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Article abstract

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Will There Be a Science of Law in the Twenty-First Century?*

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ABSTRACT

The skepticism of the American Legal Realists and their heirs threatens to make a politically neutral science of law impossible and thus to undermine the liberal polity which needs such a science. Ronald Dworkin attempts to refute the skeptics and defend both legal theory and liberalism. However, the author points out, Dworkin and liberalism are themselves skeptics when it comes to moral principles, and, therefore, they cannot wholly escape from similar skepticism with regard to legal principles. Both Anglo-American and Continental legal history are

RÉSUMÉ

Le scepticisme des théoriciens de l'école réaliste américaine et de leurs disciples compromet l'élaboration d'une science juridique non partisane et, par conséquent, menace l'État libéral qui a besoin de cette science. Ronald Dworkin tente de réfuter les arguments des sceptiques et vient à la défense tant du libéralisme que de la théorie du droit. Toutefois, l'auteur souligne que Dworkin et la pensée libérale font eux-mêmes preuve de scepticisme à l'égard des valeurs morales et ne peuvent donc s'en départir entièrement à l'égard des

* This essay is a revised version of a lecture originally delivered in Spanish to the Tenth Conference on the General Science of Law, held November 4, 1988, in Valparaiso, Chile, on the topic "The Science of Law in the Twenty-First Century". That lecture was later published in Chile in *En el Umbral del Siglo XXI* (EDEVAL, 1989) and reprinted in Spain in 12-13 *Cuadernos informativos de Derecho Histórico Público, Procesal, y de la Navegación* 3009 (1990). Because its perspective is that of a U.S. law professor addressing Civil Law scholars, the essay may be of particular interest to the readership of this review.

examined in the course of these arguments.

principes juridiques. C'est dans ce contexte qu'il examine l'évolution tant du droit anglo-américain que du droit continental.

With recent U.S. academic debates in mind, I would like to discuss the impact of contemporary skepticism on the possibility of a "science of law", understood in the European sense of systematic knowledge of a set of legal norms. I first present what appears to me to be the strongest argument in favor of skepticism. I then turn to the response of the well-known North American scholar Ronald Dworkin, who tries to refute the skeptics and to show the possibility of such knowledge — albeit in a form quite different from that usually found in the Romano-Germanic world. Finally, I present my own reasons for remaining somewhat skeptical.

Already in the last century the American jurist Oliver Wendell Holmes, Jr. argued that a judge is often not bound by legal norms, because these either are quite vague or else are contradictory. Law has no conceptual unity knowable by a legal science, being merely a prediction of what such unfettered judges are likely to say in the future. Holmes' followers (many of whom were influenced by the nascent social sciences) founded in the 1920's and 30's the American school called "Legal Realism," and gave new impetus to the thesis that "the law is no more than what the judges say it is". Some in this school came to affirm that legal rules never, or almost never, decide cases and that, on the contrary, it is political and psychological factors that are decisive for the judge. Consequently, they wished to exchange the traditional methods of legal research and teaching for those of the new social sciences.¹ They hoped, indeed, to have many sciences *about* law; but they denied the possibility of a science *of* law. There cannot be systematic knowledge of a set of unrelated particulars.

In point of fact the Legal Realists were highly successful: Although in the last century Americans, as well as Europeans, spoke often about "Legal Science", today these words would be incomprehensible to a U.S. law student.

One of the best Realist arguments in favor of the lack of coherence (and so also of comprehensibility) of the body of legal rules was based on the existence of dissenting opinions. Even the wisest judges often disagree on what the law requires in a given case. But if these jurists have not made a mistake of fact or of logic, their disagreement would appear to prove that the law can dictate contradictory conclusions with equal facility and, therefore, cannot be internally coherent. Nor can it be authoritative, for if

1. See, for example, the classic work by Jerome FRANK, *Law and the Modern Mind*, Brentano's Inc., 1930.

the law requires two opposite holdings, then it requires neither, and cannot decide the case in point.

Those early Realists were not revolutionaries, just simple pragmatic progressives who wished to release judges from the then-dominant mechanical conceptualism, so that they could be free to confront pressing societal problems. The Realists did not wish to abolish law but to use it as an instrument to further their own social values. However, in recent years in the United States a new school has arisen which seeks to draw much more radical conclusions from the Realist theses. This school calls itself the "Critical Legal Studies Movement". In his *Knowledge and Politics*,² and elsewhere, the genius of the movement, Roberto Mangabeira Unger (Brazilian, today professor at Harvard Law School) argues that the Realist critique is incompatible with the liberal polity as we know it.

Liberalism, according to Unger, is an ideology requiring a law that is coherent, complete, and neutral with regard to politics and morals. It wishes to leave open as large a field of action as possible to individual interests by restricting law to a set of dry rules of the game. In order to promote private planning, the common good must be reduced to a minimum and specified in advance. Such a political project is much aided by a moral skepticism and subjectivism that warns the judge not to let any personal (read "private") normative ideals influence his or her legal judgments.

The fact of moral pluralism seems to confirm and strengthen such a vision of the rule of law. For if persons of equal intelligence have different moral opinions, it seems that there must be no accessible morality that is objective or otherwise universally valid. And in a world without credible shared values, people must rely more than ever on the public rules of law. In Europe and in many parts of the New World, these demands of liberalism led in the nineteenth century to codification, while in the U.S. other equally conceptualist forms emerged — such as that of a coherent, neutral, and binding set of case precedents (the doctrine of *stare decisis*). Both sides of the Atlantic claimed that "Legal Science" was now possible.

But now Legal Realism comes along to say that rules of law do not exist, or at least that they do not decide cases. Moreover, Realism points to disagreement about law as a proof of legal subjectivity in a way exactly parallel to liberalism's use of disagreement about morals as a proof of moral subjectivity. What decides cases, according to the Realists, are the private beliefs of the judge; these are imposed *ex post facto* on parties in disagreement with him or her. Thus the neutral point above morals and politics, needed by liberalism, is destroyed by the Realist critique. What Europeans tend to call "the crisis of statutory law" is in reality a crisis for all law and for liberalism itself. Critical Legal Studies people are pleased

2. New York, New York, The Free Press, a division of Macmillan Publishing Co., 1975, 2nd edition 1984.

with this turn of events, for they wish to finish up with liberal society, in order to construct new communities of types still largely unspecified.

Dworkin's anti-Realist response is based in part upon an earlier distinction made by H.L.A. Hart in his *The Concept of Law*,³ that concerning points of view "internal" and "external" to law. Hart teaches that every properly legal affirmation is made from a perspective that takes as given the obligation to play the legal game — that is, is made from a perspective "internal" to law. Only someone internal can say "one must pay this tax" or "one is obligated to report an accident". Someone external to law can only describe the opinions of those who are internal, saying, for example, "most judges think that you have an obligation to pay taxes and report accidents". That is, the internal person can make normative legal affirmations while the external person cannot go beyond sociological description.

Confronted, then, with the Realist thesis and proffered proof of legal incoherence, Dworkin in *Taking Rights Seriously*,⁴ and in *Law's Empire*,⁵ insists that law appears so only from an external viewpoint. He challenges the Realist sociologist to sit down on the judicial bench and see with his or her own eyes whether there is not in fact a best answer for nearly every legal case or problem, even if other judges on that bench are often in disagreement, Dworkin says that our skeptic will end up finding the answer which seems to be legally most appropriate, and not imposing his or her own private preferences as to morality — even though moral ideas will certainly influence this result, a fact that Dworkin does not deny. It is only from the outside, from the point of view of someone not committed to playing the legal game, that one can conclude from the fact of disagreement among judges that the relevant law is incoherent. On the inside, one may discover that some judges are simply mistaken, despite their intelligence and good will — with the proviso, of course, that one may oneself be the one mistaken and, therefore, that one must retain an open mind on the matter.⁶ In this way, Dworkin is able to reaffirm the possibility of a science of law — at least in the sense of a legal theory that may be redeveloped by each judge, if not in the more enduring sense to which Europeans have aspired.

I would say that Dworkin has a good argument here. The Realists were in fact quite enamored with the emerging social sciences and with the

3. Oxford, England, Clarendon Press (Oxford University Press), 1961, 2nd edition, 1972.

4. Cambridge, Massachusetts, Harvard University Press, 1978.

5. Cambridge, Massachusetts, Bel Knapp Press (Harvard University Press), 1986.

6. A similar argument has been made by John FINNIS, in *Natural Law and Natural Rights*, Oxford, England, Clarendon Press, (Oxford University Press), 1980, with regard to the objectivity of basic moral and natural law judgments.

goal of a purely factual, non-normative description of law as it “really” is.⁷ But without assuming a purpose, a *telos*, there cannot be coherence or theory, so it is no wonder that these would-be sociologists found none.

What is that finality which ordinarily provides coherence to the rules of law? There is only one purpose which can be universally ascribed to all those internal to law and therefore can offer help to an all-embracing Legal Science: the will to be bound, the will to submit, the will to obey the law. Whatever its ulterior motivation may be, it is this will or aim which makes one “internal” to the law in Hart’s sense and makes possible Dworkin’s discovery of legal unity. For if the law is to control, it cannot contain antinomies. One cannot obey two contradictory masters (the truth in Hans Kelsen’s early opposition to “pluralism”). The Realists and their Critical heirs do not disagree with these assertions. By holding that the law contains contradictions, they destroy its binding power in logic and in effect. But it is then also the case that if one begins with a commitment to legal authority, to the binding quality of law, one cannot fail to presuppose its latent unity. And given this presupposition, and sufficient time and good will, a judge will almost always be able to find some non-contradicted principle in law and legal tradition which is able to resolve the case in point, without (self-consciously at least) imposing his or her personal moral or political beliefs.

Such a judicial quest is not quixotic. *If* the law has authority, it *must* contain a manifest or hidden unity. The Realists can mock the search for systematic legal theory only by committing themselves in advance to an anti-authoritarian posture — not by pointing to any correct empirical description of the world. Dworkin is right from the internal point of view, and they are right from the external point of view. But the choice of point of view can be determined neither by positive law nor by fact.

This is not first time in history that such conflicts and misunderstandings have arisen. The *mos juris gallicus* (the French Humanist school of Roman Law study) made similar criticisms of the anterior *mos juris italicus* (the approach of the Glossators and Commentators who first expounded rediscovered Roman Law to their students in Bologna). The French ridiculed the Italians for believing in the unity of Roman Law instead of seeing it from an historicist perspective, as merely a collection of often unrelated and contradictory statements uttered over a thousand or more years of Roman civilization. But of what possible use could the French perspective have been to the professors of Bologna who were attempting to explain the content of a living system of law, authoritative at least for those subject to the Holy Roman Empire? A collection of unprincipled and possibly contradictory rules cannot decide concrete cases. (It is worth noting that even

7. An excellent historical summary of the relationships between Legal Realism and the new sciences of society can be found in Edward PURCELL, Jr., *The Crisis of Democratic Theory*, Lexington, Kentucky, University Press of Kentucky, 1973.

in France itself, while many scholars followed the French school, judges and lawyers stayed with the Italian).

Thus a seeming paradox: From the practical imperative to decide cases according to an authority comes the theoretical effort to develop a Legal Science. Practical duty requires theoretical science. Sociologists of law can look with contempt upon the theory of law only if they do not care about the practice of law.

In saving legal theory, Dworkin claims also to save liberalism. He shows that, even in difficult and controversial cases, good judges do not seek to impose their own wills or private opinions, but rather to develop their distinct visions of what the law is in itself. They are making judgments, not imposing personal preferences. Thus there need be nothing unfair or arbitrary in a judge's conclusion that the law comes down on one side of a case, even if many colleagues might think it settles on the other side. It is possible for us to go on with that belief, essential to liberalism, that the judge is bound and limited by the law, even when he or she has recourse to controversial legal theory. Dworkin rescues liberalism from the skepticism which threatened to destroy it, by permitting us once again to stand united as a community in search of the latent coherence we suppose to be present in the norms which govern us.

For me, however, a central problem remains. Liberalism must at the same time reject and incorporate skepticism about norms. It must reject skepticism on the legal plane, because it needs to affirm the existence of a determinative set of rules overriding the personal and particular values of each judge. But it requires skepticism on the moral plane, in order to treat all non-legal norms as private and subjective, and thus to avoid the revival of a natural law which might justify additional restrictions on individual liberties and interests. Dworkin himself holds that human equality and respect for other persons excludes any attempt to use state power to impose a moral concept of the good life on those not in agreement with that concept. Such an imposition, he says, would unfairly use the state to advance the preferences of some over others. But then why is it not also unfair and a lack of respect for a judge to impose on others a controversial decision of law?

Dworkin defends the judge by pointing out that the judge does not knowingly impose anything personal to himself or herself when deciding a controversial case: It would indeed be unfair and disrespectful for one to impose a preference *because it is one's own* on others, but it is not wrong for one to impose one's best judgment concerning the meaning of a law binding all. However, in the moral realm, too, most of us do not imagine ourselves to be expressing merely our private feelings or personal preferences. In all humility, we make an effort to render an opinion concerning what is really the best way to live together. To impose that view on others may be a mistake, but it is surely not a favoring of ourselves nor a disrespect for those others.

Dworkin cannot have it both ways. He cannot be a skeptic with regard to morality and a believer with regard to law, for it is the same doubt that assails, and the same faith that strengthens, the one as the other. Either the fact of disagreement reduces normative judgments to private preferences or it does not. But whatever it does, it does the same both to law and to morality.

One way to understand these tensions in Dworkin's work would be this: Dworkin is seeking to discover the fundamental principles that undergird liberal politics and law. He correctly observes that in adopting and enforcing a particular view of those ultimate grounds, one is not favoring oneself but rather one is impersonally favoring what one supposes to be the best answers. Nevertheless, this very process leads him to an ultimate liberal premise which states that all ideas of the good are to be treated as personal preferences. In other words, the content of liberal theory contradicts the process by which it must be understood and affirmed. It is not Dworkin himself who is inconsistent. Rather, he has revealed an inconsistency in the body of thought which he is so profoundly examining.

Liberalism itself contains an antinomy that prevents it from silencing the skepticism of the heirs of Realism, the radicals in the Critical Legal Studies Movement. Liberalism needs skepticism to liberate itself from traditional moral beliefs and to raise the banner of law as the sole object of public loyalty. But that same skepticism turns law into the private preference of each judge. We must choose: either we give up on neutral legal theory, or we give up on liberalism and begin to speak as seriously about morality as we do about law. And no matter which we choose, "Legal Science" becomes a daunting task.