory to overcome this gap (Ely 1980).

As Dworkin has argued, the scheme of classification underlying this dichotomy is a poor one, since "any recognizable theory of judicial review is interpretive in the sense that it aims to provide an interpretation of the Constitution as an original, foundational legal document, and also aims to integrate the Constitution into our constitutional and legal practice as a whole" (Dworkin 1985, pp. 34). Any sensible real-world theory of interpretation, therefore, needs to overcome the limits of this dichotomic approach to constitutional argumentation.

In the present chapter, I will work with three of the contemporary theories that go beyond "interpretivism" and "non-interpretivism" in the American landscape.

12.3 Cass Sunstein's Judicial Minimalism

Cass R. Sunstein is one of the exponents of an interpretive approach known as "judicial minimalism", the purpose of which is to re-interpret the role that courts should play in a constitutional democracy.

Minimalists are suspicious about constitutional theory and judicial review, even when these are deployed with emancipatory purposes. For this reason, they are reluctant to accept a social protagonism on the part of judges, who should rather focus on the specific solution of the case under their auspices.

Sunstein's basic idea is that judges, in constitutional adjudication, must leave many questions open, having no hurry to introduce substantive and conclusive answers – or even brilliant academic theses – to their constituency. It is rather explicit the preference for a type of legal practice in which judges must move away from "theoretical" arguments in their decisions.

He believes that the U.S. Congress understands the democratic dimension much better than the Supreme Court, and therefore is more entitled to give final answers on most of the legal issues. In consequence of this, there would be a "greater promotion of democracy" if judicial interference in the political process decreased. Thus, a minimalist decision has the merit of leaving a space for future reflections on the matter, at national, state and local levels.[3]

In order for that to happen, magistrates must understand that there is not the slightest need – or legitimacy – for them to decide questions which cannot be regarded as essential to the resolution of the case at hand. Therefore, the assessment of complex cases that have not yet reached a level of maturity in the course of decisions in society should be avoided by simply denying the *certiorari*.[4]

Sunstein argues that a minimalist decision shall normally have two features: superficiality and narrowness or restriction (Sunstein 1999, p. 10). Hence, the Court objectively decides on the case at hand, rather than making an attempt to establish rules for application in other similar or future cases.[5]

[3] Michael Dorf (1998) prefers to refer to this judicial stance as legal experimentalism, since this complementary space, for both the Legislative and the state Courts, allows a greater reflection on the problem to be discussed by the entire society at various levels (pluralism favoring).

[4] Here we have a reduced burden of legal decisions and decreased risk of a mistaken decision: with this, it is possible to avoid overloading judicial decisions tasks, so that eventual errors of the courts become less frequent and less damaging. As it is widely known, judicial resolutions of issues that are highly complex from the technical standpoint and politically controversial can generate political and economic side effects (Sunstein 1999).

[5] An example is the judgment on gender discrimination at the Virginia Military Institute, in 1995. By adopting a minimalist understanding of the decision, the Supreme Court did not attempt to establish a general rule that could put an end to the discussion about the constitutionality of the gender discrimination practiced by the U.S. military schools that only accepted male students, ruling instead in the strict case of the State of Virginia. (United States v. Virginia, 518 U.S. 515, 1996).

Therefore, decisions must be "narrow rather than broad" and "shallow rather than deep". In these terms, "decisions should be narrow to the extent that the court should simply decide on that case, without anticipating how similar (or analogous) cases would be solved. And should be shallow to the extent that they should not try to justify the decision for reasons involving basic constitutional principles."[6]

In these terms, the minimalist approach would have the power to: "a) not have courts deciding on issues unnecessary to the resolution of a case; b) have courts refusing to decide cases that are not yet mature and ready for decision; c) have courts avoiding the discussion on constitutional issues; d) have courts respecting their own precedents, e) not have courts issuing advisory opinions, f) have courts following the previous legal precedents but not necessarily following personal opinions expressed in votes that have no binding force; g) have courts exercising passive virtues associated with maintaining silence about the big day-to-day issues" (Sunstein 1999, pp. 04–05).

With this, we have in Sunstein's theory a relevant space for the constructive use of silence. That would be "a trivial and correct measure for the activity of judicial institutions", either because it allows the court to "buy time" while the appropriate political forums do not solve the problem, or because judges have "little democratic legitimacy to provide wide public evidence over certain matters".[7]

But despite taking the minimalist approach, Sunstein also spells out what he means by maximalism. For him maximalism requires judicial decisions that establish "general rules for the future" as well as "ambitious theoretical justifications". These decisions will be "deep" and "wide". Under certain contexts and circumstances, they will be necessary (minimalism does not always prevail, because it is not absolute, as no interpretive theory could be, as a matter of fact, in the words of Sunstein). In these terms, there is a minimalism favourable assumption though it can be overcome, in certain specific (contextual) situations, by law enforcement.

So the idea is, if the "limited" and "superficial" nature of the decisions is an assumption rather than a dogma, how could it be possible for one to know when it is desirable to frankly adopt a more "proactive" stance? Certainly, it would not be possible to find an answer that definitively resolves this problem, although for Sunstein, some general considerations can be advanced.

In this vein, according to Sunstein, there are a few cases in which it may be recommended to construct arguments supported by broader and more abstract principles, especially in the following cases: (i) When a wider solution can reduce the cost of the uncertainty of the decision for both the court itself and the litigants; when it is necessary to establish conditions for a prior planning, able to provide legal certainty and predictability to actors in society in general; where the lack of clear decisions may deprive citizens from a solid support to act democratically. Moreover, it is also admissible (ii) when a more activist approach promotes democratic goals,

[6] For Sunstein, a judge must decide "one case at a time" and limited to what the case requires as to avoid taking position on moral or political controversies which are not indispensable to the solution of the particular problem (Sunstein 1999, pp. 10–11).

[7] In law, as everywhere, what is said is not necessarily more important than what is not said. This is especially so when the acceptance of a controversial theory can increase the risk of assessment mistakes, errors that judges and courts are not often in a good position to evaluate.

enabling essential prerequisites to the functioning of deliberative democracy. The decision of the U.S. Court in *Brown v. Board of Education*[8] is certainly the most suitable example (Sunstein 1999, pp. 56–57).

On the other hand, the features that make a more modest approach recommended in turn are: (i) when the situation in which the court must decide generates great uncertainty about fundamental aspects of the rules, especially constitutional ones, or in case of rapid social changes and instability; (ii) when any broader solution seems to entail great uncertainty for future cases; (iii) when there is no urgent need to establish safe public planning criteria for the future; (iv) when the preconditions of democratic deliberation are not in play and democratic goals are unlikely to be promoted by a bolder judgment (Sunstein 1999, pp. 56–57).

As mentioned above, Sunstein's main concern is not with the decision itself, or its internal and external justification, but with the "consequences" of that decision. He moves away from the search for legitimacy, correctness or suitability of the decision rendered. The "arguments of principle" are overridden by "political arguments". Here, in an extremely instrumental way, what really matters are the impacts of the decision. As a matter of fact, the decision will only be appropriate when in accordance with its strategic effects in concrete situations, in a given time span (the "adequate" cannot be "adequate" in a given instance for a political reason), so even "theoretical arguments" should be eschewed in favour of "practical arguments" and the empirical perspective (empirical research on attitudes and practices of judges and courts) prevails over any theoretical construction (based on interpretative theories).[9]

12.4 Pragmatism and the Anti-theoretical Trend Against the Backdrop of Richard Posner's Law and Economics

The works of Richard Posner have been highly discussed in several countries, and their contribution, which will be analyzed here, concerns the so-called "law and economics" as well as the debate on pragmatism and the anti-theoretical movement in legal discourse.

Starting with "law and economics", its milestone dates back to a book published in the early 70s of the last century, in Chicago (Posner 2003b). This work was divided into seven (7) parts, involving topics such as corporate and financial markets law, the distribution of wealth and tax revenues, the American legal procedure and the profile of the legal economic arguments (Economic Legal Reasoning) (Posner 2003b).

The core of such theory lays on the assumption that law is an instrument for accomplishing social ends, and with that, its ultimate goal would be economic effi-

[8] *Brown* v. *Board of Education of Topeka* – 347 U.S. 483 (1954).

[9] For an empirical institutional analysis of judicial practice, which advances this perspective, see: (Vermeule 2006) and (Vermeule 2009).

ciency. For such a task, Posner considers economics as the science of rational choices *par excellence*, stating in his digressions that economy guides the making of the law and that people are the rational maximizers of their satisfactions. Therefore, all persons (except for small children and the mentally retarded) throughout all activities (except under the influence of psychosis or mental disorders caused by drug or alcohol abuse) work with choices and should maximize them (Posner 2003b).[10]

The thesis of law and economics could then be synthesized from the utilitarian perspective (although it is not the "traditional utilitarianism" or "pure utilitarianism" which aims to maximize the "wellness", "pleasure" or "happiness"), in which the decision of a judge must be guided by a cost-benefit ratio. Thus, the duty is perspectival when it promotes the maximization of economic relations, and the maximization of wealth (wealth maximization) should guide the involvement of judges (Posner 2003a, b).

We draw attention here to the so-called North-American legal pragmatism, from a "realistic matrix", which sees legal reasoning by an exogenous (external) logic which searches for the best "practical" and, consequentially, strongest results. Law then inexorably stands as a *strategic* and indefinite instrument, which suffers from a legitimation deficit and lacks any commitment to the idea of "rightness" or correctness.

As to legal pragmatism, it is advisable to clarify that although there are many different approaches to this philosophical traditions, there seem to be three general characteristics that define this concept, namely: contextualism, consequentialism and anti-foundationalism.

Contextualism implies that any proposition is judged on the basis of its compliance with human and social needs. Consequentialism, in turn, requires that any proposition to be tested by anticipating its consequences and possible outcomes. Finally, anti-foundationalism is the rejection of any kind of metaphysical entities, abstract concepts, *a priori* categories, perpetual principles, past instances, transcendental entities and dogmas, among other possible foundations to thinking.

Hence, when Posner postulates that legal judgments should be evaluated according to a cost-benefit ratio which seeks wealth maximization, he provides a place for the judicial system to ensure dogmas (i.e., private property, contracts, etc.) that shift the standards of legitimacy of judicial decisions from law to economic parameters. Legal decisions lose their deontological nature if guided by a ratio of costs and economic impacts interconnected by the logic of efficiency. That is, we have here a strand of the "strong consequentialism", which holds that judicial decisions must be made not with the eyes in the past (following an interpretive bias, for instance), but always with an eye to the future (the prospective), with a view to choosing among

[10]Thus, according to Posner, the Chicago School clearly supports the application of microeconomic analysis in law based on three assumptions: (a) individuals are rational maximizers of their satisfactions with behaviors both out and inside the market; (b) individuals respond to price incentives with behaviors both in and out of the market, (c) rules and legal actions can be evaluated based on efficiency, since legal decisions should promote efficiency.

the options one that brings greater advantage from the economic perspective. Posner, who is a Federal Judge, will be heavily criticized for many of his opinions. One of those criticisms comes from Posner's defence of the correctness of the U.S. Supreme Court in its decision concerning the *Bush X Gore* election,[11] in which the original outcome was maintained (with the Bush victory) in spite of the fact that the election has been knowingly forged in the State of Florida.[12] According to Posner, the decision contrary to the recount (even if it was legally consistent because of the possible fraud) would cause a huge loss to the institutions of the country, let alone an excessive instability in not making a decision about who would be the future President during the election reanalysis period.

We point out that the assessment of the consequences of the decision, rather than its strict "legality", becomes increasingly more important for Posner. Yet, this consequentialist approach faces some important objections. If market imperatives are driving the judicial conduct, Law becomes colonized by another system with a different logic, replacing law's binary statements of "legal" and "illegal" by a reasoning based on "profit and losses", with a tendency towards the disappearance of Law and giving way to obvious risks to the legitimacy and stability of a democratic society.

Another important point to be noticed is that Posner's pragmatism frontally attacks most of the scholarly theories of law (*legal scholars*).[13]

That means this is part of what is called an anti-theoretical populist movement, which holds that no moral theory can provide a solid basis for moral judgments (no moral theory that can convince a person, for example, a judge, to accept a moral judgment he initially rejects).[14] Moreover, Posner also argues that whatever the force that a moral theory may have in ordinary life, or even in politics, judges should ignore it because magistrates have better resources to defend their objectives and decisions (Dworkin 2006, p. 117).

The central argument is that judges are not faced with moral questions in their cases, and more, are not interested and should not be interested in issues of justice.

[11] Bush v. Gore – 531 U.S. 98 (2000).

[12] As Dworkin states "by far the best known defense of the Supreme Court decision in Bush X Gore is the assertion that the court spared the country from a new, and perhaps prolonged, period of legal and political battles, not to mention the uncertainty about who would be the new US President. From this point of view, the five conservative judges knew it was impossible to justify their decision on legal grounds, but heroically decided to pay the price of having their reputation as law officials scratched in order to save the nation from all these difficulties: as is sometimes said, they have burned themselves to preserve us. In a book of which I was the organizer, Richard Posner, with his usual vigor and niggardliness, presents a favorable argument to this view more clearly than anyone else ever did". (Dworkin 2006, p. 133).

[13] Those somehow establish a connection between the philosophy of law and moral philosophy, or better yet, insert legal theory into moral theory. Posner's prime targets (legal scholars) are: Ronald Dworkin, Charles Fried, Anthony Kronman, John Noonan and Martha Nussbaum.

[14] (Dworkin 2006, p. 117) Here the author does not advocate a moral nihilism (i.e.: nothing is morally right or wrong), but a moral relativism in which there are valid moral claims, namely those which are derived from a local perspective, i.e., related to a moral code of a particular culture.

According to Posner, when faced with challenging cases where a simple answer cannot be drawn from ordinary sources of guidance (Constitution, precedents, laws), judges "can do nothing but resort to notions derived from the management of public affairs, professional and personal values, intuition and their own opinion". (Posner 1999, p. 08)

More important than making the judge aware the moral content during her decision making process, (i.e., the value of democracy within a society, what is the meaning of the clause of mutual respect, or if a law prohibiting physician-assisted suicide is compatible with the Constitution), is to have her (the magistrate) mastering the knowledge of all economic, social and political issues involved in the matter. She must have control, with the highest possible predictability, over of the consequences generated by her decision, always taking the adoption of the measure that will bring greater benefit or an improvement to the general conditions observed by those involved in the case as his guiding framework.

12.5 Ronald Dworkin's Theory of Integrity: The Defence of "Theoretical Argument" Against "Practical Arguments"

For the north-american jurist and philosopher Ronald Dworkin law must be read as part of a collective enterprise shared by the whole society. Rights would then be creatures of history and morality, to the extent that they have a historical-institutional construction for sharing within the same society the same set of principles and recognition of equal rights and freedoms to all subjective members (communal principles).[15] This involves recognizing that all who belong to the same society necessarily share a common set of basic rights and duties, including the right to participate in the construction and attribution of meaning to these rights, whether in the field of the Legislative or the Judiciary Power.

Therefore, magistrates neither would be free to exercise strong discretion while deciding concrete cases brought to the courts, nor could base their decisions in the pursuit of collective goals (which benefit only a portion of society over another branch) if individual rights (embodied by legal principles) are under question, because – as wildcards in a game of cards – they hold primacy over the first (collective goals), given their universal character – being valid for all members of that given society (Dworkin 1986).

The view that the adjudication is not produced in the vacuum, but rather in a constant dialogue with history, bears the influence of Gadamer's hermeneutics. Nevertheless, Dworkin goes beyond Gadamer and advocates a constructive inter-

[15] The "Communal principles" becomes the fundamental idea in the Dworkian theory, for it is the condition of possibility for the metaphors of Judge Hercules and the "Chain Novel".

pretation[16] and, therefore, a critical hermeneutic theory in which the decision of a case produces the "growth" a particular tradition. Moreover, the construction of the decision of a case and, consequently, of its constitutional interpretation, shows itself as something undertaken collectively and open to constant evolution and – why not – review.

Dworkin devises a metaphor (the chain novel) in which each judge is regarded as merely the author of a chapter in a long collective work about the proper interpretation of a legal system. Each judge is, therefore, not only bound to the past, but also is committed to continue the work of her predecessors and to preserve the integrity of the legal practice by constructing the best possible theoretical scheme of the principles recognized by the community in which she is inserted (Dworkin 1986).

To summarize the argument: the political value of integrity denies that the legal statements are either mere factual reports geared to the past, as argued by conventionalist positivism, or instrumental programs geared towards the future, as held by pragmatism and its predecessors from American Legal Realism. For Law as integrity, legal assertions are interpretive positions aimed both at the past and the future.

A society which accepts integrity as a virtue becomes, according to Dworkin, a special type of community that promotes its moral authority in order to take over and mobilize the monopoly of coercive force. Therefore, Dworkin's theory brings us at least four (4) points worthy of emphasis, since they are relevant to this discussion: (1) the denial of judicial discretion (in the strong sense), (2) the opposition against judicial decisions based on political guidelines, (3) the importance of the concept of due process to the dimension of integrity, and (4) the notion of integrity itself, which raises the requirement that each case be understood as part of a linked history; therefore, not to be dismissed without a reason based on coherent principles (Dworkin 1986).

So for Dworkin, the judge, according to the theory of integrity, should identify among the principles accepted by society one that justifies the decision in his case, conceiving law as part of a linked history and thus developing a constructive interpretation based on the coherence of these principles.

The judge must act with his or her gaze facing the past and looking forward to the future, building a coherent theory with a view to justifying the way by which the community of principles embodies social practices. These communal principles form what Dworkin sees as the "political morality" of a given community, which should provide the basis for identifying the associative purposes of such community and the key standard about how the practice of law should be constructed.

This so-called political morality that serves as a substrate for coherent decisions can be explained by the principles of equality and freedom, which are fundamental

[16] A social practice such as law or courtesy is interpreted in a "constructive" way when the interpreter does two things: (1) First, he acknowledges that this practice is not merely a brute social fact, but rather has a purpose or a "point" that makes it valuable to him/her and to those who join the practice. (2) Second, he interprets this practice in a constructive way because he regards the practice as "sensitive" to this point and strives to make this practice the best it can be from the point of view of its very point. (Dworkin 1986).

to the theory of Dworkin. A real political community must accept that its members are governed by common principles and not only by rules created from a common political compromise. According to Dworkin, law as integrity is no longer just a guiding theory for the magistrates' activities, but rather revealed as a "commitment to people" towards equal respect and concern for all individuals, so that no group is excluded, guiding in this way the realization of the project of a political community (Dworkin 1986).

A society that accepts integrity as a political virtue becomes, according to Dworkin, a special type of community that promotes its morals and overcomes an account of legal authority based merely on coercive force.

For that matter, Dworkin's theory, as already explained, shows us the requirement of integrity, according to which each case must be understood as a link of the chained story and cannot be dismissed without a reason based on consistent principles. This is, indeed, the key ***argumentative obligation*** imposed upon legal reasoners who accept Dworkin's model of Law as Integrity.

Integrity, therefore, becomes a necessary element, rather than an option, to the democratic rule of law that appears endowed with legitimacy, allowing legal decisions to be made by the same "collective body", i.e., by this community of principles that even in face of a reasonable disagreement (pluralism of lifestyles and dignified living options) demands equal respect and concern for all citizens. In other words, Dworkin argues that judges, regardless of their personal and moral convictions, must be endowed with the responsibility (stemming from "political morality") to make the best decision for each case that arises as a unique and unrepeatable event (Dworkin 1986).

But how can such a construction be achieved? What would be the proper way of reasoning about the enforcement of law? For Dworkin, there are two answers to the question of knowing what the appropriate way of thinking about the truthfulness of legal allegations is. The first, called "theoretical approach", involves the application of a network of legal principles of political morality to specific legal problems. A second response, called "practical approach", sustains that a judicial decision is a political event that should be achieved by analyzing the consequences of different responses according to an economic assessment, not being mandatory the use of a "library of political philosophy" for such purpose (Dworkin 2006, pp. 72–73).

The practical approach has been developed by numerous supporters and seems to be more sensible and tuned to the North-American way of thinking, although Dworkin, in his philosophical endeavours, has objectively demonstrated the shortcomings of this approach, making it patent that the "theoretical approach" may be more appropriate, and even necessary, for the application of law to be done with integrity.

The theoretical approach assumes that issues about the truth of legal claims is an interpretive matter, which must be justified by principles that best reflect the legal practice in the case at hand and put the case to its best light. It is seen as interpretive, since any legal argument is subject to "justificatory ascent": when we move our eyes away from the particular case toward a more general examination of the issues embedded in it, we must determine whether the principle with which we want to

justify our decision is inconsistent or not in line with the principle that justifies another broader sphere of law[17] (Dworkin 2006, p. 76). The "justificatory ascent" to Dworkin would be provided by the metaphor of Judge Hercules, who, as a judge of extraordinary powers, does not expresses his arguments from the inside out, as do most lawyers, but from the outside in, trying to grasp the more abstract issues and finally decide the case. In these terms, Dworkin argues that

> Before judging his first case, he could develop an all-encompassing, gigantic and broad scope theory, appropriate to all situations. He could decide all the key issues of metaphysics, epistemology, and ethics, as well as moral, including political morality. He could decide about what exists in the universe and why it is justifiable to think that is what exists, of what justice and impartiality require, about what it means to have a well understood freedom of expression, and whether and why it is particularly worthy of protecting, and about when and why it is correct to require damages to be awarded to persons whose activity is linked to the loss of others. He could combine all that and other things to form an architecturally wonderful system. When a new case arises, he would be very well prepared. Starting from outside in – starting perhaps in intergalactic dimensions of his wonderful intellectual creation – he could quietly lean on the problem at hand: finding the best possible justification for law in general, for the American legal and constitutional practice as a branch of law, for constitutional interpretation, for liability and then finally to the poor woman who took pills in excess and the enraged man who set fire to the flag (Dworkin 2006, p. 79).

In a dialogue engaged on with a number of interlocutors, Dworkin summarizes what he calls "the three major criticisms" directed at the "theoretical approach" by the advocates of the "practical approach".

The first criticism, metaphysical in nature, is based on the idea that there are no objectively correct answers to legal questions or objective truth about the political morality that can be discovered by lawyers. To such criticism, all our beliefs are simple creations of our language games, so that language creates our moral universe instead of expressing it.[18]

A second critical perspective of the theoretical approach is called professional critique and departs from the premise that we are just lawyers and not philosophers, and then we cannot get our legal reasoning based on the grounds of the typical arguments of philosophical investigations.

Finally, we have the pragmatic critique, directly linked to authors such as Richard Posner, that states that his views on judicial decision are independent, since they only focus in an economic perspective, analysing and choosing the best conse-

[17] In Dworkin's example, where there is the right to claim that a person who suffers harm as a result of the use of a medication deserves to win or lose his cause, we can see that principle X is not compatible with principle Y, that applies to tort cases.

[18] In *Justice for Hedgehogs* (2011), Dworkin defends the idea that there is truth in morals, either against those who hold what can be called as internal skepticism, i.e., the skepticism inherent to substantive moral judgments, or against those who hold the external skepticism, which is based on external, 'second-order' claims on morality. The internal skeptics use moral as the foundation to denigrate the moral, stating, for example, that if God does not exist, it removes any basis for morality, or that morality is empty because all human behavior is causally determined by events that go beyond the control of any person; external skeptics judge moral from outside and reject any possibility of moral knowledge, stating, for example, that moral judgments are neither true nor false, but the simple expression of feelings (Dworkin 2011, pp. 31–34).

quences for the specific case. Such an analysis would be "progressive", once linked to consequential and deontological arguments not because the deontologist could take a result that, in certain situations, manages the worst consequences, while the pragmatists (so-called "progressives") would always be stuck in searching for the maximum welfare in the decision.

It turns out that the theory of integrity, defended by Dworkin, has a diverse consequentialist concern than the one raised by Posner, for it always aims at a general objective which is a structure of law and a community that ensures equal respect and consideration at all. I.e., consequentialism should indeed exist, but cannot be taken to the last consequences, as to break the necessary limit with the "integrity of the decision". A consequentialism that "takes law seriously" can only be defended on "weak" terms. As Dworkin poses: "It is consequential in the details: each interpretive legal argument is intended to safeguard a state of things which, according to the principles embodied in our practice, is superior to the alternatives. It is therefore impossible to consider an objection to the theoretical approach the assertion that it is not sufficiently progressive, in case progressive means consequential". (Dworkin 2006, p. 89)

Dworkin will also question the use of the concept of welfare to search for correct answers as a plausible argument. A utilitarian would claim that a legal decision would only make a certain situation better off in case it would bring improvements to the discussion, either in absolute or average terms. This type of utilitarianism, of Posnerian matrix, however, could not serve as a guide to judicial decisions because in Dworkin's opinion constitutional rights presuppose the principles of equality and freedom that will oppose, in certain situations, to the argument of the best result for the majority. By detaching from the lawful/unlawful code, utilitarianism would only be concerned about what works or what might be best for the greatest number of individuals, leaving aside what may be the truth, according to the moral principles embraced by our society.

12.6 Conclusion

It is with some confidence that one can say it is not usual to find theories of legal argumentation in the North-American legal system as those developed in Roman-Germanic tradition (by authors such as Viehweg, Perelman, Alexy, Aarnio, Günther) and the UK legal system (in particular by MacCormick 2005, p. 23). It is an interesting argument as to why American jurists not bend over a methodological study on rules (and procedures) to the discourses of justification of judicial decisions.

Notwithstanding the strong attachment to legal realism since the early twentieth century, the American theoretical tradition, given a series of characteristics, sought to justify the Supreme Court decisions regarding the interpretation of Constitution, by taking into consideration, up until very recently, the dichotomy of "interpretivism versus non-interpretivism". Of course each of these positions has internal differences, but they keep common traits that were exposed along this chapter. That is, at

the end of the day, finding an interpretivist or non-interpretivist judge or lawyer has never been a great challenge.

Sunstein's minimalism, Posner's pragmatism and Dworkin's theory of Integrity are attempts to break the above mentioned dichotomy, in order to better operate the foundations for the interpretation and application of legal decisions.

Among these attempts, we chose to support Dworkin's opinion in the current chapter, since contrary to minimalism (that advocates the need for vague and superficial decisions), we understand that: (1) the "arguments of principle" should override the arguments of "policy" or "political", which stand at the root of minimalism. According to my position, minimalist decisions underestimate the need for equal respect and consideration in the light of political morality advocated by Dworkin, (2) minimalism, following the "anti-theoretical" stream, moves away from the proposed use of "theoretical arguments" in the application of law, producing thereby a clear deficit of legitimacy in judicial decisions; (3) the minimalist proposal is actually covered by a type of utilitarianism with an extremely instrumentalist bias (adaptation of means to ends) that "does not take law seriously", (4) for the advocates of minimalism, what matters in the end is not the decision itself, and its bases built on the principles of rationality of equal respect and consideration, but rather the effects of the decision and its impact, i.e., merely the consequences of that decision. Here, although we are facing a weaker consequentialism if compared to Posner's (in so far as a "valuable theory" for interpretation is acceptable) there is a consequentialism stronger than Dworkin's (to the extent that the use of a "theory of the value" is relativized on "controversial cases"). In Sunstein's account of legal adjudication, the theoretical premises that are necessary to provide a justification for a legal decision may remain bracketed or pushed to the background on the basis of a compromise or an incompletely theorized agreement, without any power to influence the outcome of a legal decision (Vermeule 2006).

Against Posner's "pragmatic" anti-theoretical movement (which advocates a strong consequentialism and maintains that no moral theory can provide a basis for the judges to decide cases), I argue that: (1) Dworkin's account of legal argumentation is not drawn solely from a tangle of abstract moral and legal concepts; (2) in these terms, the moral argument which provide the basis for a legal decision is not built by judges only in borderline cases of "difficult" decisions. In fact, any legal interpretation requires a moral argument; (3) concepts such as democracy, freedom, equality, due process of law, among others, are legal concepts that are impregnated by political morality and that, whenever challenged in court, necessarily will be interpreted; (4) for all that, those who interpret the law must do so with a view to constructing arguments that provide the best possible justification for the legal practices of the political community. To that extent, the theoretical approach argues that there are principles so embedded in our legal practice that when we apply them to a case at hand they transfer (or not) the right to the claiming party; (5) we justify legal claims as we demonstrate that the principles that underpin them also offer the best justification for a more general legal practice in the field of law involving the case;

(6) constitutional law presupposes the principles of equality and freedom that will preclude the majority, in certain situations, from adopting a particular political directive; (7) for sure, there will be disagreement concerning which set of principles offers the best solution to the case. But this disagreement, rather than leading to the rejection of the thesis, is by itself what makes it more attractive; in this perspective, the controversy over this set of principles – that is a moral issue – will be resolved by means of the comparison of the various arguments deployed to solve the case, and the one to prevail, shall be that which demonstrates more responsibly the best fit to the legal practices; (8) the claim that no moral theory can provide a solid basis for a legal judgment is contradictory because it is based on an implicit moral theory to vindicate this claim, (9) in other words, Posner's proposal, despite all its seeming indifference to moral issues, ends up being the holder of a certain conception of morality: one that, in our view, is seen in utilitarianism; (10) in reality, as Dworkin would say, the debate about the moral content of legal concepts is inescapable. Just as it is the theoretical reflection, because everyone who is committed to some ambition of equality and democracy will have better success if he or she blazes the trails of theory, (11) just as the use of theory should not replace empiricism, empiricism (which is currently of great importance to the analysis the process of adjudication by courts) cannot "annihilate" the use of theoretical arguments; (12) with all that, we can see that moving away from theory and the "practical reason" inherent to it, amounts to distancing ourselves from the world, something impossible given our human condition, unless we can lie to ourselves (self-deception). Accordingly, the anti-theoretical movement is nothing but a contradiction in terms.

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