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Dworkinian Interpretivism after the Institutional Turn

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Introduction

Dimitrios Kyritsis' book *Shared Authority: Courts and Legislatures in Legal Theory* (Hart Publishing 2015) is a substantial contribution to on-going debates in legal theory. The main thesis of the book, forcefully argued by the author, is that an interpretivist position along roughly Dworkinian lines not only has the conceptual resources to grapple with the difference that various kinds of collaborating institutions make to legal practice by appealing to normative considerations of institutional design largely pertaining to separation of powers principles, but that it may also occupy a position of advantage when it comes to explaining the institutional nature of law vis-à-vis its main rival, legal positivism. This thesis is both original and surprising, insofar as it is a well-established habit of thought to consider that one of the explanatory advantages of positivist theories is, precisely, their ability to better account for the institutional structure of law than their main anti-positivist rivals. Importantly, Kyritsis subjects Dworkinian interpretivism to a much-needed institutional turn. He maintains that, in order to account for the existence of a multiplicity of collaborating institutions and to elucidate the crucial concept of jurisdiction that helps make sense of it, interpretivism has to undergo a series of transformations. These include, non-exhaustively, substituting the notion of separation of powers for that of integrity, abandoning a narrowly court-centric view of the law in

favour of a systemic one and providing a plausible epistemological story about how different kinds of institutions can have access to interpretively construed legal content.

Kyritsis' overall ambition is to help transcend the apparent deadlock of a by now well-known dialectic consisting in familiar abstract moves and countermoves in the debate between positivist and anti-positivist theories of law, by testing both on the new and relatively underexplored battleground of institutional interaction. In the very opening pages of the book, Kyritsis gives voice to the sense shared by many that continued investment of intellectual resources in the Hart/Dworkin debate yields increasingly diminishing theoretical returns. Kyritsis urges us, instead, to focus on particular areas of law, in order to investigate how well different theories fare. This is as it should be, since we have reason to believe that theory choice in law, like theory choice elsewhere, should be evaluated holistically: choosing (a version of) positivism versus (a version of) anti-positivism should be ultimately guided by the fruitfulness of the respective research programmes when it comes to explaining and justifying a wide range of pertinent legal phenomena. The critical part of Kyritsis' book thus consists precisely in a series of carefully crafted arguments to the effect that influential positivist theories, such as Joseph Raz's, have trouble explaining collaboration between legislatures and courts, as compared to an institutionally sensitive Dworkinian interpretivism. The hope underpinning Kyritsis' project is that future debates in legal theory could move to encompass more terrains of particular jurisprudence in both public and private law, thus testing rival theories across the board and not just at an overtly abstract level.

In this short contribution I do not wish to probe the extent to which Kyritsis' critical arguments against positivism succeed. Instead, I shall focus on further developing

the epistemological aspect of an interpretivist view of institutional collaboration along lines that are inspired and, I hope, could be accepted by, Kyritsis himself. My aim is to show that, though it may seem rather remote from Dworkin's initial version, Kyritsis' recasting of interpretivism can answer an important objection to which Dworkin's version appears *prima facie* vulnerable. My aim is thus to provide further motivation for developing the institutional reworking of interpretivism initiated by Kyritsis as part of a larger project of internal growth of the interpretivist research programme. Throughout, references of page numbers are to Kyritsis' book.

An Epistemic Challenge to Dworkinian Interpretivism

The objection that I have in mind can be expressed in the following way. Dworkin's initial formulation of interpretivism roughly asserts that the law consists in the set of principles that both fit and justify the past political practice of a given community. Moreover, Dworkin himself explicitly framed his interpretivism in court-centric terms, giving the impression to many, and first and foremost to his positivist objectors, that he was in reality advancing not a theory of law, but a theory of how the law should be interpreted from the point of view of the judge (as we shall see later on, and despite the existence of considerable agreement to this effect, I shall suggest that this should not be thought to be the same as a theory of adjudication or of how judges should decide cases). Abstracting for now from the twin problems of how best to understand the dimensions of 'fit' and 'justification' as well as Dworkin's court-centrism (on which see the extremely penetrating critical remarks by Kyritsis on p.57-68 and 95-104 respectively), Dworkin's version of interpretivism makes the content of the law dependent on 'the entire political

history of the legal system to which [the judge] belongs' (p.95). This appears to present interpretivism with the following problem. If we suppose that the content of the law depends on constructive interpretations of the totality of the political history of the systems to which judges belong, how could the latter ever realistically undertake such a formidable task? More specifically, under what conditions could the interpretive facts to which Dworkin's theory makes reference be epistemically accessible to judges, given the judges' actual (as opposed to ideal) cognitive capacities? Call this the epistemic challenge to Dworkinian interperetivism. A fuller way of articulating the challenge is as follows.

It is almost unanimously thought (barring certain extreme legal realist theories that view judges as pervasive law-makers) that judges are, at least in part, in the business of identifying the truth-values of singular propositions of law. Different theories of law identify the facts determining those truth-values in different ways. However, no matter how truth-values are considered to be determined, it is natural to suppose that, in order to achieve the epistemic goal of accurately apprehending the pertinent facts, judges need to deploy appropriate epistemic means. Following Bishop and Trout[1], we may call the epistemic means that judges deploy to this effect 'reasoning strategies' in a large sense, taking care to note that these comprise not only acts of reasoning, such as making appropriate inferences and moving in a logically correct manner between propositions, but also concrete ways of gathering various kinds of empirical information. Now, it appears reasonable to impose two kinds of normative constraints on the acceptability of judges' reasoning strategies. First, they ought to be *reliable*, i.e. such as to allow agents to systematically track the relevant facts. This follows from the fact that typically the epistemic goal of judges is the truth about propositions of law and not some other aim,

[1] Michael Bishop and J.D. Trout, *Epistemology and the Psychology of Human Judgment* (Oxford UP 2005).

such as simple justifiability or reasonableness. Second, they ought to be *tractable*, i.e. suitable for judges as epistemic agents endowed with finite cognitive resources. This second dimension of evaluation of reasoning strategies is particularly important, since it points to what philosopher Christopher Cherniak has called the 'finitary predicament'[2] of human epistemic agents, to wit, the fact that their cognitive resources are limited.

Human agents' rationality, insofar as it is dependent on finite cognitive resources, has been variously called resource-dependent or bounded. Bounded rationality approaches, whether in law or in other domains such as economics, focus on how agents with limited information, time and cognitive capacities ought to make judgments and decisions. The approaches became particularly prominent after the 1970s, when an impressive array of experimental results indicated that, under various kinds of circumstances, agents reason in ways that systematically violate formal canons of rationality. Bounded rationality models attribute at least part of the explanation for these shortcomings to the scarcity of cognitive resources available to human agents. Mapping out the actual limits of these resources is an important part of cognitive science and empirical psychology. Both conceptualize the mind as a finite information-processing device, strictly limited with regard to its memory, attention and computation capacities. Bounded rationality accounts ask which reasoning strategies agents with finite cognitive resources ought to follow in order to reliably attain specified epistemic goals for different kinds of environments. Reasoning strategies thus identified are typically resource-relative: they are tailored to the actual cognitive abilities and resources of human agents.

Now, resource-relativity as a normative constraint on the selection of reasoning strategies can be justified in two ways. The first appeals to ought-implies-can

[2] Christopher Cherniak, *Minimal Rationality* (MIT Press 1986) 8.

considerations: it is not reasonable to ask of agents that they comply with epistemic norms, compliance with which is impossible, given the agents' actual cognitive setup. Whilst a lot could be said on how best to unpack what the 'can' of 'ought-implies-can' means, it seems to clearly rule out certain kinds of reasoning strategies, such as those that are computationally intractable. The second appeals to cost/benefit considerations. It follows from resource-relativity that reasoning strategies come at varying costs, some being more expensive than others. As an example, take time. Suppose that part of the difficulty of deciding some cases stems from the fact that complex consequences have to be taken into account, which judges do not have enough time to calculate (abstracting from issues of expertise). If judges had infinite time, they could arguably score better on the reliability dimension. However, judges do not have infinite time and, in fact, they are under relentless time pressure, amplified by the ever-increasing volume of their caseload. So depending on the circumstances in which they are placed, we might think that judges can sometimes justifiably trade off marginal increases in reliability for speed, by following appropriate reasoning strategies (e.g. a more deferential and less fine-grained standard of review). Generalizing the point, we might say that it is not enough that reasoning strategies score high on the reliability dimension: it is important that they also come at an acceptable cost with regard to the finite epistemic resources of judges. The upshot for the purposes of the present discussion is that reasoning strategies ought to take account of judges' epistemic resources limitations. Even if the relevant facts, whatever they happen to be, would in principle be accessible to resource-independent agents, we still ought to ask, first, whether they are they also in principle accessible to resource-dependent judges and, second, at what cost. Incidentally, the cost of reasoning strategies

is at least one kind reason for which a theory of adjudication is not just a theory of interpretation of the law from the point of view of judges. Insofar as decision-making by courts is not a theoretical but an eminently practical enterprise, the way real flesh-and-blood judges are able to reliably and at acceptable epistemic cost discover facts determining the truth-values of particular propositions of law entails that the question 'how should judges decide cases' does not automatically come off from an answer to the question 'how should the law be interpreted from the point of view of the judge'.

With this brief discussion of epistemic resource-relativity in place, it should be clear what the issue with Dworkin's version of interpretivism is. If the interpretive facts on which the truth of singular propositions of law depends comprise not just mind-independent moral facts (access to which poses special epistemological problems of its own that I shall not be touching upon in this discussion) but also an interpretive reconstruction, in light of those moral facts, of the totality of past political decisions, then the question arises of the reasoning strategies via which judges can have access to these facts. How could a judge, alone or working on a panel with other judges, ever hope to discharge the task of interpreting under the normative guidance of integrity every single past political decision that can have an impact on the truth of propositions of law that she articulates as Dworkin seems to maintain? And if that is not part of her proper job description then what is? Plainly, introducing a fictional ideal judge such as Hercules is here to no avail, since the question is to do with how finite, flesh-and-blood judges, can devise reliable and tractable reasoning strategies. At best, Dworkin's formulation of interpretivism ignores the question. At worst, it leaves the impression that the epistemological question should be treated *in tandem* with the metaphysical one about the

grounds of the truth-values of propositions of law. But then Dworkin is left vulnerable to the objection that his interpretivism flouts the tractability constraint. It is in this vein, for example, that Brian Leiter accuses Dworkinian interpretivism of being 'unusable by real judges'.[3] Likewise, Cass Sunstein and Adrian Vermeule have criticised Dworkin for disregarding 'judicial capacities'.[4]

Kyritsis' Answer to the Epistemic Challenge: from Individual Interpreters to Moralised Institutional Collaboration

It is at this point that Kyritsis' version of institutional interpretivism provides an original and much needed answer to the epistemic challenge. His answer comprises two distinct but interrelated components. First, Kyritsis urges that interpretivism move away from a court-centric view of law and towards a systemic understanding of the joint project of governing, which is crucially based on the collaboration of a multiplicity of institutional actors. Call this the *institutional* component of Kyritsis' interpretivism. Second, Kyritsis remains an interpretivist, insofar as he views the institutional component through the lens of a theory of systemic legitimacy. Thus, reasons of institutional design, and first and foremost of separation of powers, are full-blown normative reasons of political morality that can justify a project of governing by *inter alia* identifying the proper content of the concept of jurisdiction. Call this the *interpretivist* component of Kyritsis' interpretivism. My claim is that, taken together, these two components provide the abstract form of a

[3] Brian Leiter, *Naturalism in Legal Philosophy* in E Zalta (ed.) *Stanford Encyclopedia of Philosophy (Summer 2012)* available at https://plato.stanford.edu/entries/lawphil-naturalism/.
[4] Cass Sunstein and Adrian Vermeule, 'Interpretation and Institutions', 101 *Michigan Law Review* 904.

convincing answer to the epistemic challenge while, at the same time, amounting to a significant reworking of Dworkinian interpretivism.

To begin with, the institutional/systemic component entails that judges, and in fact all kinds of legal officials, act in a context of division of labour that also comprises other officials. The possibility is thus opened up, which in fact corresponds to many actual practices of the legal systems with which we are familiar, of a division of epistemic labour whereby some officials systematically rely on the epistemic contributions of others in the identification of the truth-values of propositions of law (p.124). Kyritsis himself notes a number of epistemic devices used by judges, such as deference to other branches of government or judicial doctrines that can be justified on a rule-consequentialist basis, insofar as they provide reasoning strategies that can track the truth of interpretive facts indirectly and without relying on the reasons on which they are based. I would add that these reasoning strategies might also typically comprise recourse to rule-formulations provided by legislatures. On an institutional epistemic reading, we might think that something like the 'model of rules', under which the legal system is represented as a collection of distinct legal norms created by various officials, may well survive as a more-or-less reliable heuristic used by judges and other epistemically resource-constrained actors, justified as it were partly on consequentialist epistemic grounds of reliable truth-tracking, despite the fact that it may well fail as a metaphysical explanation of the grounds of the law.

Furthermore, because the metaphysical level of the grounds of law and the epistemological one of efficient reasoning strategies come apart, institutional interpretivism does not have to view the function of legal rules through the lens of the all-

or-nothing conceptual straightjacket of pre-emption, as positivist theories typically do. It thus retains a considerable degree of flexibility that can enable it to explain reflexive 'protestant attitudes' towards the law, whether adopted by judges or by simple citizens (p.145-147). At the same time, institutional interpretivism can account for the many instances in which actors simply rely on the heuristic of rule-formulations: here again, the reflexivity evinced by the protestant attitude does not have to be a quality of some particular actor, but the systemic product of epistemic collaboration (which may well take the form of contestation) between a plurality of actors. Overall, the institutional component of Kyritsis' interpretivism can thus account well for the tractability constraint on judges' (and others') reasoning strategies.

Moreover, and concomitantly, Kyritsis' second component guarantees that tractability of reasoning strategies will not come at the cost of normative blindness. In fact, the selection of reasoning strategies has itself to be justified by recourse to reasons of political morality and, crucially, of the combination of reasons of content and considerations of institutional design. It is here that Kyritsis' version of interpretivism can prove to be particularly useful, since not only is it compatible with the tractability constraint, but it can also direct us to track normative institutional reasons that underpin the reliability requirement. These reasons may make it, for example, mandatory for certain officials (e.g. judges) to perform certain kinds of reasoning (e.g. independent assessment of what some constitutional right entails), even if that assessment will come at a cost to reliability. Whether they ought to or not will depend on a normative specification of the officials' duties within the joint project. On this view, reliability is not a consideration external to judicial practices, whose sole function is to truthfully track

legal content, but also part of the wider network of values of institutional design that inform the judicial role. Institutional interpretivism can thus provide a general normative framework for assessing both tractability and cost/benefit considerations, as these were identified above. By the same token, it deflects accusations of institutional blindness à la Sunstein and Vermeule and significantly enriches the interpretivist research programme. We can only hope that the opportunities provided by this conceptual enrichment will be taken up by others to further holistically probe the programme's fruitfulness and explanatory power on the terrain of particular jurisprudence.