R. DWORKIN AGAINST H. L. A. HART (CONECTION BETWEN LAW AND MORALITY)

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Abstract. Ambition of article is to compare understanding rules and principles by R. Dworkin and H. L. A. Hart, and show the way to take the law seriously. These authors present two ways if neccessary connection between law and morality or no.
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Introduction

Dworkin work Taking rights seriously is the way to take the law seriously. His work constitutes one of the most solid and interesting contributions, offered by American thought to contemporary legal and political philosophy. In this article we want compare Dworkin´s and Hart´s understanding norms, principles, connection between law and morality and also the problem of judicial decisions.

The purpose of the article is to compare understanding rules and principles by R. Dworkin and H. L. A. Hart, and show the way to take the law seriously.

Literature review. Some aspects of the norms and principles of law and morality were studied by R. Dworkin and H. L. A. Hart and others. In the existing works, however, R. Dworkin developed his own criterion of institutional support and proposed the relations between Law and morality from the point of view of the normative gaps. Hart identified the need to take into account the role played by spontaneous obedience and the voluntary use of norms in his works. Austin researched the jurisprudence or the philosophy of Positive Law.

Research methodology. The comparison of understanding rules and principles by R. Dworkin and H. L. A. Hart will be analyzed by the comparison analyses meyhod which provides a basis for making statements about empirical regularities and for evaluating and interpreting cases relative to substantive and theoretical criteria. In this broad sense, comparison is central to empirical social

science as it is practiced today. Researchers compare the relative effects of variables across cases; they compare cases directly with one another. A comparative research is a kind of method that analyzes phenomena and then put them together to find the points of differentiation and similarity. A comparative perspective exposes weaknesses in research design and helps a researcher improve the quality of research. The focus of comparative research is on similarities and differences between units. Comparative analysis means describing and explaining the similarities and differences of situations or consequences among law and morality.

Research results. Positivism: It is simply that explanation that conceives the law as a universe of specific rules that link a certain legal consequence to the realization of a certain assumption of facts.

Faced with this, Dworkin aims to show us a much richer and compel a juridical reality, impregnated with moral elements and composed not only by specific rules, but also by principles that cannot be identified by the rule of recognition or by another analogous procedure.

Dworkin aims to characterize the principles as logically differentiated behavioral models.

Dworkin´s approach can be prosecuted at least from two different perspectives. In the first place, it is necessary to ask ourselves if we are dealing with a correct description of a developed legal system and, especially, if it is true that there exist within the Law logically different models of behavior that are articulated and work in the way that our author proposes. And, in the second place, it can also be asked if the conception of the Right today dominant, which moves between normativism and realism, is in effect incapable, as Dworkin claims, to satisfactorily explain the reality of Law.

What Dworkin intends to demonstrate is that judges frequently resort to standards that cannot be identified by the recognition rule and, in connection with it, that there are legal duties that do not find their foundation in a social practice.

In fact, the author does not seem to consider a rule or criterion that includes exhaustively the different legal principles necessary, which, I believe, implies renouncing a closed image of the legal system.

Dworkin is reluctant to develop his own criterion of institutional support, which is obviously contradictory to the thesis of the „normative rule" or the „normative state of affairs". We think that the meaning of the jurist's work is debated. Positivism, through one or another procedure, has always tried to achieve the identification of the rules without committing itself to its content or moral value; hence the effort to refine the notion of validity of elements that might suggest moral obligation, hence also the use of empirical data as identification criteria, and so on.

Relationship between right and moral. In the first works of Dworkin the problem is not directly faced: the principles are both at the same time, which can only be explained if one is thinking, as our author does, in amorally acceptable right and full of guidelines or moral principles. The legal system cannot be divorced from morality, and the most solid theory of law in its explanatory and justifying task has to penetrate resolutely into this supra-positive world.

The process of justification of explicit law, necessary to identify the principles, seems at first glance to bear some resemblance to the old „iuris analogy", form of integration of law from the criteria and guidelines implicit in the positive system itself but it is evident that in the framework of positivism, the obtaining of principles through the iuris analogy has nothing to do with supra-positive rules of morality. Dworkin, however, does not seem to accept this consequence; on the contrary, he argues that, at least in difficult cases, moral reasoning is irremediably present in legal reasoning.

Dworkin usually proposes the relations between Law and morality from the point of view of the normative gaps, of the difficult cases where the legal order does not offer a satisfactory answer, and not from the perspective of the possible contradictions or antinomies between both systems.

According to Dworkin, „he may have to lie", he must hide the valid Law; it is true that „it would be unwise to convert this lie into a matter of jurisprudential theory". Probably, Dworkin is right from the perspective of an enlightened moral, but certainly not from the legal point of view.

Legal discretionality. The meaning and scope of the activity of the judges constitutes one of the central arguments of the work of Dworkin.

Paradoxically, Dworkin embraces the faith of the most primitive positivism; it is true that he accepts in all judicial reasoning a „weak" discretion, but he strongly supports the self-sufficiency of the Law.

Dworkin develops his theory of judicial decision in the chapter on „difficult cases" and in close connection with problems of profound political significance. Positivism is wrong because the judges, resorting to the principles, always have sufficient legal material to resolve any conflict, however difficult it may be. But, above all, positivism encourages or justifies an antidemocratic and harmful jurisdictional function for individual rights; undemocratic, because the judges do not play a representative power and, in any case, the attribution of a creative role would violate the separation of powers; and harmful to rights, because if their decisions are made ex post facto, the basic postulate of predictability of actions disappears and, with that, legal certainty.

Although Dworkin sometimes speaks of principles in a broad sense, in the framework of the theory of adjudication or judicial decision, the principles should be understood exclusively as a type of standard that „has to be observed, not because it favors or ensures an economic situation". Political or social, but because it is a requirement of justice, equity or some other dimension of the modality.

Dworkin´s objections to moderate positivism have been answered by Hart both on the legal and political technical level. With regard to the first, it is true that before a difficult case judges do not comer legal books to venture into legislative work, but have certain instruments to seek a solution in accordance with the law, such as analogy, valuation of some relevant principles or objectives.

It is also doubtful that the Dworkin principles can play the role of closing norms. Traditionally, the criteria that have been suggested to close the legal system are presented in a simple and alternative way, which of course does not happen with the principles of Dworkin, which are characterized by a formulation open to the possibility of „terbium datur" and that In addition, they maintain a relationship of subsidiarity with the explicit right. Actually, we think that in Dworkin's scheme the idea of „closure of the ordering" is strange and hardly viable after the explicit renunciation of the recognition norm and any other final identification procedure. Perhaps it could be defended that the principles of Dworkin effectively close the Law, but at the price of dissolving it with the moral system; it would be the legal order itself that would see its precise limits disappear.

The authors' emphasis on demonstrating that judges are not political bodies or that they are guided by principles and not by guidelines; otherwise, they would lack legitimacy to deal effectively with the designs of the majority, nor could they claim that their decisions were more just than those of the Government.

At the service of this philosophy, Dworkin develops a doctrine of constitutional interpretation, whose nuclear objective is to convince the reader that the rule of the Constitution cannot be guaranteed if the judges are not willing to play an active role in defense of the moral theory on which the whole system rests.

Dworkin pursues as a basic objective to restore the foundations of liberalism, damaged, in his opinion, by the utilitarian philosophy. The liberalism that our author defends is not, however, that profoundly conservative and regressive ideology that today seems to export the „new American revolution", but wants to present itself under an equal and progressive sign.

To overcome the tensions between freedom and equality, Dworkin resorts to a principle of justice that functions as a substratum or essential premise of the whole system: the right to be treated with the same consideration and respect. Thus, equality, and not freedom, seems to be the primary value of Dworkin´s liberalism.

The idea of rights as „triumphs" against the majority postulates its full constitutionalization as basic decisions of sovereignty capable of imposing itself on all constituted power.

We think that Dworkin´s conception of human rights is satisfactory, but perhaps insufficient. Satisfactory because it offers a very solid theoretical basis for the system of liberties to be imposed as a basic constitutional decision against any of the constituted powers, because it converts rights into fundamental criteria of legitimacy of the entire system.

Dworkin reminds us that judges do not have as much power as has sometimes been supposed. Rights in Serious is an advisable

reading for all jurists concerned about the meaning of Law, as well as the implications of their own work.

There is no necessary connection between law and morality. There are many ways of thinking about the relationship between law and morality, and as Hart himself writes, no relation can be „advantageously designated as the relationship" for excellence (Hart, 1981, p. 216).

A) What is the character of the thesis of separation, i.e., what is the nature of the connection you are denying?

Following the line drawn by Austin, Hart argues that: „in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated the standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that was a rule of law (Hart, 1983, p. 55). Austin did not get tired of repeating how frequently he forgot the content, however trivial, of the thesis of separation. A law that exists is a right, although we disapprove of it or even diverge from our standards. This truth, when it is formally enunciated as an abstract proposition, is so simple and obvious that it seems absurd to continue to insist on it: but „A law which exists is a law, though we happen to dislike it, or even it varies from our assumed standard. This is announced as an abstract proposition, is so simple and glaring the instances in which it has been forgotten would fill a volume" (Austin, 1991).

This perspective reveals that it is a thesis that has a conceptual character, this means that whoever enunciates it presupposes two different concepts of rule or norm: that of rule or juridical norm and that of rule or moral norm.

B) The second clarification refers to the nature of the moral element, that is, to which morality the lawyer refers when he denies the conceptual relationship between right and moral? In this case, what is relevant is moral content, that is moral correctness. The thesis of separation states that „it is not in any sense a necessary truth that Laws reproduce or satisfy certain moral requirements". In this sense, Austin claims that „[...] when we say that is a human law is good or bad, or is it (unless we are intimate with mere liking or aversion) this: namely, that is to say, that is to say, whether or not we are tacitly referring to a measure or test"(Austin, 1991, p. 61).

Therefore the nature of the moral element in the thesis of separation may have a subjective or objective character.

When it is affirmed that moral correctness has an objective character and therefore does not depend on human beliefs or attitudes, it goes without saying that the thesis of separation is justified when it is justified. It remains the intermediate point between these two hypotheses, that is, those who admit the value of certain intersubjective agreements with which moral correctness is „objectified" by making it dependent on qualified human attitudes. From this perspective the distinction between critical morality and positive or social morality works in the same way that distinguishes between knowledge and belief. That is the case of Govert den Hartogh: "The concepts of "positive" and "critical morality" are necessarily connected with each other, like "belief" and "knowledge". So we should certainly not conceive of „positive" and „critical" morality as two independent systems. Rather, they are two dimensions within social reality itself. Social rules may have one or both of two properties: they may be recognized generally, accepted, effective, or they may be justified within the system as a whole" (Den Hartogh, 2002, p. 173).

C) The third clarification is aimed at clarifying which elements are from the point of view of the lawyer necessary in the configuration of the legal system.

It is worth remembering that the recognition rule is the social rule (or rules 14) that determines the criteria for the validity and identification of the other norms of the system, and which in turn cannot be said to be valid or invalid.

This does not mean that the recognition rule cannot be critically endorsed as amorally satisfactory rule of identification; and this even more so when it is considered that it can also contain substantive elements among the criteria of identification „the recognition rule can incorporate as a criterion of legal validity the conformity to moral principles and substantial values" [...] (Hart, 1981, p. 321.) the rule of recognition may be incorporated as criteria of legal validity with moral principles or substantive values". That the critical morality defended by many, or some, is based on a concrete rule of recognition is not something that can erode the thesis of conceptual separation: even if all the rules of

recognition (in every time and place) demanded that everything the valid right was morally correct, someone like the lawyer uses different concepts for moral correctness and legal correctness can say that this is an empirical coincidence. Jules Coleman signals the possibility of thinking of the thesis of separation in a negative form, that is he affirms that it is possible to conceive at least one rule of recognition that does not incorporate moral criteria for juridical validity. In this way, even if all the legal systems had rules of recognition with moral criteria of legal validity, this would not invalidate the thesis of separation, which would have a negative character. But if this were so it is very probable that one would never have distinguished between law and morality and, therefore, we would not have two concepts of rule involved in the discussion: legal and moral (See Coleman, 1982, pp. 139-164).

Acceptance and existence of law. In „The concept of law" we try to reconcile the thesis of the separation between law and morality with the configuration of a concept of law that does not present a notion of norm that resolves itself in the order sustained by the threat of suffering an evil in case of disobedience. Hart defends a conception of law which is rethought the role that plays in imposing force the behavior. Kelsen also posed the same problem, for this reason he distinguishes between the objective sense and the subjective sense of an act of will, identifying the juridical norm in the first of them (Kelsen, 1956, pp. 27-28).

The aim of the Hartian analysis is twofold: first, to offer a better description of the legal phenomenon and, secondly, to be able to account for some kind of normativity, without which it would have been impossible to justify actions by referring to legal norms as reasons for acting. In essence, the task that Hart sets itself is to offer a different explanation of legal normativity to better describe the phenomenon of law.

To this intention, Hart tries to distinguish between mere imposition and the juridical norm. The authors identified the differences and similarities present in the case in which a person „sees himself obliged", for example, to hand over the money to a bandit and in case person „has an obligation", for example, to pay a fine. The concept of law reads: „The plausibility of the thesis that the situation of the bandit explains the meaning of the concept of obligation lies in the fact that regarding it we would certainly say that B, if he obeyed, was "obliged" to deliver one's money. It is equally certain, however, that the situation would be distorted if it were said, in relation to these facts, that B „had an obligation" or a „duty" to deliver the money.

So it is clear from the beginning that we need something different to understand the concept of obligation". In this way, the difference immediately emerges between the mere imposition of an order supported by threats and the legal norm. Hart distinguishes between these two cases without resorting to moral or metaphysical elements: having a legal obligation is a de facto situation that takes place when certain empirical criteria are fulfilled. To affirm that there is a juridical norm means to affirm that some complex social facts have taken place.

The point is that Hartian positivism does not deny that law is a system through which behaviors are imposed, but affirms that it is not only this. What Hart emphasizes is the need to take into account the role played by spontaneous obedience and the voluntary use of norms.

However, at this point, a dilemma arises in the literature: or the law is characterized by being a system of imposing behaviours through the institutionalized use of force – and voluntary obedience has a residual role, since it is sufficient for people to act in a consistent manner for reasons of prudence (fear of sanction), and the legitimacy of power is a merely contingent phenomenon; or law is not characterized by being a system of imposition of behaviours through the institutionalized use of force, since it consists of justified impositions - voluntary obedience is an indispensable requirement as well as its legitimacy in the eyes of the participants. In Hart´s words: „Here we will understand by juridical positivism the simple thesis according to which it is in no sense a necessary truth that laws reproduce or satisfy certain needs of morality, even though in reality they have often done this" (Hart, 1981, p. 217).

The latter are metanorms that focus on the primaries that impose obligations: „They specify the ways in which we can decisively ascertain, introduce, eliminate, vary the primary rules, and determine the fact of their violation"(Hart, 1981, p. 112). The legal system, therefore, can be considered as a set of primary and secondary norms.

At least, therefore, there are three elements that are intertwined when it comes to recognition rule: 1) criteria of legal validity, 2) a theoretical category to systematically reconstruct the law, 3) a complex and effectively existing social practice, of which it can preach the character of a social rule. With regard to this speech we are interested in 'recognition rule' as 'social practice (2)'.

A social rule, following the Hartian theory, can be identified by contrast with a habit. The choice of this contrast is not random; on the one hand, Hart rejects the idea that law can be rebuilt as an order sustained by threats and, on the other hand, its theoretical requirements are not satisfied with predictive theories – that detecting the existence of a habit.

Hart does not offer criteria for identifying the reference group, but we must assume that these are people among whom there is some kind of relationship. The note that distinguishes habits is represented by indifference. In particular, when it comes to habits, the members of the group do not demonstrate a criticism-negative attitude towards those subjects who do not maintain the same convergent behaviour. A social rule, therefore, differs from a ha bit because it presents an internal aspect that shows itself in the consequences that occur in keeping a deviant behaviour. Furthermore, these criticisms are considered justified and are typically expressed through the use of a normative language. With the words of Hart, where there is a social rule "deviations are generally considered errors or crimes deserving of criticism, and the threat of deviations is opposed to a pressure in favour of conformity and „The criticism of deviation is considered legitimate or justified (See Hart, 1981, p. 67).

A social norm has an „internal" aspect, in addition to the external aspect that it has in common with a social habit and which consists in the consistent and regular behaviour of which an observer can realize (See Hart, 1981, p. 68).

The philosophical-juridical literature has in various ways insisted on the configuration of an internal aspect. In particular, it seems to have made an element not detectable externally. For example, according to Neil MacCormick, Hart denies the possibility of explaining the rules by referring only to an external regularity of behaviour. As MacCormick says the additional element is the attitude held by group members whose behaviour shows the existence of the rule „[...] is denying the possibility of explaining rules applicable by reference to the external regularities of behaviour. [...] The further necessary element is an element of an attitude among members of a group whose behaviour does reveal such patterning (MacCormick, 1981, p. 30).

A factor that is manifested externally not only through the detection of the probability of a hostile reaction to deviant behaviour, but above all through the use of normative language that has the function of affirming that a certain behaviour falls within the scope of the rule (Hart, 1981, p. 105-106). And „the violation of the norm is not only the basis for the prediction that a hostile le reaction will follow, but it is a reason for this hostility" (Hart, 1981, p. 108). It should be recalled, in fact, that there is a difference between the attitude towards the existence of a rule and the attitude taken towards a certain reiterated behaviour. When one wonders about the acceptance of a social rule, one wonders about the attitude towards a given course ([...] if a social rule exists at least must look upon the behavior in question as a general standard to be followed by the group as a whole "(Hart, 1981, p. 56) since acceptance is already a definitive criterion of the rule.

Conclusions

It is true that his idea of positivism is quite poor and does not delve into the contributions of continental legal culture; it is even true that, under an innovative and controversial aspect, there are sometimes conceals and ideas of debatable originality; it is true, in short, that we do not find an answer to any of the questions that the author himself formulates. But perhaps Dworkin has written what the Anglo-American legal world needed to read; perhaps so many years of realism and positivism demanded, as in a kind of pendular movement, airs of renewal, of revitalization of the Law and of individual rights as instruments of impregnable justice and defense against the insatiable expansionism of politics.

Dworkin has transformed into virtues some characteristic defects of legal work, which the positivists already knew, but sought to overcome or conceal modestly. It is true that some of

the fundamental ideas of Dworkin would find a place in a positivist conception, but it is no less true that, if not for „Rights seriously", the dominant legal theory today might not have addressed certain important aspects of the law. functioning of a system of Law.

According H. L. A. Hart in connection between law and morality demands logical rule v tertium nor datur.

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