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Legal Theory and Epistemic Values: Against Authoritarian Interpretivism

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Legal Theory and Epistemic Values: Against Authoritarian Interpretivism

Abstract: In his new book, R. Dworkin advocates the unity of values thesis. He wants to circumscribe morality as a proper epistemological domain which is methodologically different from scientific inquiry. The epistemological independence of morality is supposed to be a consequence of the irreducible fact/value dichotomy. This paper sustains that unity of values thesis is methodologically correct; all moral reasoning must be a constructive interpretation of its meaning. However, that author fails to recognize that not every axiological interpretation implies moral consequences. From H. Putnam's pragmatic realism, this paper intends to demonstrate that much of scientific inquiry relies on values interpretation, and that this kind of reasoning is morally neutral. Finally, it should be clear that epistemological choices in legal positivism – e.g. the decision on which aspects of social interaction are theoretically relevant – should not disturb the soundness of its argument nor should it be read as if it had moral implications. This paper concludes that positivist theories cannot be ruled out. Since the choice between descriptive and interpretative models requires a circular justification, legal theory is itself an activity governed by epistemic values interpretation. Likewise natural sciences, it can only be understood from an internal perspective. Accordingly, inclusive positivism holds the advantage of being more consilient than interpretivism, which is arguably parochial.
Keywords: Legal Theory, Ronald Dworkin, Hilary Putnam, Interpretativism, Pragmatic Realism, Epistemic Values, Interpretive Concepts.

II. Introduction

Ronald Dworkin is presently one of the leading anglophone legal theorist. His writings, especially at the constitutional law field, has had a remarkable influence on the legal thinking, in Brazil and worldwide. Dworkin's new book, *Justice for Hedgehogs*, is bound to draw a great deal of attention to itself. One of its noteworthy features is its deep philosophical concerns. The author takes pains to answer to several of his critics in a wide range of topics. One important aspect of the book is the lengthy exhibition of his controversy against the positivist conception of law. For

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the first time, since his *Law's Empire*, Dworkin presents his argument in its full length. This alone suffices to make its publication a major event in recent legal theory.

The present article aims at a small, albeit relevant topic in *Justice for Hedgehogs*. It is meant to present and discuss, through criticisms made from a neopragmatic approach, Dworkin's thesis on the nature of legal theory and philosophy of law. Inspiring as it is, the book is very polemic in some subjects. One of his fundamental proposition is the long-debated "Hume's principle". It states that fact and value constitute irreducibly different aspects of experience. Form this thesis, and some other important premises, the author concludes that the positivistic conceptual analysis of law is untenable. Since law is a value concept, he argues, it cannot be subjected to a strictly neutral conceptual analysis. On the contrary, its meaning should be articulated in a comprehensive moral theory.

Briefly, this paper aims to show that Dworkin is short on evidence of this methodological implication of the Hume's principle. Surely he may show that a normative concept of law have to be subject to an interpretive enterprise. But he fails to prove that there cannot be a neutral, strictly descriptive concept of law.

II. Dworkin's Stance in the Legal Theory Debate

Dworkin made his name as a public intellectual with a series of attacks on the prevailing legal theory in the Anglo-Saxon world. His preferred target was, not surprisingly, the greatest English language philosopher of the twentieth century, Herbert Hart. Dworkin's criticisms of the British professor's positivist model cover a great number of subjects. Some of them in fact led Hart to reconsider relevant aspects of his writings. But one of them continued being a matter of debates for decades, and *Justice for Hedgehogs* is certainly destined to renew this discussion. The theme in question is the nature of theory and philosophy of law.

Dworkin denies that Hart is capable of doing justice to the essence of the idea of law when explaining the concept of law as a simple fact[3]. No concept of law that is seen from an external perspective, such as the Hart's proposal of a descriptive theory – at least as Dworkin describes it –, could explain in which way the disputes over the meaning of Law are themselves its constituents. Legal theories as a simple fact fail, the author states, by not taking into account the role of moral considerations in the legal argument, by adopting criterial semantics of legal terms and, consequently, by adopting a supposedly external and neutral perspective for analysis.

[3] Ronald Dworkin, *O Império do Direito*, 2007, 10-15 and 30-38.

Law is not a simple social fact and any concept of jurisprudential interest – and not merely sociological or historical interest – must account for its character value. A merely descriptive conception makes the mistake of confusing criterial concepts with interpretive concepts[4]. Political concepts such as law have value, are oriented to fulfill a certain finality. Theorizing about particular value is to give it meaning, supplying an interpretation of what it is and what it requires[5]. This is the constructive interpretation that Dworkin defends as the valid method for legal thought.

Dworkin defended in one of his arguments – the semantic sting argument – that a discipline dedicated to social practices cannot offer a neutral description of its object. Looking at the history of his own theory of law, he admits having presented a flawed concept of law in his first works. At the time, he understood law and morality as different systems and that the task of the theory of law is to measure the degree of entanglement between them[6]. Since then, especially after the publication of his book *Law's Empire,* the concept of Law began to be characterized by Dworkin as a deeply contested concept, such as political or moral ones. What makes them so intrinsically contentious is the fact that they depend on a teleological perspective, on values that give them meaning[7]. *Justice for Hedgehogs* innovates by sustaining that, given the unity of value, there cannot be a clear distinction between law and morals. Both are part of the same type of intellectual activity and differ themselves only by the purpose they serve[8].

Consistently, Law does not have a deep structure that can be discovered by empirical investigation. The divergence of legal practitioners concerning their fundamental propositions indicates that Law is not a mere conventional concept. Hence, there aren't defined usage criteria that can be clarified by theory. What exist are irreducibly different conceptions of Law that reconstruct the legal practice holding a different set of elements as essential. The interpretive reconstruction of Law depends on the value that is attributed to it in each different conception. Given the idea of an integrated epistemology – which results from Hume's principle –, part of Dworkin's moral philosophy, conceptual analysis that incorporate value is not different from the justification of substantive legal doctrines. Thus, it is not possible to propose a legal theory that is neutral in relation to its object. The criteria that guide the theorist to privilege some elements of

[4] Dworkin (note 3), 9-12.
[5] Dworkin (note 3) 57/58; Ronald Dworkin, *Justice in Robes*, 12.
[6] Ronald Dworkin, *Justice for Hedgehogs*, 2011, 404/405.
[7] Dworkin (note 5), 149.
[8] Dworkin (note 6), 405.

the practice over others are evaluative and have the same nature as the criteria that lead the judge to support a certain concept of existing law.

III. The role of interpretation in Dworkin

In Dworkin's writings, the idea of interpretation has a much larger role than acquisition of meaning from texts or the reconstruction of the judicial activity. It is also the sole valid method for the analysis of the concept of law. To understand this surprising affirmation it is important to take into account his most recent arguments in moral philosophy.

Since *Law's Empire*, Dworkin's theory of law gets outlined as what came to be known as interpretivism – the model according to which the fact that makes legal propositions true or false is interpretive. Since then, the source of Law's normativity is its own justification. This is because ever since he started to abandon the two systems notion, Dworkin could offer a theory of public morality as a source of normativity as an alternative to the identification of specific authorities' decisions, which are merely political facts.

In fact, Dworkin's new book is largely dedicated to clarifying and defending specific aspects of his theory of morality, such as the idea of interpretive concepts and the idea of moral responsibility, which are indispensable for his conception of legal theory. Thus, by expanding interpretivism to the level of a theory of normative discourse in general, Dworkin can demonstrate that his conception of law stems from a comprehensive moral theory[9].

In this way, Dworkin's statement that the conception of Law is interpretive, just like other political conceptions, makes complete sense. Since the truth of first-order legal propositions is determined by fundamental propositions of the legal system[10], the latter are secure parameters for the identification of the most adequate legal solution in each case. However, because of the interpretive character of law, the fundamental propositions are profoundly disputed. The essential attributes of the practice of law are subject to the reconstruction operated by the interpretive activity[11]. In spite of recognizing that certain political facts – like judicial or legislative decisions – are consensually relevant in the identification of law, interpretivism states that what makes them legally relevant is the *normative fact* that that is the best theoretical reconstruction of the

[9] Dworkin (note 6), 557.
[10] Dworkin (note 3), 7.
[11] Nicos Stavropoulos, Interpretivist Theories of Law, in: *Law*: metaphysics, meaning and objectivity, ed. E. Villanueva, 2007, 10.

legal practice[12]. Easy and hard cases, relative to specific questions or to the foundations of Law, are all subject to criticism. So, every legal proposition should be coherent with a theory – explicit or implicit – that potentially covers the totality of Law, understood as a specific legal order or as a generic concept[13].

One can conclude that jurisprudence is methodologically related to moral philosophy. Considering that interpretation can only take place within the amply accepted interpretive genres[14], the problem of the limits between morals and law – if they should be postulated or not – can only be resolved from the perspective of one of the two normative systems, by the assumption of either a moral or a legal point of view[15].

IV. Normative and Neutral Concepts in Science and in Legal Theory

The disagreement over the concept of Law is indeed a nontrivial divergence and certainly is the product of a form of value assignment. It is also the case that law is open to moral judgments. The problem with Dworkin's theory is in considering that the deep disagreement over the concept of law can only be a consequence of its supposedly moralized core; and that central attribute should link legal analysis to a normative doctrine. Putnam offers an alternative way of thinking the theoretical divergence phenomenon.

The biggest problem is that the category of interpretive concepts is more comprehensive than Dworkin seems willing to admit. For example, the Hilary Putnam's pragmatic realism provides that, due to conceptual relativity, even the most fundamental truths can be disputed in the way Dworkin's moral truths are. Conceptual relativity is the doctrine in which a given conceptual scheme can determine rigorously opposite statements to another alternative scheme, without them really being in opposition – in the sense that it is not possible to decide in a neutral nonpartisan way, which of these is the most adequate[16]. Dworkin understands that the disagreement between two people over what is right or wrong could only be a sign of relativism according to a third person's judgement, someone able to offer his own moral considerations[17]. Basically, Dworkin believes that what is true or false can only be understood within the scope of

[12] Stavropoulos (note 11), 14.
[13] Stavropoulos (note 11), 12.
[14] Dworkin (note 3), 134.
[15] Dworkin (note 3), 402.
[16] Hilary Putnam, *The Many Faces of Realism*, 1987, 19.
[17] Dworkin (note 6), 121.

a certain theory; and this is exactly what Putnam's pragmatic realism presents, not only for moral theory, but for every cognitive experience[18].

Some recent developments in epistemology may suggest that "fact and value" dichotomy is not as clear as Dworkin argues. The evidence points to a different conception of the relationship between normative and descriptive ways of thinking, especially in science. Putnam has devoted much of his career to criticize the "fact and value" dichotomy. He is quite an eclectic philosopher and wrote on various subjects, including legal theory. His role in the present work is to raise doubts about the implications that Dworkin argues for the Hume's principle.

A constant concern in Putnam's work is to find the place of fact in a world of values[19]. Confronting the logical positivists for their attempts of asserting the criteria of rational justification in general – which should result in the formalization of the scientific method[20] – he intended to argue for other forms of knowledge, beside the natural sciences model[21]. It means that the worldview provided by the natural sciences cannot exhaust the possibilities of meaning. There must be a broader sense of rationality, covering propositions for which there are no verification criteria[22]. One of the remarkable aspects of this broader sense of rationality is the existence of objective value judgments – that is, that not merely reflect personal opinions. The very idea of scientific method is only possible if it is assumed that guiding action concepts[23], such as "simplicity" and "coherence", are objective[24]. If the notion of coherence integrates the parameters under which it is determined whether a scientific theory is acceptable or not, one would assume that similar notions in other areas can help determine the acceptability of other theories, *e.g.* theories of morality.

The broader conception of rationality should give rise to non-scientific forms of knowledge. Putnam shows that behind the whole objectivity notion, there are rational activities which are not governed by clear criteria. He refers to the fact that all factual judgment are permeable to value judgments. His examples point to fundamental notions in logic, mathematics and science in general[25]. Value and normativity permeate the whole experience[26]. As for moral and ethical

[18] Hilary Putnam, *Realism with a Human Face*, 1990, 96.
[19] Putnam (note 18).
[20] Hilary Putnam, *Reason, Truth, and History*, 1981, 105.
[21] Putnam (note 18), 137.
[22] Putnam (note 20), 113
[23] Putnam (note 18), 138.
[24] Putnam (note 18), 140.
[25] Putnam (note 18), 137/138; Hilary Putnam, *O Colapso da Verdade e outros Ensaios*, 2008, 50.
[26] Putnam (note 25), 50.

values, there is no reason to distinguish the type of attitude that the interpretive sciences require from the judgments about them. It is not that they are not different, but they are all arguably objective. To very crudely summarize the argument, one can say that the idea of objectivity is not the privilege of descriptive propositions, it is something present in every manifestation of exercised reason[27].

What is significant about this is that Putnam's conclusions are very similar to those of Dworkin regarding the nature of moral discourse, and yet taking completely different assumptions, specifically about the characterization of argumentative practices of distinguishing between factual judgments and value judgments. Both advocate a kind of "objectivity without objects" for morality[28]. Like Dworkin, Putnam frequently uses the idea of interpretation to portray the kind of intellectual activity that is not subject to test[29] and shows dismay over some philosophers' recurrent attempts to adopt an Archimedean point[30]. But the two authors obtain very different methodological implications. While Dworkin speaks of a dualism between interpretation and science in intellectual activity[31], Putnam speaks of conceptual relativity – the idea that there are no neutral descriptions for some fundamental notions, only partisan characterizations, and that some disputes are caused by different choice of means of formalization or by different conceptual schemes[32].

If Putnam is right, then the whole descriptive discourse is subject to fundamental notions that are very similar to Dworkin's interpretive concepts. In other words, descriptions are also founded in disagreements that have to be resolved in terms of evaluative reasoning[33], without assuming any ethical or moral implication. This means that different forms of describing reality can coexist – as theoretical disagreement or as conceptual relativity –, even if they are mutually incompatible, simply because the available conceptual schemes are not sufficiently complete so that the ambiguity is completely excluded[34].

Back to the conceptual disagreements in law, the problem of the nature of law *can* be approached as a doctrinal construction that is internal to the legal discourse, but can also be seen from a strictly theoretical point of view. The first notion, which can be called "normative concept

[27] Hilary Putnam, *Ethics without Ontology*, 2004, 52/53.
[28] Putnam (note 27), 52.
[29] Putnam (note 18) 182/183; Putnam (note 27) 61.
[30] Putnam (note 16), 20; Putnam (note 18), 98.
[31] Dworkin (note 6), 123.
[32] Putnam (note 16), 18-20.
[33] Putnam (note 27), 47.
[34] Putnam (note 27), 43.

of law"[35], is adequate to formulate a justification for a certain characterization of law. This is because, from the internal perspective of a participant in a legal system which is not simply a system of rules, what defines the correctness of a norm[36] – what distinguishes an acceptable norm from a "wrong" norm[37] – is a comprehensive theory that accounts for the law's finality. Basically, what Dworkin intends to build is a theory of law that is a special case of a theory of public morality[38].

What the interpretivist can long for is to offer a conception of law that is adequate for the way the participants face the legal discourse in the scope of their specific legal systems. This approach is similar to positivism in the way that it tries to explain, although doctrinarily, how the legal discourse operates, highlighting its underlying elements[39]. Dworkin fails in his characterization of the theorist's job. He argues that law is endowed with a purpose and one can only understand it from the characterization of legal practices as the most satisfactory realization of this purpose. This task would be morally engaged, since it would be necessary to justify the law by stating its purpose. What Dworkin could not suppose is that every legal theorist agrees without reservation with this normative concept of law; his is not necessarily *the* concept of law[40].

So, considering the fact that jurisprudence does not impose an interpretive approach, one could accept that the knowledge of the concept of law is obtained in two different forms. If legal theory is seen as a science, instead of a doctrinal construction, it would create an intermediate level between the design of conceptual analysis proposed by Dworkin and the sciences that place themselves in a completely external perspective, like sociology of law, for instance. It dedicates itself to expose patterns of behavior more or less safe for the identification for the practice of law[41]. Unlike normative theories, such as interpretivism, this science of law doesn't position itself as the best solution for legal problems – it is neutral – and doesn't depend on its own characteristics from specific legal systems – it is generic[42]. It proposes a description of how

[35] Brian Leiter, *Naturalizing Jurisprudence*: essays on American legal realism and naturalism in legal philosophy, 2007, 165.
[36] Dworkin (note 6), 408.
[37] Dworkin (note 6), 410/411.
[38] Lawrence Solum, The Unity of Interpretation, *Boston U. Law Review* 90, 2 (April 2010), 557.
[39] Leiter (note 35), 2007, 140.
[40] Leiter (note 35), 166.
[41] Herbert Hart, *O Conceito de Direito*, 2010, 325.
[42] Hart (note 41), 309.

individuals are brought under regulatory control of a set of rules, as opposed to the empirical sciences that would provide explanations that exclude the participants' mental states[43].

Dworkin rejects this intermediate instance. For him, a theory that intends to take into account the normative aspect of a social practice, must do so itself by normative commitments. This occurs because the values are linked to an integrated epistemology that unites them in one comprehensive theory[44], and by the interpretive character of the conception of value that impose the parameters of its own interpretive genre[45]. But Dworkin fails to show what makes the law necessarily an interpretive concept.

V. The nature of legal theory

Dworkin argues that the "fact and value" dichotomy and the unity of value – central aspects in his new book – determine what the possible means of investigations are. What he fails to realize is that there isn't an incompatibility between the normative character of the object and the moral neutrality of the explicative model. Any determination of an object of study involves valuation, and this does not mean that the appropriate theory has to be itself evaluative. The judgment made by theorists on the important and significant elements of a social practice do not necessarily refer to moral judgments, even though the participants themselves attribute moral meanings[46]. What Dworkin meant by moral consequences of the theory of law, product of his unity of value argument, should be understood as a type of interpretive activity common to any other form of description.

It has been said here that the methodological question against positivism is in the interpretive character of the notion of law. The possibility of a neutral theory of law bases itself on the fact that the interpretation of a concept – in the ordinary sense but not in Dworkin's – entails its own explanation. What is expected of someone who has understood a certain concept is that he is capable of explaining its main characteristics[47]. It is true that, to determine which characteristics are really important for the understanding of the concept, some form of evaluation is essential[48]. But the value judgment important here is not the same as the one Dworkin refers to. The

[43] Stephen Perry, Hart's Methodological Positivism, in: *Hart's Postscript*: essays on the postscript to *The Concept of Law*, ed. J. Coleman, 2001, 325/326 and 328.
[44] Dworkin (note 6), 101.
[45] Dworkin (note 6), 124/125.
[46] Leiter (note 35), 165-168.
[47] Joseph Raz, Two Views of the Nature of the Theory of Law: a partial comparison, in: *Hart's Postscript*: essays on the postscript to *The Concept of Law*, ed. J. Coleman, 2001, 8.
[48] Leiter (note 35), 167.

evaluation demanded by the determination of a concept's essential features would be probably an epistemic one.

For Brian Leiter, the normative concept of law can be accepted only if it is shown to be the best explanation for the concept that is commonly used. The only normative aspect involved in the explanation of the concept is the determination of which of its elements are essential and which are merely accidental. This type of normativity is common to every scientific investigation; it means the requirement of respect for epistemic values[49]. Every investigation demands some choices about how to systematize the available data, and in certain cases – especially borderline cases – demands some kind of balancing[50]. There is no reason to believe that the interpretive or discursive character of certain practice interferes in the methodological decisions necessary for every investigative project[51]. Values such as simplicity and coherence in the context of epistemology are properties that each theory may or may not have[52]. Thus, it is important to distinguish the values that orient the choice for the best legal proposition from the values that orient the choice for the best conception of law.

Since Dworkin adopts a procedure for the attainment of the meaning of value terms, he should accept that this also works for such epistemic values. In legal theory, this means to say that there is no neutral pattern for the formulation of theoretical models. A theory that does not adopt a participant internal perspective cannot be immediately rejected, it can only be supplanted by an epistemologically better one – in other words, one that reflects better the best reconstruction of the legal theory, given some epistemic values. An inclusive positivism starts with the advantage of offering a conception of law that explains a larger numbers of situations – it is more consilient –, because it is not linked to a specific legal framework.

In this argument presented by Leiter, Dworkin's conception of law must be compared to the positivist conceptions. Interpretivism is at a frank disadvantage because of its local characteristics. The interpretivist method is a theoretical choice based on the characteristics of a specific legal system, the American legal tradition. Thus, an important defect of this theory is that it is excessively parochial; it could be a good conception of American law, but fails in its attempt as a general conception of a concept of law[53]. It should be possible to formulate a universal conception of law that establishes its meaning through a non-interpretive procedure; hence,

[49] Leiter (note 35), 168.
[50] Leiter (note 35), 168/169.
[51] Leiter (note 35), 174.
[52] Putnam (note 27), 69.
[53] Leiter (note 35), 134.

rejecting Dworkin's interpretive concept classification. According to Leiter, Dworkin writes as if the normative concept is *the* only concept of law, but what Dworkin should be trying to argue is that his normative concept of law is *our* concept of law.

One last concern should take place. Leiter's characterization of the dispute is inadequate because it considers that there is a convergence of objectives between positivists and interpretivists. In his characterization, every legal theorist is engaged in the same enterprise. However, as Dworkin makes it very clear in his last book, his normative concept of law cannot be understood outside of a moral theory. One could say, according to Dworkin, a neutral explanation is inadequate not for ignoring nature of the concept that is effectively shared, but by rejecting a notion of obligation, at least from the point of view of his own moral theory[54]. It could be said that the interpretivist model imposes itself as a moral obligation for every legal theorist. It is hard to understand exactly what that would mean, and it Dworkin certainly never intended to follow this train of thought.

VI. Conclusions

The debate between the two endeavors, the interpretivist one and the positivist one, appears to be confused. Each one seems to come from too different places to have any type of understanding. Hart, in his postscript to *The Concept of Law*, seems to have understood precisely this point. He rejects the suggestion that his project and that of Dworkin, "so different" from each other, could be in conflict[55]. As a matter of fact, maybe they are not. Dworkin states that it is impossible to define a line between law and morals and the relation between them – one of the greatest jurisprudential problems – without assuming the answer for the beginning. Either the question is approached from a legal point of view, from a theory of legal sources – that should adopt a descriptive, morally neutral approach from the reading of legal texts – or from a moral perspective, resorting to a justification for this delimitation – which is nothing more than a justification of the legal institutions[56]. The positivist would rejoin that he operates on a different level, trying to describe how the participants perceive the relation between law and morality. This enterprise is neither legal, nor moral, but conceptual. All that is left for Dworkin is to appeal to

[54] Dworkin (note 6), 407/408.
[55] Hart (note 41), 311.
[56] Dworkin (note 6), 403.

his concepts' taxonomy[57], which is nothing more than a direct consequence of the assumption that the factual judgments are of a different nature from value judgments.

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[57] Dworkin (note 6), 404.