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Judges Taken Too Seriously: Professor Dworkin's Views on Jurisprudence*

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Abstract. The author analyses Ronald Dworkin's ideas about legal theory and legal philosophy, with particular regard to metatheoretical and methodological problems. He focuses on the questions of the function and the object of jurisprudence, and on those of the content and method of argumentation of jurisprudence. According to the author, Dworkin's theory is a normative theory, an ideology referred to the judicial practice. Although judges really make law, one can deny that they do. This strategy is the one judges traditionally employ when they say that they are merely applying the law-giver's intentions or fundamental principles that existed long before the case they have to decide. It is that discourse, not rights, that Dworkin takes seriously.**

Many among those who have written on Ronald Dworkin's works have endeavoured to define him either as a positivist or as an advocate of natural law and have come to differing and contradictory conclusions (Bell 1972; Carrió 1980; Rebuffa 1980; Pastore 1984). It could be argued that the classification of a scholar is not of the foremost interest, except for the history of ideas, and that it is preferable simply to examine that scholar's theory on its own merits. But it might also be asked why people who do not present themselves as historians of ideas would play that game of classification, and why they play it more intensely when some specific scholar is concerned.

One type of explanation could be found in the need for polemic arguments:

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** Abstract by M. La Torre.

When a scholar classifies himself in some theoretical group and that scholar contends with an opposing group, it is tempting for his opponents to try and expose the contradictions involved in the unconscious assumption of ideas that he opposes consciously. Thus, it has often been said of Kelsen's Pure Theory of Law that it was in fact tainted with natural law; similarly it has sometimes been argued that Dworkin is not as far from positivism as he seems or purports to be (Carrió 1980).

There are of course more serious reasons: Every classification allows for a considerable intellectual saving. Arguments for or against positivism, for or against natural law, are well known. If a scholar carries one of those labels, he will benefit from all the arguments put forth in favour of the group he belongs to and naturally be exposed to all the arguments against it.

Unfortunately, some scholars are hard to classify, either because their writings bear some properties of one of the groups and some of another group, or because they involve theories or ideas that are characteristic of neither of the groups. In such cases, any attempt to classify is without interest, first because every classification would be arbitrary or would imply a re-examination of the criteria of classification, and secondly, because the intellectual benefit normally expected from that operation would here be unattainable.

Ronald Dworkin is just such a scholar, i.e., hard to classify, and that is precisely what makes his writings so interesting. What could be called – using a term he would probably reject – his "metatheory" is a striking example of this difficulty. A positivist metatheory is a theory stating that legal theory (or legal science) is and should be kept distinct from its object. In this respect, Ronald Dworkin is clearly antipositivist. But on the other hand, positivist metatheories assume that legal theory (or legal science) should describe the law as it is.[1] And this is what Dworkin generally claims he is doing, which could make a positivist of him. This merely shows that the game is childish and that no attempt should be made to classify him as a whole. Such a classification is impossible and even if it could be done, none of the usual benefits would be attained. Thus, one should ask not only: Is Dworkin's metatheory positivist or not, but also what is Dworkin's metatheory? What are the ideas that it entails? Are these ideas true, or, if one dislikes that word, "appropriate"? In other words: Only specific ideas, not theories, can be classified as positivist or antipositivist and then sometimes – but not always – submitted to classical arguments for or against that doctrine.

But first, is there a metatheory of the law to be found in Dworkin?

It is perfectly clear that, even if every scholar does not devote a special passage to legal metatheory, it is always possible to find in their writings an implied conception of what legal theory is or should be. There is a great temptation

[1] It seems preferable whenever possible to use the expression "legal theory" instead of "jurisprudence." The former means exclusively a general and abstract description of the law, whereas jurisprudence can be descriptive and prescriptive and sometimes simultaneously.

to believe that in the case of Dworkin it is not necessary to undertake a similar task of reconstruction because he has clearly and openly stated his views, especially in his article "La théorie du droit comme interprétation" (Dworkin 1985b). But this statement is only partial and there is a need to proceed in the same way as with other scholars by examining not his metatheoretical but simply his theoretical writings (meaning writings dealing with law) to see what underlying conception of legal theory is at work.

If what is generally meant by legal metatheory is a discourse on legal theory or simply a general idea – even an unstated one – about legal theory, then legal metatheory may entail several aspects.

First of all it ought to identify what its object is: What is a legal theory? Is legal theory or jurisprudence distinct from the law itself? Properly speaking, there can be no metatheory when legal theory and law are not distinguishable. We shall see that this condition is not satisfied in the case of Dworkin. Nevertheless, I shall use the term "legal metatheory" to refer to a discourse dealing with legal theory and with law, and I shall do this for two main reasons: (i) The distinction between legal theory or jurisprudence and law can be criticised on the basis of a certain idea of jurisprudence. (ii) One should make a distinction between a discourse on the total of legal theory plus law and another discourse simply on the elements of law. For example, between those writings (which belong to legal theory) in which Dworkin asserts that law is not a system of rules and those in which he talks about legal theory as a type of activity practised by judges and lawyers.

Moreover, every metatheory should entail a theory about the status of the propositions asserted by legal theory: Are they prescriptive or descriptive? If descriptive, can they be characterised by the terms "true" or "false"? If they can, what truth standards may be used?

I shall leave aside here one aspect on which Norberto Bobbio has rightly insisted: the distinction between descriptive and prescriptive metatheory (Bobbio 1967). There are two main reasons for that omission.

On the one hand, whenever some legal theory corresponds to an implied metatheory, that metatheory is necessarily prescriptive. For even a scholar who seeks a legal theory that is scientific or simply useful always has certain ideas about what properties such a theory ought to present in order to be really scientific or useful (or to satisfy whatever other conditions that scholar sets). Only if someone wishes, like Bobbio does – but exclusively in the above-mentioned article – to envisage legal theories in the manner in which the philosophy of science examines scientific theories, can he claim to build a descriptive metatheory. But in order to do the latter, it is necessary first to consider not one legal theory *in statu nascendi* but a whole set of theories, and secondly to assume that they are all valid. These things are required in order to ask the question "how do we know what we know?" and state the reasons why we regard theories as true or acceptable. Yet such an assumption is clearly impossible because one cannot accept as true every legal theory advocated at a given

moment, since these theories entail contradictory propositions.[2] This is the reason why all the scholars involved in legal theory, unable to accept every other legal theory as true, are content with a prescriptive metatheory. This is, for instance, what Kelsen does, as well as Bobbio himself in other writings.

On the other hand, the distinction loses its relevance when the scholar, as is the case with Dworkin, refuses to distinguish between legal theory and the law itself.[3] If it is always possible to determine at what level of language Dworkin places himself, it is impossible to determine the level of jurisprudence, since this term has two meanings: The first is the subject matter that is taught in law schools under that name or under the names "legal theory" or "legal philosophy" and that deals with general concepts and types of reasoning used by practising lawyers; the second is that reasoning itself. If then, in the case of Dworkin, I use the term "metatheory" it can only be in a sense altogether different from its customary sense. It is not a theory the object of which is another theory, the latter being itself distinct from its own object. Dworkin's metatheory is merely the very general manner in which he depicts jurisprudence, whatever the function or subject of jurisprudence should be. But we shall never know whether that metatheory prescribes to jurisprudence to prescribe something to the judge (that he should describe and implement the law that is), or alternatively if it simply describes what the judges actually do (practice jurisprudence as Dworkin characterises it) or, as a third alternative, if it prescribes to jurisprudence (that of teachers) to describe what the judges do.

It is thus preferable to speak of metatheory as neither a prescription nor a description, but as a representation, that may be both even at the same time.

I shall therefore simply examine the way in which Ronald Dworkin depicts the function and object of jurisprudence on the one hand, and the propositions his jurisprudence entails, on the other hand.

I. The Function and Object of Jurisprudence

According to Bobbio (1965), one ought to distinguish between three dimensions or aspects of positivism: first, as an approach or method of studying the law, i.e., as a metatheory, secondly, as a theory of the law, or legal theory, and thirdly as an ideology. Dworkin's arguments against positivism primarily concern the theory of law, since he criticises scholars belonging to that group, especially H. L. A. Hart, for conceiving of law as a system containing nothing but rules and for saying that in the absence of a clear rule judges enjoy discretionary power.

[2] It is certainly possible to envisage a descriptive metatheory that, without regarding all existing legal theories as true, would limit itself to examine for each one separately the conditions for the validity of its propositions that this theory establishes for itself and that inevitably differ from one theory to another. But in that case, one would only reproduce the meta theory of everyone of these theories and thus construct a meta meta theory.

[3] Yet, he is obliged to admit implicitly a similar distinction in his theory of legal propositions expressed within legal reasoning but distinct from rules.

Yet, although he does not expressly criticise the positivist conception of legal theory, i.e., the first aspect of positivism, the positivist metatheory, it is easy to see how on three points at least, he rejects the positivist approach.

First, positivism is based on a radical distinction between law and morals or, in other words, between law as it is and law as it ought to be, between actual law and ideal law. This distinction reflects a specific conception of the subject of legal theory: Legal theory should only deal with the law as it is. It follows that if a legal rule is incompatible with a rule belonging to some moral system, it is nevertheless a legal rule. It follows also that a positivist is someone who refrains not only from comparing existing law to some positive moral system, but also from asserting moral principles or formulating value judgements about the law. In brief, the positivist's attitude is based on the principle of axiological neutrality. It is that principle that Kelsen asserts when he describes his theory as being "pure" (meaning pure from "any ideology") and when he claims to have founded a true science of law.

Therefore, this distinction implies, on the one hand, that a positivist will refuse to use conformity to a moral rule as a criterion to identify the elements of the legal system and, on the other, that he should abstain from expressing a moral judgement on the law as a whole or on any part of it.

Even a superficial examination of Dworkin's writings clearly shows that he does not accept these methodological principles. For instance, he defines a principle that, in his view, is binding on judges as "a standard that is to be observed. . . because it is a requirement of justice or fairness or some other dimension of morality" (Dworkin 1978, 22). In the same manner he writes of the American constitution that it "fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems, like the problem of whether a particular statute respects the inherent equality of all men" (Dworkin 1978, 185).

Admittedly, some commentators have argued that Dworkin's position is not as rigid as it seems. Thus, Carrió holds that the relationship between law and morals as Dworkin sees it is not a necessary relationship, but that it is only a contingent one (Carrió 1980, 161). According to Carrió, it happens to be the case in the American system that the Constitution asserts certain moral principles and that the validity of a rule depends on its conformity to these principles. But this feature is specific to the American system, and it is not to be found in every legal system. He quotes a passage where Dworkin replies to some of the arguments against him and writes that it does not follow from his views "that the law is always morally right or that all that is morally right is always the law" (Dworkin 1978, 342). Carrió concludes that Dworkin accepts, just like any other positivist, that a rule may well contradict morals and yet be a legal rule.

It is quite clear that if Dworkin did nothing else but describe the fact that some legal systems use as a standard for the validity of rules the conformity of these rules to some positive moral system, there would be very little difference

between his attitude and that of a positivist: Concerning one particular system, they would both try to describe the facts and would only disagree in their descriptions.

However, the attempt to bring Dworkin back to the positivist fold fails because it is based on an inadequate analysis of that famous separation between law and morals. True, positivism relies on the idea that law and morals are separate, but the terms of this proposition can be understood in several very different ways. According to at least one of these understandings, it would be hard to find even one scholar who is not a positivist. No one thinks, for example, that law and morals are always absolutely identical, that positive law, law in force, is always just no matter what its content, the manner in which it was issued, or its source. Nor do people believe that moral principles can always serve to tell what ought legally to be done. If, therefore, Dworkin simply refuses to say that the law is always morally just or that what is just is always legally right, these facts do not make him a positivist unaware of being one.

In fact, the separation of law and morals can mean, and often does mean, something very different; for example, it can refer to a simple refusal to formulate a value judgement on existing law, or the idea that the content of the law, independently of its conformity or non-conformity with moral rules is a specific normative system that ought to be studied separately. The fact remains that Dworkin does not accept such a separation if it is understood in this manner. It must also be remembered that in the same article, cited by Carrió, Dworkin adds that if legal principles are not moral principles, in the sense that they are "morally correct principles," they are nevertheless necessarily moral "in their form," whether correct or not. In other words, although these legal principles may very well be morally despicable, they are in essence moral principles all the same.

In spite of all the intellectual precautions he takes to avoid that risk, Carrió seems to have made a second error, that of mistaking Dworkin's legal theory (asserting that within some legal systems, like the American one, some legal principles are moral principles) for a metatheory.

This is especially clear with Dworkin's discussion of Nazi law. He imagines a dispute between a Jew and a non-Jew on the basis of a discriminatory statute. Dworkin argues that the non-Jewish plaintiff has a weak right to win the case, but that this weak right is overcome by the moral right of the defendant. This means first that for Dworkin law and morals are not separate systems, since antinomies can be resolved by the triumph of the moral rule (this could be a position taken by a prescriptive legal theory), but it also means that it is the job of jurisprudence to assert the existence of moral rules distinct from and superior to legal rules – and that is the attitude of an antipositivist metatheory.

Dworkin's view on these matters can then be summarised in two ideas. First idea (belonging to legal theory): Law and morals are separated in the sense that a legal rule can always be morally unjust, but they have close links since legal principles, which are part of the law, have a moral nature (even in those

instances where they happen to be unjust). Second idea (belonging to metatheory): It is the job of the legal scholar to determine and assess the value of legal principles that have a moral nature. These should be used on appropriate occasions to supplant positive legal rules.

Secondly, Dworkin refuses to make a distinction, that a positivist normally makes, between legal theory, legal philosophy or jurisprudence, on the one hand, and legal or judicial reasoning on the other. This is particularly clear when he criticises, for instance, the idea that legal philosophy is distinct from legal practice, or that it is the study of ordinary legal reasoning. For him, legal philosophy is the very essence of legal reasoning (Dworkin 1977). In a particularly striking passage he imagines a judge with superhuman abilities, whom he calls Hercules. Hercules finds a solution for every hard case by building a political theory capable of justifying all the legislative and judge-made decisions that have been issued before. From that general theory of a philosophical character, principles will follow, which will provide a solution for the hard case. The judge is therefore also a scholar and a philosopher.

Yet, to use Dworkin's metaphor, the scholar or the legal philosopher are but two sides of the same coin: Their job is to produce interpretations capable of helping to give a consistent account of existing practices and an acceptable justification of the use of public force (Dworkin 1985b).

This view is subject to the usual criticism, which may be summarised as follows.

Apart from the fact that in refusing the distinction of language levels, he renounces the benefit of that powerful intellectual tool, he exposes himself to the argument that his reasoning, particularly in the case of Hercules, is circular: If jurisprudence is to form principles capable of justifying practices and rules, what are the practices and the rules that have to be justified? Since there are no permanent criteria enabling the scholar to identify them, he is forced to look among the principles elaborated from the rules for the criteria that will serve to select those rules, which will in turn serve to elaborate the principles, etc. (Pintore 1982).

On the other hand, if he refuses every distinction between judicial reasoning and jurisprudence, he must also necessarily refuse a distinction between jurisprudence and his own discussion of jurisprudence. One can therefore tend to think that his discussion of jurisprudence has the same function as jurisprudence itself. It serves to justify. In other words, it is nothing but an ideology.[4]

When the scholar asserts principles, he does nothing but assert values. (To justify is to assert that some fact, some behaviour, is in accordance with values.) These values, Dworkin would most probably argue, are objectively discernible, in the sense that they have been expressed by statutes and precedents, so that the scholar's only task is to discover what principles best "fit" existing rules

[4] Giorgio Rebuffa (1982), for example, thinks it is an application of liberal ideology.

and practices. But, he has to agree that it is very often possible to justify one set of rules with differing and even opposite principles. Principles, then, do exist, but we sometimes do not know what principles exist. In that case, according to Dworkin, the only solution is to figure out what principle offers the best justification. The selection would be controversial and each legal philosopher would base his arguments on his own moral convictions. This can only mean that those principles that exist are the ones that can correspond to the leading legal philosopher's moral convictions (Dworkin 1985b).

Thirdly, Dworkin refuses a distinction between prescription and description. As Thomas C. Grey (1987) correctly states: Dworkin "treats interpretation as a pervasive activity that joins the ordinary work of lawyers to the speculation of legal theorists. Interpretation breaks down the rigid separation of description and prescription, is and ought." Dworkin refuses the distinction both for judges and jurisprudence.[5] The function of jurisprudence is to assert principles which can justify existing practices, but, as we have just seen, these principles are at the same time described and prescribed. Described, because they are supposed to exist outside the courtroom, independently of the discussion in court and of the judge's decision, but prescribed because it is impossible to assert that such and such principle offers the best justification, without basing that assertion on one's own values (Pintore 1982, 69).

In addition, when Dworkin as a legal philosopher writes that judges and legal scholars have the same activity, one does not know if he describes a fact (that both judges and scholars produce theories to justify existing practices) or if he recommends that judges should adopt that type of justification for their decisions and that scholars should abandon mere description. Now, if this is a description of what both judges and scholars actually do, it is a good description only if it is true. But it is certainly not true, since many scholars try as hard as they can to refrain from providing any justification, and to limit themselves to pure description.

On the other hand, it would be easy to understand Dworkin's theory as a set of prescriptions, even if one did not wish to submit to them, if only they were presented as such, if they were part of a political programme and justified, for example, by the social utility of a system in which judges and scholars would devote their lives to the imitation of Hercules. But Dworkin purports to justify his prescriptions by the description of what some judges actually do in some cases. In other words he tries to base an "ought" on an "is", and what is more on a most uncertain "is".

II. Content and Method of Argumentation of Jurisprudence

Knowing what we know of Dworkin's theories, it is highly surprising to find in his writings the term "legal proposition." In the terminology of positivism,

[5] "Philosophers are part of law's story" (Dworkin 1986, 409).

that expression means a proposition which is part of legal science, and the object of which is the description of a corresponding norm in the law itself. Since it is a description, the legal proposition, unlike the norm, is capable of being true or false. The use of that term, therefore, necessarily entails the acceptance of the separation between legal theory and law or between legal theory and legal reasoning, which Dworkin rejects. In fact he uses the phrase in an altogether different sense, which we should now investigate. We shall first examine the origin, the object, and the status of these legal propositions, and then the conditions of their validity.

On the first point there is some ambiguity. On one side, legal propositions seem to be part of the law itself. According to Dworkin (1985b), one can no more grasp what legal practice is like without some understanding of the sense of propositions of law than we could have general understanding of mathematics without being able to grasp the sense of mathematical propositions. They are part of the law to be understood, just as mathematical propositions are part of mathematics. This is why the propositions, of which Dworkin gives examples, can be asserted not only by legal scholars, but by judges as well.

But on the other side, if they are part of the law, they are not to be mistaken for rules or norms. This is so first because the assertion of these propositions is not an exclusive privilege of judges, because scholars can also assert them; secondly, because the law they belong to is not the legal system; it is not the law in force. It is the law that one has in mind when, following the old tradition, one asks whether it is an art or a science. In other words, it is an activity practised by those who have some kind of relationship with the law in force, whether they make that law, implement it or simply describe it. In this sense, legal propositions can be said to be part of that activity just as mathematical propositions are part of mathematics.

The concept of a legal proposition is therefore different from that of a norm as well as from that of a legal proposition in Kelsen's sense. Moreover, it should be noted that positivist dualism leads to an embarrassing question, which Dworkin seems to be trying to answer with the help of his concept. If the law is a system of norms based one upon another, and one norm is the application and concretisation of a superior norm, then any law-applying body should necessarily, before positing a particular norm, assert that the superior norm exists and that it orders a certain behaviour. This means that the law-applying body must assert a legal proposition. Thus, even in the positivist sense of the term, one could be tempted to say that legal propositions are expressed by practising lawyers as well as by scholars, and to follow Dworkin in his rejection of the distinction between law and the science of law.

One ought nevertheless to resist that temptation for at least two reasons. First of all, Dworkin himself cannot escape a distinction similar to that which he rejects. He strongly opposes the idea that the law is merely a system of rules and argues that it also entails principles. But the law that entails both rules and principles is not the same law that entails legal propositions. In the first case,

it is the law in force; in the second, legal activity. Thus, the legal proposition mentioned by Dworkin, "no one shall be permitted to benefit from his own wrong" (Dworkin 1978), can be asserted by a judge writing a decision and would mean that he sees in the law that is already in force a principle stating that the law forbids anyone from benefiting from his own wrong. The legal proposition is distinct from the principle it describes. Thus Dworkin also uses the distinction between the law in force and the description of the law, but he moves the boundary, which is not, as is the case with the positivists, between law and legal science, but inside the law itself, between application and description.

On the other hand, Dworkin's view is of no use to solve a paradox which seems to result from positivism. According to that theory, a norm cannot be either true or false, but it can only be valid in a special way: It can be binding. But its validity cannot depend on the truth of a fact-proposition (because from the fact that something is, it is impossible to infer that something ought to be) but only on its conformity to a superior norm. But if before laying down an individual norm (the decision) the judge must, as we have just seen, assert a legal proposition, that there is a superior general norm and that it orders a certain behaviour, then the validity of the norm posited by the judge seems to be based on the truth of the legal proposition. If it is false, the general norm it describes does not exist or else orders a different behaviour, then the individual norm should be considered non-valid, although such an inference is logically impossible.

The positivist has only two ways out: (1) He may accept that a legal proposition asserted by a law-applying organ is not a real proposition of law, in the sense that it is neither true nor false, that it is not a function of knowledge, but of the will. In that case the proposition of law can be the basis of the validity of the individual norm. (2) Alternatively, he can believe that the proposition of law is a real proposition of law, but that it cannot be the basis of the validity of the individual norm; that validity depends only on the form in which the individual norm was posited. The latter position is not much more comfortable than the former: The individual norm can be said to have been posited in the proper form only if the legal proposition stating that the superior norm prescribes a certain form is true.

Dworkin's theory does not seem to suffer from the same paradox. If legal propositions are susceptible to being true or false, because they assert the existence and the content of some principle or rule, a court's decision is also a legal proposition, which can be inferred from the former, more general, proposition. But the difficulty has not really been escaped, because the validity of the decision, if it is understood as a legal proposition, does not depend on its conformity with a rule or with a principle, which even in Dworkin's view are prescriptions, but with its conformity to a legal proposition asserting the existence of the principle.

Secondly, even if for Dworkin, just as for positivists, legal propositions are either true or false, their truth value cannot be assessed by the same means used

by positivists and this truth value has different consequences. For a positivist like Kelsen a legal proposition (a proposition of legal science) is true if the norm which it describes exists within a particular legal system and the existence (or validity) of that norm depends on conditions internal to the system itself. It is valid either if its content is in conformity with that of another norm, or if it has been posited in the manner prescribed by a superior norm. But if the proposition of law is false, this has no consequence whatsoever on the validity of the norm. The relation between the validity of the norm and the validity of the proposition is only one-way: The validity of the proposition depends on the validity of the norm; the validity of the norm does not depend on the validity of the proposition.

For Dworkin, it is a different matter; legal propositions describe principles (among other things). Yet the existence or validity of a principle does not depend in any way on its conformity to some superior norm or on the manner in which it has been posited (since by definition it has not been posited at all). Its existence can be the subject of discussions, and lawyers try to defend it by showing that it offers an adequate justification of existing rules and practices. The proposition is therefore not true on the grounds that it corresponds to a principle, having some form of existence independently of the proposition. On the contrary, it is the existence of the principle that depends on the truth value of the proposition which describes it.

This theory rests on a conception of truth altogether different from that on which not only the positivist approach is based, but more generally that of ordinary science. By truth is usually meant some objective character of a proposition that precludes any person from denying it in good faith. Legal propositions according to Dworkin can never be true in that sense and they are always open to controversy. Moreover, in his own words, "true" legal propositions are those which offer the best justification or render the best account of a practice or of a set of existing rules. This means first that their truth value can vary in degree. Secondly, justification can only be understood in the following way: A principle offers a good justification of a rule if it can be demonstrated that from the principle that specific rule could be deduced; but clearly the same rule could be deduced from different and even mutually contradictory principles. This is why Dworkin is forced to construe the myth of a Hercules, capable of imagining principles that give an account of all existing practices. A simple judge or scholar could find many alternative ways of giving an account of these practices, so that a choice has to be made. That choice reflects the subjectivity of the person who makes it. Dworkin's use of examples taken from literature or literary criticism is particularly striking: In those cases, the best interpretation is that which fits with everything one knows. Thus, the proposition that David Copperfield is a homosexual is, according to Dworkin, either true or false, and it is false if it does not fit in with everything we know of the character (Dworkin 1985b; 1985a, chap. 6).

Yet, the assertion that this interpretation does not fit in with everything we

know, means simply this: Charles Dickens did not write that David Copperfield was a homosexual and if he had, his novel would not be as beautiful. This is only the expression of an aesthetic judgement. For Dworkin, the existence of a principle thus depends on aesthetic or ethical judgements (Guastini 1986).

Finally, if, in the eyes of Dworkin, both jurisprudence and the activity of lawyers are interpretive activities, the function of which is to provide the best justification of existing law, it follows that his legal philosophy is itself an interpretation of the same nature. His views that judges have no discretionary power, that they must apply principles, that principles can be used to supersede rules posited by the law-giver, that men have natural rights resulting from these principles, and also that the existence of principles can be established through interpretation, by showing that they provide a good justification, etc., are all views the validity of which can be demonstrated only by showing that they provide the best justification of existing practices.

This comes distinctly out of his method of argumentation. Thus, in support of the idea that the judge has no discretionary power and that he is always bound by existing principles, Dworkin uses what can be called the democratic argument: If judges had a discretionary power, this would mean that they have a law-making power; in a democratic system, law can only be made by elected representatives of the people. The United States enjoy a democratic system; therefore, in the American system, federal judges, who are not elected representatives of the people, have no power to make the law and are bound by principles. In the same way, if it were true that a judge could choose freely from among the plethora of extra-legal standards, those that he changes into legal principles, that would permit any change of even the best established rule; therefore judges cannot choose freely from the standards.

The weakness of this reasoning is clear: The problem is not whether democracy is compatible with the creation of law by judges, but only if they in fact have the capacity to create it. In the same way, the problem is not, for those who describe the law, to know whether admission by jurisprudence of the doctrine that judges choose freely from standards, would justify or permit anything, but only to know whether judges do in fact choose freely.

At this point, Dworkin would probably object that his ambition is not to describe, but to formulate principles, that he does not care whether judges do in fact really apply principles which have an objective existence and that he only wants to develop coherent justification for existing judicial practices.

If we agree that this doctrine admits almost openly to being an ideology, what remains to be discovered is what are the practices that it justifies.

That this doctrine is an ideology has often been noted. Its content can well be, as Giorgio Rebuffa remarked, political liberalism and its function the defense of the Welfare State. This is not however a decisive argument against a theory that openly admits being supportive of liberalism. The exposure of the ideological character of a theory is a valid argument only if that theory pretends to be scientific, but, it seems that Dworkin never expressed that ambition.

His views can then be criticised as an ideology only by showing either that he does not provide a good justification for what he tries to justify or that he provides in fact a justification for something else. On the first point, the critic would probably fail, because it is true that democracy does not go well with law-creation by unelected judges. On the second point, things are not so clear. Dworkin argues that jurisprudence ought to provide a justification for existing practices. His own theory then could be an interpretation or a justification of the practice by which judges decide hard cases not by creating law, but by applying principles. It has already been said that the existence of this practice can be doubted and that Dworkin does not give an adequate description of it. If it existed, it would not be necessary to give such an elaborate justification. When it is generally assumed that judges may not make law and when they do not in fact make it, there is no need for further justification.

This means that if Dworkin actually does justify something, it is not the practice he pretends to justify, but another, hidden practice. The truth is that judges really make law and, what is more, retroactive law. This practice can be justified in the manner of sociological jurisprudence, by developing some principle saying that in spite of everything it is their social responsibility to make it. Alternatively one can simply deny that judges make law. The latter strategy is the one judges traditionally employ when they say that they are merely applying the law-giver's intentions or fundamental principles that existed long before the case they have to decide.

It is that discourse, not rights and not the alleged practice of law-application, that Dworkin takes seriously and tries to justify. He therefore cannot merely deny the existence of the judges' discretion, because that would only be repeating and not justifying what the judges themselves say. This is the reason why he imagined that clever construction: The discourse by which judges justify their action by having recourse to democracy, natural law, morals, etc., can itself be justified by means of metatheory. Ideology is not hidden in theories alone, and Dworkin only exhibits one kind in order to hide another.

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