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Judges' Conscience and Constitutional Reasoning*

Keynote Speech

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I. Introduction

Article 76, clause 3 of the constitution of Japan states that: "All judges shall be independent in the exercise of their conscience and shall be bound only by this constitution and the laws."[1] Legal historians would point out the possibility that the concept of "conscience" might have derived from the Anglo-Saxon idea of equity, which is dubbed as "the conscience of the law."[2] Some might suggest possible influences of natural law tradition.[3]

However, the idea of equity has not been widespread in Japan, and natural law theorists are scarce resources in the land of the rising sun. The dispute around the concept of judges' conscience has been crystallized into the opposition between two theses: the objective and the subjective conscience doctrines. No judicial precedent tells us which the right answer is.[4] This may seem quite a parochial issue in a small country in East Asia, but I think this study will shed light on some

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1 The Japanese text of the article does not correspond precisely to this official translation. It states: "All judges shall be, in obedience to their conscience, independent in exercising their functions, and shall be bound only by this constitution and the laws."

2 *See* SARAH WORTHINGTON, EQUITY 299–302 (2003), critically analysing the idea that equity is to be distinguished from common law as it is conscience-based, moral, and discretionary.

3 *See* HAROLD BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 74–75 (2003). Berman pointed out that while for the scholastics "reason (*synderesis*)" was a superior cognitive faculty and "conscience (*conscientia*)" was an inferior practical or applicable skill, Martin Luther subordinated reason to conscience.

4 *See* Saikō Saibansho [Sup. Ct.] Nov. 17, 1948, Showa 22 (re) no. 337, 2 Saikō Saibansho keiji hanreishū [Keishū] 1565, the holding of which is ambiguous and can be understood in different ways. The Court bluntly held that article 76 demands that judges deliver decisions in accordance with their inner conscience and sense of morality. Both doctrines refer to this ruling as their corroboration.

aspects of constitutional reasoning with widely applicable implications.

The objective conscience doctrine argues that the "conscience" here means objective laws, that is, "this constitution and the laws." It suggests that the words, "in the exercise of their conscience", are redundant, and mean nothing. If judges rely on their own conscience in delivering judgements, they may deviate from objective laws, which would amount to the negation of the rule of law, as argued by the supporters of this doctrine. When established law stipulates that a person who committed murder under certain circumstances should be punished by the death penalty, judges should decide so even if they are in their conscience against death penalty. This objective conscience doctrine has been supported by most legal scholars in Japan.[5]

A few scholars support the subjective conscience doctrine. One of them is Ryuichi Hirano, who was the president of the University of Tokyo (1981–1985). Hirano pointed out that article 19 of the constitution states that: "Freedom of thought and conscience shall not be violated." The "conscience" here obviously refers to the personal conscience of each person. Individuals hold various thoughts and worldviews that may conflict with each other. Thus, freedom of conscience should be guaranteed. Hirano argued that the word "conscience" in both articles should be understood as identical. "Conscience means one and the same for everyone at every occasion."[6] Does such a view entail the negation

5 *See, e.g.*, SHIRŌ KIYOMIYA, KENPŌ I [CONSTITUTIONAL LAW I] 357 (3d ed. 1979)（清宮四郎，憲法I，3版，頁357（1979年））; TOSHIYOSHI MIYAZAWA, NIHONKOKU-KENPŌ [THE CONSTITUTION OF JAPAN] 606 (Revised ed. 1978)（宮沢俊義，全訂日本国憲法，改訂版，頁606（1978年））; HAJIME KANEKO & MORIO TAKESHITA, SAIBANHŌ [THE LAWS CONCERNING THE ADMINISTRATION OF JUSTICE] 110–11 (4th ed. 1999)（兼子一、竹下守夫，裁判法，4版，頁110-111（1999年））.

6 RYUICHI HIRANO, KEIJI SOSHŌ-HŌ [CODE OF CRIMINAL PROCEDURE] 53 (1958)（平野龍一，刑事訴訟法，頁53（1958年））.

of the rule of law? Hirano says it does not. When the law is clear and established, judges should obey and apply them. If the law states that an accused should be punished by the death penalty and the conscience of the judge in charge prohibits her from delivering the death sentence, she must choose either to deliver the death sentence or resign from the judgeship.

Then, after all, there appears to be little difference between both doctrines. Hirano argued that the conscience of judges works in cases of gaps (*lacunae*) in the law. When a judge cannot tell what the law orders her to do because of the lack of clarity of relevant texts or the conflicts of various legal sources, she cannot but have recourse to her own conscience on what decision she should make.[7]

If the subjective conscience doctrine makes only such a restrictive claim, it appears that the objective doctrine has to deny the possibility of gaps in the law or advocate that judges should dismiss cases when they face hard cases, in order to rebut the subjective doctrine. Both options go against common sense. Some scholars in the objective camp refer to Ronald Dworkin's "one right answer thesis" as their support.[8] But, in *Law's Empire*, Dworkin retreated to the modest position that even in hard cases each proponent, if she is serious at all, purports to argue that her view is objectively right.[9] He admitted that there is no guarantee that in a hard case many conflicting views converge into one that every rational person accepts. One cannot deny the possibility of gaps in the law.

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7 *Id.* at 54.

8 KŌJI SATO, KENPŌ [CONSTITUTIONAL LAW] 230 (1981)（佐藤幸治，憲法，頁230（1981年））.

9 RONALD DWORKIN, LAW'S EMPIRE 81, 267 (1986). There is a stronger reason his theory cannot support the objective conscience doctrine. On this point, I will explain below at section VII.

Then, is the subjective conscience doctrine right after all? I do not think so. Rather, I argue that the formulations of the issue under both doctrines are profoundly misleading. As a result, both of them are answering wrong questions.

II. Various meanings of morality

The crucial point is that both doctrines ask whether the constitution authorizes judges to consider their moral judgements in deciding judicial cases. The implicit presupposition behind this questioning is that judges may exercise only legal powers that the constitution (or the relevant laws) confers upon them. This seems an obvious reversal of the relationship between law and morality, which I will explain later.

The "moral judgements" that the doctrines talk about are subjective judgements, guaranteed under article 19, which may radically conflict with each other. Every individual freely chooses and commits herself to a worldview, a way of life, or a religious creed. If courts decide cases in accordance with the personal judgements of individual judges, the result would be a total negation of the rule of law. Even if subjective judgements are considered only in hard cases, as the subjective conscience doctrine claims, judicial conclusions would still differ widely in accordance with which a judge one may encounter in the court.

However, "morality" means more than various creeds or worldviews each individual commits herself to. First, it may mean conventional morality widely accepted in the society—for example, "He who does not work, never shall he eat" or "All learning and no thinking makes you confused." Morality in this sense means no more than the

fact that many people customarily think—or pretend to think—in the same way.[10] However, surely this is not what "all judges shall be independent in exercise of." Judges should not penalize those who learn but not think, or those who live in ease thanks to the inheritance left by their parents.[11]

Second, morality may mean various creeds or worldviews that an individual commits herself to. Christian and Zen Buddhist moralities are examples. The freedom of choosing such creeds or worldviews are guaranteed by article 19 of the constitution of Japan. However, as indicated earlier, this is not what judges may consider while deciding hard cases. A decision that is justifiable only from a specific religious creed or worldview is not what the constitution expects a judge to deliver.

The third meaning suggests a different route. People ponder over how to live and what to do in light of practical reasons as human beings. Such exercises and their conclusions are also called morality. As long as you are a human being, you cannot abstain from such reasoning. You can choose to be a Christian, Marxist, or Benthamite—and you can cease to

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10 When Ernst-Wolfgang Böckenförde criticizes the "value-based grounding of the law", he seems to have in mind as his target precisely this kind of "prevailing value consensus", which is "subject to frequent changes and does not offer any inherent guarantee of being right" in a pluralistic society. *See* ERNST-WOLFGANG BÖCKENFÖRDE, CONSTITUTIONAL AND POLITICAL THEORY 234 (Miryam Künkler & Tine Stein eds., 2017).

11 Sometimes judges refer to conventional morality while interpreting the law. The Japanese Supreme Court refers to "the prevalent social idea" in deciding whether some material is obscene or not. *See* Saikō Saibansho [Sup. Ct.] Mar. 13, 1957, Showa 28 (a) no. 1713, 11 Saikō Saibansho keiji hanreishū [Keishū] 997 (Chatterley case), which held that a Japanese translation of *Lady Chatterley's Lover* was obscene and fined the translator and publisher. However, this precedent has not been considered a case in which the judges exercised their conscience in referring to conventional morality.

be so—and become a renegade. However, you cannot depart from practical reasoning.[12] When you do that, you cease to be a human being. What is relevant in considering the meaning of "conscience" under article 64 is this third conception of morality.[13]

Both objective and subjective conscience doctrines presuppose that judges should obey and apply objective laws. However, this presupposition must include some morality warranting this obligation of judges. The reason why judges should obey the law cannot be that it is so prescribed in the law. That only brings about a vicious circle. If there is a reason to obey the law, it must be a moral reason which you have to seek outside the law. The idea that judges should decide disputes strictly in accordance with the law itself must be based on some moral reason—and cannot be based on legal texts.[14] Therefore, the issue should not be formulated as "whether the constitution allows judges to take into morality account? " but rather as "to what extent does morality demand judges to obey objective laws, including the constitution? "

Since judges are also human beings, they cannot cease to exercise practical reasoning during their office hours.[15] If they are content with applying objective laws blindly without considering whether they are

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12 I use practical reasoning in a wider sense here, as including judgements in particular instances.

13 The three senses of morality are not necessarily exclusionary each other. One religious creed may become a prevalent conventional morality in a given society. St Paul states: "If any would not work, neither should he eat" (II *Thessalonians* 3: 10). A conclusion of someone's practical reasoning may also converge with conventional morality.

14 I follow Joseph Raz's view here. *See* JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 183–84 (2009).

15 Andrei Marmor says that: "A judicial role is not a vacation from moral responsibilities." *See* ANDREI MARMOR, PHILOSOPHY OF LAW 114 (2011).

morally justified in doing so, they will degenerate into automated artificial intelligence and will not remain human beings anymore.

III. Kelsen's legacy?

Why do traditional doctrines think that if judges were not strictly bound by the law in deciding disputes, they would be allowed to consider their personal creeds or worldviews as morality in the second sense described above? I do not have an answer. However, one possible explanation may be that Japanese legal scholars were heavily influenced and deluded by Hans Kelsen.[16]

Kelsen argued that those who consider positive laws binding, without exception, presuppose in their thoughts the basic norm that everyone should obey the historically first constitution of the legal system.[17] This is a transcendental presupposition without which we cannot coherently explain why people consider every positive law in the legal system as binding (or valid). If you are a judge, it is natural that you presuppose this basic norm.

Similarly, Kelsen also thought that every moral system also implied that those that consider norms in the system as binding presuppose in

16 The influence of Kelsen in Japan after World War II was conspicuous. Among others, the two leading constitutional scholars, Toshiyoshi Miyazawa at the University of Tokyo and Shirō Kiyomiya at the University of Tohoku (both advocated the "objective conscience" doctrine), were known to be Kelsenians. Kiyomiya translated Kelsen's *Allgemeine Staatslehre* (Springer 1925) into Japanese (KERUZEN [HANS KELSEN], IPPAN KOKKAGAKU [*Allgemeine Staatslehre*] (Kiyomiya Shirō trans., Iwanami 1936) 1925（Hans Kelsen著，清宮四郎訳，一般国家学（1936年））.

17 HANS KELSEN, THE PURE THEORY OF LAW 201 (Max Knight trans. & ed., The Lawbook Exchange 2009) (1967).

their thoughts the basic norm that entails that every norm in the system is morally binding.[18] You can freely decide whether you presuppose such a basic norm. And "it is paramount and cannot be emphasized enough to understand that not only one moral order exists, but many different and even conflicting ones."[19] Since Kelsen was a radical non-cognitivist,[20] it makes no sense for him to ask whether some conduct is objectively good or bad, right or wrong. When you presuppose a basic norm, only then can you judge whether some conduct is good or bad, right or wrong, from that viewpoint.

In my view, this is an extreme idea. It is more extreme than Thomas Hobbes' idea. While Hobbes says that in the state of nature there is no standard to judge what is right or wrong, he still thinks that even in the state of nature people are equipped with natural laws, that is, practical reasons that guide them to construct a leviathan, a state that provides them with preconditions for a peaceful social life.[21]

As described in Section 2, not all kinds of morality have such radically subjective characteristics. Morality in the third sense is not one that you can freely choose and, if you like, cease to adopt. It makes sense to say that "it is legally prohibited in Shinjuku, Tokyo to smoke outdoors except in the designated areas. However, you can choose not to take a legal viewpoint." On the other hand, if you say that "it is morally wrong to smoke regardless of one's surroundings. However, if you do not take a

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18 *Id.* at 67–68.

19 *Id.* at 68.

20 *See* HANS KELSEN, WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE (1957).

21 THOMAS HOBBES, LEVIATHAN, at ch. 14–17 (Richard Tuck ed., Cambridge University Press 1996). It should be noted that for Hobbes natural laws are natural inclinations of human beings.

moral viewpoint, you are still morally permitted to do so", no one can make sense of what you say. If you live as a human being at all, you cannot depart from morality in this sense.

If you were a radical non-cognitivist like Kelsen, you might not be able to make sense of morality that applies to human beings in general. If you are a judge, you are presumed to presuppose the basic norm of the legal system, which warrants the binding force of every legal norm in it. If you deny the possibility of legal gaps,[22] then the objective conscience doctrine is right. On the other hand, if you sincerely think that you encounter a legal gap, what you can have recourse to in order to solve the case is morality in the second sense, which you can freely choose among various candidates. Then, the subjective conscience doctrine is right.

The conflict between morality and law as presupposed here by the traditional doctrines is not a genuine conflict. For the conflict here is that of between two basic norms, one legal and the other moral. In principle, you can freely adopt one or the other. In either case, the conflict would go away. Besides, it is quite doubtful whether judges should be presumed to think that every positive law in the legal system is binding and ought to be obeyed in every case.

It makes sense to ask whether there is moral reason to obey and apply a positive law; to think this is an essential pre-condition to consider the relation between the law and morality seriously.

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22 Kelsen himself denied the possibility of legal gaps. *See* KELSEN, *supra* note 17, at 245–50.

IV. Law and morality

The law claims to have legitimate authority.[23] This does not mean that the law coerces people by force. When the law requires you to do something, you ought to do it not because you will be punished unless you obey its order or because the law promises rewards for your doing so. You ought to do it because the law says so. Why is it so? This is because by obeying the law, people can better follow the courses of action that they have reasons to take; or at least the law claims so. Therefore, you should abstain from judging the courses of action that you should choose, and just follow the law's instructions. In other words, the law functions as a reason for you which replaces your original reasons based on which the law is issued. In obeying the law, you can better conform to the reason that applies to you than try to follow the reason directly. Thus, the law legitimately guides people to take specific courses of action.

Typical cases are traffic rules. When you drive a car, you usually do not have a preference regarding the side of the road on which you should drive. You should choose a side that every other driver in society chooses. Every driver thinks this way. This is a co-ordination problem situation, which can be solved by gradually emerging conventions in society. However, if the law tells you that you should drive on the left side, then you have a sufficient reason to obey the rule. You do not have to speculate on which side other people drive any more. Although you

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23 Here, I draw heavily on Joseph Raz's analysis of legal authority. *See* JOSEPH RAZ, THE MORALITY OF LAW, at ch. 2 & 3 (1986); JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN, at ch. 10 (Revised ed. 2001) [hereinafter RAZ, ETHICS], explaining his normal justification thesis on practical authority.

are not morally obligated to drive on either side of the road, once the law tells you to drive on the left side, you are obligated to do so.[24]

Many legal schemes for providing public goods have similar characteristics. If enough people contribute to a scheme, there is reason for you also to contribute. If not, then your contribution to the scheme is of no use for public interest or for your personal interest, and it is irrational for you to insist on contributing.[25]

On some issues, the government (or experts to whom the government delegates the power of decision-making) has better knowledge than ordinary people: some areas where this operates include, for example, identifying medicines that should be permitted to be sold by drug stores or identifying people who are qualified to work as attorneys, etc. In such cases too, people have reasons to consider the law as possessing legitimate authority and abstain from autonomously judging how to behave, though you should not lightly presume that the government always has better knowledge than ordinary people on many issues.

When the law works as a legitimate authority, it guides people's conduct successfully. In order to perform that role effectively, the law should be equipped with several characteristics: legal rules should be public (promulgated), clear, general, stable, consistent with each other, not retrospective, and implemented faithfully by every state organ. When the requirements are satisfied sufficiently—in this imperfect world, no

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24 This is what Thomas Aquinas called *determinatio* (Thomas Aquinas, 2-1 Summa Theologiae, q. 95 a. 2.).

25 *See* RICHARD TUCK, FREE RIDING (2008).

legal system satisfies the requirements completely—it is said that the rule of law is realized.[26]

For the law to guide people's conduct (and for the people to follow the law and its instructions), another condition is necessary: that we can tell what the legal rules are and what they are not. In other words, with the help of the rule of recognition, we can distinguish between the rules of a given legal system and other norms. Thus, there is an intimate nexus between the concepts of legal authority, the rule of law, and the rule of recognition.

In summary, laws are convenient instruments for people to dispense with autonomous practical reasoning. In obeying the law, you can cut your practical reasoning short and skip to the conclusion, which is what you should do according to the reasons applying to you anyway; or so the law claims. The law's claim to possess legitimate authority presupposes that there are moral reasons to accept its claim. Therefore, when there is sufficient reason for you to not obey the law's instructions—for example, your state is a "failed state", failing to co-ordinate people's courses of action, or when applied to a given case the law entails obvious immoral consequences—you should disregard the law's claim and follow your own practical reasoning. In other words, you stop using convenient instruments and return to your original position. That is, you think of what to do by yourself.

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26 Whether these characteristics are required from rules or their sources—typically legal texts—is difficult to answer. Perhaps, we aspire, first, that legal texts are equipped with these characteristics, and second, that legal rules that are practically effective should not deviate from the texts. If there is a huge discrepancy between legal texts and implemented laws, we may say that the laws are not public, and therefore, that the rule of law is not realized.

V. A digression on Kelsen's theory on legal reasoning

A digression on Kelsen's theory on legal reasoning may help us understand the relationship between law and morality. In his later years, Kelsen argued that the truth of legal statements cannot be established by referring to already established legal statements.[27]

According to Kelsen, in the following example, even if the truth of the legal statement (a) is established, we cannot deduce from (a) with the factual statement (b) that the statement (c) is true. In other words, we cannot deduce the validity (existence) of the legal norm (c) describes logically from the valid norm (a) describes.

(a) Every thief should be punished by imprisonment.

(b) Jimmy is a thief.

(c) Jimmy should be punished by imprisonment.

There is a grain of truth in this argument. Kelsen does not deny that courts usually try to justify their decisions by referring to already established legal norms.[28] However, his point is, I think, that justification offered by a court is rarely a complete reason to establish the validity of its decision. Even if it is established that Jimmy did indeed steal Mary's book, there might be some circumstances that legitimized his action, or that his action is excusable because of his mental state. According to Kelsen, every legal norm is created by an act of will. Therefore, only when a court delivers its decision, an

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27 HANS KELSEN, ESSAYS IN LEGAL AND MORAL PHILOSOPHY 240 (Ota Weinberger ed., Peter Heath trans., D. Reidel publishing 1973) [hereinafter KELSEN, ESSAYS]; HANS KELSEN, GENERAL THEORY OF NORMS 237–39 (Michael Hartney trans., Clarendon Press 1991).

28 KELSEN, ESSAYS, *supra* note 27, at 260.

authoritative concrete legal norm, a judicial decision, is created and the legal statement describing the decision becomes true. While there is still room for doubt about the justifiability of the decision, it acquires the force of *res judicata* and no one can dispute or overturn it anymore. The parties should regard it as an established legal norm.

However, in some cases, a court may provide a simple and seemingly complete reason justifying its decision, and the statement describing it may seem true before the court delivers its decision. In such cases too, Kelsen may insist that because every judicial decision is a creation of the act of will, the statement describing it becomes true only after the court delivers that decision. However, when every rational person agrees on the content of the appropriate conclusion, insisting on the need for the court's decision seems redundant and goes against common sense. If the truth of a legal statement in such cases cannot be sufficiently supported by the law before the judicial decision is delivered, how can Kelsen deduce the conclusion that the court is accorded the authority to deliver a judicial decision at all? Does the statement that the court has such authority become true only after the court creates a corresponding power-conferring norm by its decision? This is evidently vicious self-authorisation.[29]

Though judges do not invariably provide simple and seemingly complete reasons justifying their decisions—if they always do so, do we need a doctrine of *res judicata*? —Kelsen seems extreme in denying such possibilities; although in such cases too, the relationship between

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29 I suspect that when Joseph Raz says that: "the authority of the courts to make decisions validating delegated legislation … depends on the very chain of reasoning that Kelsen is committed to reject" in RAZ, ETHICS, *supra* note 23, at 264, this is what he means.

the legal premises that the judge explicitly refers to and the conclusion he delivers may not be characterized as a mere "logical" reasoning.[30] In other words, there must be easy and hard cases. In easy cases, legal reasoning leading to judicial decisions appears to be independent of non-legal reasons, including moral ones. The law works perfectly as a tool to skip practical reasoning; a judge can persuasively "deduce" a conclusion by referring only to established legal norms and judicial facts.

Judges must refer to non-legal and moral considerations to justify their decisions in not a few cases. Whether a case is easy or hard depends on moral considerations surrounding legal reasoning that is necessary to decide the case. In easy cases, moral considerations are latent; in order to reach a sufficiently justified decision, the court does not have to refer to them. However, they are still there, except that they are just dormant and undetected.[31] Legal reasoning is always soaked in moral reasoning.[32]

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30 This is because, as explained in the text below, logical inference is just one element in the reasoning; legal reasoning is not a one-way exercise from the premises to the conclusion. The conclusion should also be supported by other, substantive and moral reasons, in order to be a sufficiently just one.

31 Although the criminal code provides various mitigating clauses, sometimes judges still must refer to moral considerations in order to avoid unjust decisions entailed by the code. In its ruling dated 4 April 1973, the Supreme Court of Japan had to make recourse to the proportionality principle, which was prescribed by article 14, the equal protection clause, in order to invalidate Article 200 of the criminal code that stipulated that patricide and matricide should be punished with death penalty or imprisonment for life. The Court held that the punishment was disproportionately severe, since patricide or matricide could be committed under extraordinary circumstances. In this case, the accused had been sexually abused by her father since her childhood and was cornered to kill him as he tried to forcibly confine her to obstruct her marriage to her boyfriend (Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 45 (a) no. 1310, 27 Saikō Saibansho keiji hanreishū [Keishū] 265).

32 This immersion of legal reasoning into moral reasoning may disfigure judicial reasoning when the surrounding "moral reasoning" degenerates to, for example, an

Kelsen tried to exclude all moral considerations from legal reasoning. Legal reasoning must be pure, he thought. From his non-cognitivist view, to take into account moral considerations would make legal systems and legal reasoning radically unstable. It would make it impossible to secure a legal domain working autonomously, purified from savagely conflicting rival ideologies in his age. This line of thinking might lead him to create his ingenious theory on legal reasoning, which makes him unable to distinguish between easy and hard cases. Kelsen's observation that judicial decisions cannot be reduced to mere logical inferences from the already existing law is right. However, this conclusion can be explained adequately only when we admit that judicial decisions should be supported by moral considerations as well.

VI. Authority of the constitution

Whether the constitution is a law (or a cluster of laws) is a delicate question. Here I assume that the constitution is a system of norms, written, entrenched, and interpreted by various state organs, typically by the constitutional court. The constitution is usually composed of two parts: one that organizes the system of state organs, the other that declares basic rights guaranteed to the people. The first part obviously regulates the conduct of state organs, including the people as a voting body. It guides the addressees' conduct. Therefore, this part is to claim that its norms are laws and should be regarded as having legitimate authorities.

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extremely authoritarian one. Judges cannot be entirely immune from their social and political atmosphere.

Here, we should distinguish between constitutional texts and practices. As many scholars point out,[33] there is no sufficient reason to assume that those who established the constitutional code were equipped with expertise that ordinary people lack, despite the American reverence for the founding fathers or the Rousseauian myth of "lawgiver (*législateur*)."[34] If norms organising and regulating state organs are laws, it is not because the founding fathers had better knowledge on constitutional matters. Even if they did have better knowledge, since the constitution is entrenched and expected to last for long years,[35] its effectiveness would soon lapse. Therefore, if these constitutional norms should be considered as possessing legitimate authority, it is because they successfully co-ordinate people's actions at the constitutional level.[36] However, if this is so, then when there is a discrepancy between constitutional texts and practices, people have reason to obey not the texts but practices, because co-ordination problems are solved by actual practices.[37]

As to constitutional clauses declaring basic rights, there is a dispute on whether they are *laws* incorporating moral principles: the dispute

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33 *See, e.g.*, RAZ, *supra* note 14, at 341.

34 *Cf*. Jean-Jacques Rousseau, *Of the Social Contract*, *Book II*, *in* THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 57, 68–72 (Victor Gourevitch ed., 1997). The Rousseauian lawgiver confers upon people their fundamental laws, which transform the nature of the people and make them seek public welfare. He induces them to accept the fundamental laws with help of the divine myth, because vulgar people cannot understand the law-giver's sublime reason. "At the origin of nations, religion serves as the instrument of politics", Rousseau says.

35 The average lifespan of constitutions in the world since the French revolution is 19 years. *See* ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009). However, a constitution lasting for just 19 years is not deemed as a successful constitution.

36 RAZ, *supra* note 14, at 348–49.

37 *Cf*. RAZ, *supra* note 14, at 350.

between the inclusionary and exclusionary theses.[38] While this is not an appropriate place to discuss the dispute, I am inclined to adopt the so-called exclusionary thesis. Even if we assume that these clauses "incorporate" moral principles into the legal system, the addressees should still ponder upon and judge by themselves as to what conduct is congruent with these principles; because they are moral principles. In other words, these "incorporated" moral principles cannot pre-empt people's autonomous practical reasoning; and therefore, cannot work as authorities.[39] They are not able to say: "you should do it because we say so." What they can tell people is just to: "ponder upon and judge by yourself what a moral conduct is for you in a given situation."

However, when the court interprets a basic right clause and delivers a norm that is reasonably workable as a guidance for state organs, then, we may say that a law has emerged, that is, an authoritative constitutional law. Such products of judicial interpretations become elements of the constitution as far as they are policed, protected, and polished by the constitutional court. Here again, practices, not texts, generate constitutional *laws*.

As many scholars point out, the constitution is not the rule of recognition. The rule of recognition exists only as customary practices shared among law-applying public officials including, in particular, judges. It can neither be written into a legal text, nor be intentionally changed as the constitutional code sometimes is. If the rule of recognition were written into a legal text, we would need a higher rule of

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38 *Cf.* JULES COLEMAN ED., HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW (2001).

39 Scott Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469, 469–507 (1998).

recognition in order to identify that text as a positive law, which would be a contradiction.[40] This means that the written rule is not the rule of recognition after all.[41]

VII. A digression on Dworkin's interpretive theory

Laws are convenient instruments for people to dispense with autonomous practical reasoning. Why they work as such instruments and to what extent they successfully do so can be explained by moral considerations. There is an intimate relationship between the law and morality. If this is so, it appears to be possible to deny the distinction between the law and morality. Ronald Dworkin took this step. I will state very briefly why I refuse to adopt the bold interpretive theory he developed in *Law's Empire*.

First, while he sometimes appears to deny the existence of the rule of recognition, this attitude cannot be taken at face value. Not only professional lawyers but ordinary citizens know the distinction between positive laws and moral norms.[42] According to his theory, the interpretation of social practices including the law starts from the "pre-interpretive stage" where rules and standards are "identified." In the second "interpretive stage", an interpreter should construct an argument justifying the identified rules and standards; and the justification need

40 JOHN GARDNER, LAW AS A LEAP OF FAITH 102 (2012).

41 On the other hand, the rules of change and adjudication can be, at least partially, written into codes or statutes. *See*, for example, article 41 (the rule of change) and article 76 (the rule of adjudication) of the constitution of Japan.

42 For a similar, but more subtle, criticism of Dworkin's view, *see* MARMOR, *supra* note 15, at 75–76.

not fit every aspect of the standing practices, but should sufficiently fit the main elements constituting them: "enough for the interpreter to be able to see himself as interpreting that practice."[43] I think that the interpreter that Dworkin describes cannot identify the rules and standards, or construct a justification fitting them, without the help of the rule of recognition. His interpretive theory necessarily presupposes the existence of the rule.[44] However, I suspect that this point is not very significant for Dworkin after all, because, as we shall see, his core contention is to deny the authority of positive laws.

Second, he seems to suggest that every understanding of law is an interpretation.[45] This cannot be taken at face value, either. As Andrei Marmor explains,[46] an interpretation of a statement produces only another statement, which must also be interpreted in order to understand its meaning, but that interpretation too produces only another statement. Such an exercise entails infinite regress. We will not be able to understand the meaning of a legal text for ever. Interpretation is, as Marmor points out, to be conceived as exceptional exercise parasitic to the ordinary understanding of texts, which need not have recourse to interpretation.

Finally, at the very end of *Law's Empire*, Dworkin advocates the "protestant attitude" towards the law, which demands that every citizen should imagine "what his society's public commitments to principle are,

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43 DWORKIN, *supra* note 9, at 65–66.

44 However, I cannot but admit that the rule of recognition has enigmatic aspects. It consists of customary practices, is rarely stated explicitly, cannot be written into a legal text, and still imposes duty on law-applying officials. It guides them.

45 Michel Troper also subscribes to this thesis. On this point, *see* Yasuo Hasebe, *The Rule of Law and Its Predicament*, 17 RATIO JURIS 489, 489–500 (2004).

46 ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY, at ch. 2 & 146–54 (1992). See also the comments on the argument in TIMOTHY ENDICOTT, VAGUENESS IN LAW 168–78 (2000).

and what these commitments require in new circumstances."[47] Dworkin seems to require that every citizen should be responsible for constructing a theory which sufficiently fits the prevailing statutes and precedents and adequately justifies them, and then for extrapolating answers to particular cases from that theory. Practically, this thesis means that the distinction between easy and hard cases evaporates for every citizen, because ultimately, a conclusion for every legal question depends on his justifying theory of the law as a whole. In other words, the authority of law is totally negated. Every legal question is a moral question, and each citizen should autonomously think and decide upon its conclusion, which is surely a protestant attitude. I think that this thesis is too demanding for ordinary citizens as well as for ordinary judges. What they want is rather a convenient instrument to cut their practical reasonings short.

The interpretive steps his imagined judge Hercules takes in deciding hard cases may be an accurate description that any judge facing a hard case may purport to do. How a case should be decided ultimately depends on moral considerations supporting the law. However, as H.L.A. Hart points out, in such a hard case, "[i]t will not matter for any practical purpose whether the judge is making law in accordance with morality" or "guided by his moral judgement as to what already existing law is."[48] I suspect that Dworkin would not be shaken by such a remark at all, because his point is nothing but to deny the authority of the law.

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47 DWORKIN, *supra* note 9, at 413.

48 H.L.A. HART, THE CONCEPT OF LAW 254 (3d ed. 2012). For a similar observation, *see* RAZ, ETHICS, *supra* note 23, at 225.

VIII. Where does judges' conscience lead us?

The morality that a judge has recourse to when he faces a hard case is not his personal conviction that may radically conflict with other individuals' convictions. He should have recourse to the morality that he sincerely believes to be congruent with the current legal system as a whole; the morality that can be widely shared among judges in society.

In the case of Japan, one of its main components is the morality of liberal constitutionalism, which purports to realize a society where individuals holding radically conflicting, even incommensurable worldviews are still treated fairly and can lead civilized and autonomous lives.[49] The fact that individual freedom to conscience is guaranteed in itself shows that this is the morality that every judge should take into account when he doubts whether a conclusion seemingly entailed from the established law is congruent with "judges' conscience." We do not live in the Weimar republic. Judges need not retreat to the enclave of "pure legal reasoning" in order to avoid being dragged into a ferocious ideological warfare. When judges exercise practical reasoning, they usually claim that they are applying basic rights clauses or some general legal clauses under civil or criminal law. However, what they are carrying out is moral reasoning and not mere logical inferences from the already existing laws.

Legal rules are convenient instruments to cut practical reasoning short. As Aristotle stated long ago:[50]

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49 *See, e.g.*, Yasuo Hasebe & Cesare Penelli, *Constitutions*, *in* ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 9, 9–19 (Mark Tushnet, Thomas Fleiner & Cheryl Saunders eds., 2013).

50 ARISTOTLE, NICOMACHEAN ETHICS 100 [1137b] (Roger Crisp ed., 2000).

> What makes for the puzzle is that what is equitable is just, but not what is legally just—rather a correction of it. The reason is that all law is universal, and there are some things about which one cannot speak correctly in universal terms. In those areas, then, in which it is necessary to make universal statements but not possible to do so correctly, the law takes account of what happens more often, though it is not unaware that it can be in error. And it is no less correct for doing this; for the error is attributable not to the law, nor to the law-giver, but to the nature of the case, since the subject-matter of action is like this in its essence.

Before Aristotle, Plato stated the following:[51]

> [L]egislation can never issue perfect instructions which precisely encompass everyone's best interests and guarantee fair play for everyone at once. People and situations differ, and human affairs are characterized by an almost permanent state of instability. It is therefore impossible to devise, for any given situation, a simple rule which will apply to everyone for ever.

The whole purpose of legal reasoning by judges is to seek substantively just conclusions. Laws are expected to work as instruments for that purpose. For laws to do so, they must satisfy the requirements of the rule of law. However, laws that satisfy them, that are public, clear, general, consistent with each other, not retroactive, may bring about unjust conclusions when they are applied to concrete cases. Laws sometimes malfunction as instruments.

In such cases, judges should return to their original position. They have to exercise their own practical reason. Constitutional texts, in particular, its basic rights clauses, indicate that judges are permitted to

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51 PLATO, STATESMAN 58–59 [294b] (Julia Annas & Robin Waterfield eds., 1995).

exclude the authority of the law in such cases.[52] Thus, the "objective conscience" doctrine, which reduces the judges' conscience to objective laws cannot be right. Neither can Dworkin's theory be of help to this doctrine, as his position is far apart from its view that judges are strictly bound by positive laws. However, the morality that judges should seek recourse to is not each judge's personal worldview. Therefore, the "subjective conscience" doctrine is also wrong. The right answer should be sought in the middle of both extreme positions.

52 The Kelsenian centralized constitutional court does not perform the constitutional exclusion of the authority of the law on its own in solving judicial cases, because it does not preside over the litigation itself. When ordinary courts detect malfunctioning of legal rules and refer constitutional issues to the constitutional court, we may say that the constitutional exclusion is carried out by a collaboration between ordinary courts and the constitutional court. The same observation applies when the constitutional court invalidates legal rules and then the ordinary courts decide cases in accordance with its decisions. I understand that the Constitutional Court in Taiwan is equipped with these "concrete review" and "individual complaint" powers. *See* JIUNN-RONG YEH, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS 163–64 (2016); Jiunn-rong Yeh & Wen-Chen Chang, *An Evolving Court with Changing Functions: The Constitutional Court and Judicial Review in Taiwan*, *in* CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 110, 114–15 (Albert H.Y. Chen & Andrew Harding eds., 2018).

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