

Dworkin and Legal Positivism

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I

The expression 'legal positivism' is used in many different senses referring to clearly distinguishable and sometimes mutually incompatible theses.

The following statements represent some of the theses which have been taken, both by its supporters and opponents, as characterising the positivist outlook:

(1) There are no prescriptive 'natural laws', that is, absolutely valid standards establishing rights and duties, which are applicable in every society and time and which can be inferred from the 'nature' of man or of human reason or from the general arrangement of the universe.

(2) There is no rational way of objectively justifying the validity of moral standards and ideals about the rights and duties that men have or about the justice of social institutions.

(3) The mere fact that a legal system, whatever the content of its rules, is in force in a certain society is a reason for considering it morally justified and for asserting that the community and officials have the moral duty to obey and to apply it.

(4) Legal standards are distinguishable from other social standards and, in particular, from the moral standards the society accepts.

(5) Legal systems are self-sufficient in providing solutions for any possible case; the law has no gaps, contradictions, linguistic vagueness or ambiguities, etc.

(6) The opposite of (5); i.e., the legal system may not contain a determinate solution for some cases.

(7) The law consists only of standards explicitly enacted by centralized organs (i.e., statutes).

(8) The law includes only those standards which are recognised by judges by reason of their originating in some events occurring in time and space. Standards which judges apply in their decisions only because their content seems just to them or because they are supposed to be of divine origin, are not part of the law.

(9) A legal system in force in a certain society can be identified only by taking into account empirical facts, just as the judicial recognition of its standards, disregarding any consideration about its moral value or justice.

The fact that legal positivism has been associated with so many different contentions makes it difficult to assess what is at stake in some criticisms of it which do not adequately discriminate the theses which are being objected to. No positivist thinker defends all the positions listed above. Hardly any two authors who claim to be positivists support the same sub-set of theses among those which have been mentioned. Furthermore, some of the theses are held by self-declared positivist writers without taking them as essential to their positivism.

However, if we take some outstanding positivist philosophers like Bentham, Austin, Kelsen, Ross and Hart, we can conclude that the central contention they share, as the kernel of the positivist conception of law, is none of the first eight propositions of the foregoing list, but that which was expressed in thesis (9). Despite their different views on the possibility of a rational justification of value-judgements, the distinction between legal and moral standards, the source and structure of legal norms, the existence of indeterminacies in the law, etc., all the authors mentioned share the conception that the law is a factual or social phenomenon (or at least, that it is intrinsically related to some sort of empirical fact) which can be identified and described by an external observer without adopting a position about its moral justification or the moral duty to observe it. They emphasise that one can and should distinguish the law that 'is' from the law that 'ought to be'.

If this is accepted as a fair account of the point of view of current positivism, the strategy that Professor Ronald Dworkin has chosen to attack it in a series of articles¹ looks odd indeed. He does not argue against what I have described as the basic positivist tenet, i.e., thesis (9). He contends, instead, mainly against the idea—which he considers implicit in Hart's theory about the 'rule

1 For this analysis of Dworkin's views I have taken into account mainly the following articles: 'The Model of Rules', *University of Chicago L. Rev.* xiv (1967); 'Social Rules and Legal Theory', *The Yale Law Journal* lxxxi (1972), p. 855; 'Hard Cases', *Harvard Law Review* lxxxviii, vol. 6 (1975), p. 1057; 'No Right Answer?' in *Law, Morality and Society: Essays in Honour of H. L. A. Hart* edited by P. M. S. Hacker and J. Raz (London, 1977).

of recognition'—that all laws have an authoritative factual source or 'pedigree'—thesis (8). Dworkin argues that, apart from the legal rules which do satisfy that test of origin, the law includes other sorts of standards—which he calls 'principles'—that do not have such an authoritative factual source. He undertakes this attack as a way of objecting to the thesis that there is a clearcut conceptual distinction between legal and moral standards—thesis (4). Dworkin goes at great lengths to criticise thesis (6)—that the law is sometimes indeterminate—accusing positivism of supporting this thesis through a confusion of two senses of 'discretion': positivists think, according to Dworkin, that each time that judges have discretion, in the sense that a rule cannot be mechanically applied by them without making considered judgements, they have also discretion in a stronger sense which implies that they are not legally bound to choose a certain solution. Furthermore, Dworkin criticises positivism for assuming something like the afore-mentioned thesis (3), that is to say, that judgements to the effect that courts are obliged to apply certain standards can be justified on the mere basis of some social practices.

Despite the fact that these criticisms imply considerable confusion and do not directly touch on the basic positivist tenet but refer to theses which many positivists do not hold or, if they do, they defend them with independence of that tenet, Dworkin's arguments against positivism are extremely interesting. They throw light upon several undiscussed assumptions in the controversy between positivists and anti-positivists. Once these assumptions are made explicit, what appear to be the main conflicting contentions of both positions prove to be reconcilable.

II

When Dworkin's first article on the subject of principles appeared, it was soon countered by a number of replies. Among the most important of these, one should mention the rejoinder of G. R. Carrió¹, who mainly presented a lucid distinction between different types of legal principles while arguing that some of them can be identified by Hart's test on the basis that they are incorporated into judicial customs; the reply of J. Raz,² who

¹ *Legal Principles and Legal Positivism* (Buenos Aires, 1971).

² 'Legal Principles and the Limits of Law', *Yale L.J.* lxxxi (1972), p. 823.

developed an intelligent discussion directed at showing, among other things, that principles do not differ logically from rules; and the answer of Sartorius,¹ who questioned the consistency of Dworkin's position since he himself seemed to distinguish between standards which are part of the legal system and those which are not, by taking into account whether or not they enjoy 'institutional support'. However, once Dworkin published his second article on the subject, some of those replies lost much of their weight. This is not because Dworkin has conclusively refuted them in his second article but because it showed that Dworkin's theory is built upon a series of misleading assumptions which confounded both its author and its critics.

I think that the objection that some of Dworkin's principles can be captured by a test of origin and do not differ logically from rules, is inadequate. The principles to which Dworkin refers are *moral* principles; he himself makes this explicit when he says that they express ideas of justice, fairness, or other dimensions of morality. Now, it is precisely a feature of moral principles that they are not recognised because they derive from some authoritative factual source. When a standard is recognised as a moral principle its enactment through some procedure is not considered to be relevant to its validity.

This characteristic of moral principles has important consequences for the resolution of cases in which two or more of them conflict. When the acceptance of two conflicting standards depends on considerations related to their origin, it is possible to resort to well-known conflict-resolving criteria, like those expressed by the principles *lex superior* and *lex posterior*. This is not the case when we are confronted with conflicting standards whose validity is not dependent on some enactment. It is meaningless to say, for instance, that the principle that nobody can profit from his own wrong prevails over the principle that circumstances that make a will unenforceable should be interpreted restrictively, because the former was promulgated later than the latter or was enacted by a higher authority (to say this is meaningless even if it were true that these principles have been endorsed by some authoritative source, because their recognition is independent of that endorsement). Moreover, this fact about the acceptance of moral principles implies that there is no verbal formulation of them which is

1 'Social Policy and Judicial Legislation', *Am. Phil. Q.* viii (1971), p. 154.

taken as their canonical expression. This has consequences for the application of other conflicts-resolving criteria, like that contained in the principle *lex specialis*, which depend on the existence of fixed formulations of the standards so as to determine their respective scopes. It may also be the case, though this would require a more careful discussion, that the fact that a standard is accepted without taking into account its origin, affects the way in which it is treated in the practical reasoning which leads to a decision, since in this case, the need to preserve the authority of the source from which the standard derives does not play a part among the reasons for conforming to it.

Thus Dworkin seems to be right when he maintains that there is a radical logical difference between the principles he has in mind and the rules which are recognised because of their authoritative origin. But he has presented his argument in a most misleading way, giving the impression that he distinguishes principles and rules on the basis of their different impact on practical reasoning and of the way in which conflicts between them are resolved, and that once he has made this distinction, he advances the substantive thesis that principles cannot be captured by a test of origin. In fact, the way in which Dworkin argues shows that he is implicitly *characterising* principles, as opposed to rules, on the basis that they are not identified in terms of their derivation from some authoritative source, and that his substantive thesis is that principles, so defined, work differently from rules in practical reasoning, and that the conflicts between them must be resolved in a different way from that in which conflicts between rules are resolved. The confusing presentation of Dworkin's argument has led his critics to attack what is, in fact, an analytical proposition deriving from a conceptual stipulation. If principles are *defined* in terms of the fact that they are accepted without regard to their origin, to reply that some principles are recognised by taking into account their origin does not make sense.

Dworkin maintains that judges recognise in their decision principles which express moral requirements, without taking into account whether or not such principles have been enacted or endorsed through some authoritative procedure. His thesis is that such principles should be considered part of the legal system, since they fulfil the same role as rules in the judicial recognition of people's rights and duties. As Dworkin assumes that positivism cannot accept as part of the legal system standards which are not

identified by their origin, he concludes that positivism offers an inadequate account of law. But is that assumption a legitimate generalisation of the positivist thinking?

It certainly does not correspond to Ross's theory. When this author speaks of the 'cultural tradition of the community' as a source of legal standards,¹ he explicitly rejects the idea that the law includes only standards which are formally established through some authoritative procedure. Ross makes clear that 'positivism' is an equivocal expression which could refer either to the doctrine that all legal standards are positive, in the sense of 'formally' established, or to the thesis that the law is a social phenomenon which can be identified on the basis of empirical experiences alone, without resorting to *a priori* intuitions about metaphysical 'facts'. He declares himself to be a positivist in the second sense but not in the first. For him the law consists of all the standards which are taken into account in judicial decisions independently of how they originate. Dworkin's principles can perfectly well be part of the legal system, in Ross's view, in so far as they are applied by judges in the justification of their decisions.

With regard to Hart, Dworkin hastily interprets his rule of recognition as requiring judges to adopt certain rules which are identified by their origin or 'pedigree'. But Hart has been careful to point out that his rule of recognition may contain any criteria for the identification of the standards whose application it prescribes,² and nowhere does he exclude the possibility of a rule of recognition that prescribes the application of standards which are identified not by their origin but by their content.³ It is true that, as the existence of the rule of recognition depends on its being practised (mainly by the judiciary), in many cases it would be artificial to distinguish between the judicial acceptance of a rule of recognition, which prescribes the application of standards with a certain content, and the acceptance of such standards. When judges accept some standards because they are enacted by certain organs, one can distinguish between the observance of such standards and the general practice of obeying the authorities who enacted them, and one may say, consequently, that that observance is grounded on this latter practice. This looks like an unacceptable

1 See *On Law and Justice* (London, 1958), chapter III, sec. XIX.

2 See *The Concept of Law* (Oxford, 1961), p. 92.

3 See this point in David Lyons' work, 'Dworkin and the Critique of Legal Positivism', forthcoming.

duplication when the only practice that can be postulated behind the application of some standards is one which just prescribes the application of standards with the content of those actually applied. However, there may be cases in which this distinction is not entirely idle. Suppose a system whose judges were confirmed rule-utilitarians, as Wassertrom proposes they should be,¹ and considered themselves bound to apply any standards and only those standards which increase social utility. In this case one would want to distinguish between the general observance of the rule-utilitarian principle, which works as the rule of recognition of the system, and the application of particular rules in accordance to that principle. But when judges apply principles which they consider morally valid without following a distinguishable basic practice which sets out criteria for choosing them, such principles cannot be part of the legal system according to Hart's theory. It is arguable that Hart's conception of a legal system is, thus, defective and should be modified so as to allow for the possibility that the basis of the legal system consists not only of rules of recognition but also of standards, like Dworkin's principles, which judges actually apply in their decisions without following rules of recognition. But this possible modification of Hart's theory would not undermine its positivist nature. Hart maintains that the basis of a legal system consists only of one rule of recognition, not because this is implied in his positivist outlook, but because he thinks that this is necessary for the individuation of a legal system as a unitary whole, different from other legal systems. Raz had shown² that Hart is not justified in thinking that there must be only one rule of recognition in every legal system, and, so, that the unity of the legal system cannot be based on the singleness of the rule of recognition. Once this is accepted, we might as well admit that a legal system can have as primitive standards not only several rules of recognition but also principles judges actually accept in their decisions without regard to what is prescribed by those rules of recognition.

The admission that the moral principles Dworkin refers to may be part of the law in so far as they are applied by courts in their decisions, does not, in any way, undermine the positivist basic tenet that the law is a social phenomenon that can be identified by an external observer on the basis of empirical facts alone and without

1 Richard J. Wassertrom, *The Judicial Decision* (Stanford, 1961).

2 *The Concept of a Legal System* (Oxford, 1971).

having to make value-judgements about its conformity with postulated moral ideals (thesis (9)). An observer may perfectly well verify that a principle like that which establishes that nobody can profit from his own wrong is recognised by courts in their decisions and consider it—precisely because of its judicial recognition—to be part of the legal system, regardless of his own ideas about the moral justifiableness of that principle.

Moreover, even though the aim of distinguishing between positive legal standards and positive moral standards (thesis (4)) is shared by legal philosophers of quite different frames of mind, and not only by positivists, it is important to notice that the admission of Dworkin's principles as part of the law does not shake the positivists' view about the matter. None of the authors mentioned above have denied that a moral standard can become a legal one, once it satisfies the criteria of membership in a legal system, for instance, when it is recognised by courts. Even Kelsen's insistence that legal norms must be created by acts occurring in time and space is not aimed at distinguishing them from positive moral norms, since he requires the same factual origin in the case of the latter.¹ What he wants to prevent with this requirement is that an observer who describes the legal system, i.e., a legal scientist, should postulate, as part of it, moral standards that he himself considers valid and which have not been enacted, endorsed or applied by authorities of the system.

III

Dworkin accuses positivism of thinking that each time that a rule cannot mechanically be applied by courts, but its application requires making considered judgements, the law positively concedes discretion to courts to decide the case according to their choice. But this accusation is groundless, since Ross's and Hart's theories, as well as many other positivists' accounts, allow for a clear distinction between the two senses of 'discretion' referred to by Dworkin. Positivists would say that in the first case mentioned by Dworkin there is a gap in the law, since it does not correlate a given case with a univocal normative solution. If judges, nevertheless, resolve the case, it must be by application of standards (or considerations) which are not yet part of the legal system (their judicial recognition may make them become, thereafter, part of

1 See *Théorie Pure du Droit*, 2nd edition (Paris, 1962), p. 85.

the law, thereby filling the gaps it previously presented). This by no means implies that, in such cases, judges are positively authorised by the law to decide the case according to their choice. This would be an absurd conclusion since it would imply ignoring what has been taken as characterising the situation in question, that is, that the law does not contain a solution for the case. If the law authorised judges to decide the case according to their choice, it would not present a gap but a determinate solution. It is one thing to say that a judicial decision is not normatively determined by the legal system, and it is another quite different, and in fact, contradictory thing to say that it is authorised by the legal system. As far as I know no positivist thinker has confused the two propositions.

Dworkin presents this attack against positivism in a misleading way because, after accusing it of confusing the two senses of 'discretion' distinguished by him, he empties the first one of any real content; he does not think that the law can present gaps or other sort of indeterminacy.¹ In this respect, his position is very close to that of a prominent positivist writer, Kelsen, who assumes that any legal system is necessarily complete, since it necessarily includes a principle to the effect that a conduct which is not expressly prohibited by the rules of the system is permitted. Alchourrón and Bulygin² have shown that Kelsen's position is based on a logical mistake. He confuses the sense of 'permission' which is equivalent to 'non-prohibited by a norm of the system' with the sense which refers to the existence of a norm positively authorising the act. Taking 'permission' in the first sense, it is necessarily true of any legal system that an action which is not prohibited is permitted, since this statement merely expresses a tautology. However this analytical proposition does not exclude the existence of gaps in the law since it is compatible with the possibility that a certain action is not correlated with any normative solution by the system, viz.: is neither prohibited, nor authorised, nor declared obligatory. On the other hand, if 'permission' is understood in the second sense, the truth of the proposition that a conduct which is not prohibited is permitted would imply the

1 One may say that, while for authors like Ross and Hart it is sometimes certain that the law is uncertain, for Dworkin the law is always certain even when we may be uncertain as to what the law is.

2 *Normative Systems* (Wien, New York, 1971), chapter VII, sections 2, 3 and 4.

absence of gap in the law, only if there are norms in the system which positively authorize all actions not expressly prohibited by other norms of the same system; but the existence of such norms is a contingent, not a necessary, feature of a legal system.

However, Dworkin follows a different strategy in his denial of legal gaps. He believes that the incorporation of principles into the domain of the law eliminates the indeterminacies that the rules of the system might present. But it is difficult to see how this claim can be justified.¹ The principles in question may be vague, ambiguous, subject to the open-texture of the language in which they are formulated; there is no guarantee that they would cover all possible cases and that they would be mutually consistent. Indeed, Dworkin himself refers at length to conflicts between principles and to the fact that they are not resolved through fixed procedures. When he says that the effect of a vague statute upon the law is not necessarily to make the legal system uncertain, since there are principles and theories of interpretation aimed at dealing with a vague statute, he may be right, but this is a contingent matter depending on the existence of those principles as part of the legal system (and not only as proposals of jurists) and on their being themselves precise and consistent. It is not rash to say that this is not the case in any modern legal system: principles of interpretation actually accepted by courts are, in general, extremely vague; they do not cover all possible cases and they conflict with each other. Dworkin agrees with this description but, nevertheless, says that it is not relevant to the thesis that the law is always certain. We shall discuss later a possible explanation for this apparently strange remark.

Dworkin says that what he calls 'no right answer' thesis has two versions: one states that there is a 'logical space' between apparently opposing propositions of law; another claims that, although there is no such 'logical space' the conditions for asserting that any of the two opposing propositions is true, may be absent. In fact, the two versions do not exclude each other and both of them are right.

Dworkin argues against the first version, that lawyers do in fact take a proposition like 'a contract with the property x is valid' as the logical negation of the proposition 'a contract with the property x is not valid', so that the hypothesis that there is a

1 See David Lyons, *ibid.*

logical space between the two propositions does not reflect adequately the semantics of legal discourse. But Dworkin commits here the same sort of mistake Kelsen commits when he denies the existence of gaps in the law. As we have seen, Kelsen confuses the proposition (a) 'conduct x is authorised by the legal system' with the proposition (b) 'conduct x is not prohibited by the legal system', concluding wrongly that when the proposition (c) 'conduct x is prohibited by the legal system' is false, we can infer not only the truth of proposition (b) but also that of proposition (a). Dworkin confuses similarly the proposition (a') 'it is the case that a contract with the property x has been declared not valid by the legal system' with the proposition (b') 'it is not the case that a contract with the property x has been declared valid by the legal system', assuming without justification that when the proposition (c') 'it is the case that a contract with the property x has been declared valid by the legal system' is false, we can hold not only that (b') is true but also that (a') is true. While (b') is the logical negation of (c'), this is not so in the case of (a'). Both (a') and (c') can be true, in which case there is a contradiction in the legal system (which does not mean that (a') and (c') are mutually contradictory; the contradiction lies in the legal system and not its description through these propositions), and both (a') and (c') can be false, in which case there is a gap in the law. What Dworkin says about how lawyers talk and think is perfectly right in relation to (b'), but let us hope that they are able to distinguish it from proposition (a') and to see that it is not the logical negation of (c').

I think that the origin of Dworkin's mistake is the same confusion which underlies Kelsen's: it is a confusion between the level of normative discourse and the level of the description of that discourse. While (a') (or (a)) and (c') (or (c)) have counterparts in the normative discourse, viz. the norms declaring a contract valid or declaring it invalid (or the norms prohibiting and authorising a conduct), proposition (b') (or (b)) does not have such a normative counterpart since it describes the absence of any norm about the issue. So it is easy to assimilate proposition (b') with proposition (a') when one does not clearly distinguish the two levels of discourse. In the enactment of norms about the validity of contracts we have these three alternatives: (1) to declare a certain contract valid; (2) to declare it not valid; (3) to authorise judges to enforce or not the contract at their discretion. On the other hand, in the description of how the law has treated

a certain contract we have four alternatives: (1) to assert that it has declared the contract valid; (2) to assert that it has declared the contract not valid; (3) to assert that it has given discretion to judges to either enforce the contract or not; (4) to assert that the law has neither declared the contract valid, nor has it declared it to be invalid, nor has given discretion to courts to either enforce the contract or not. Dworkin denies that there is the third of the foregoing alternatives; even if he were right—and he is not—this would not be relevant to the existence of legal gaps since that existence depends on the possibility of asserting not the third, but the fourth kind of statement of those mentioned above. If a statement of the third type were true in relation to a given case, there would be a determinate legal answer for that case.

The second version of the 'no right answer' thesis (which is not, in fact, an alternative version but an expansion of the former), maintains that even when we consider pairs of legal propositions which are really mutually contradictory—like 'it is the case that a contract with the property *x* is declared valid by the law' and 'it is not the case that a contract with the property *x* is declared valid by the law'—there are situations in which we are unable to say which of them is true. One of these situations is given when the legal description of valid and invalid contracts is vague. I have already considered Dworkin's argument to the effect that vague statutory language does not make the law uncertain. I would like to add, in answer to another point Dworkin puts forth, that, though the vagueness of the description of the situations in which a contract is valid or invalid does not make the concepts of valid and invalid contracts vague, it does make the *application* of these concepts to particular cases uncertain.

Dworkin says that this version of the thesis may be supported not only by an argument from vagueness but also by an argument from positivism (which would maintain that legal propositions are propositions about law-creating acts) and by an argument from demonstrability (which would state that legal propositions, like any other propositions, can be held to be true only when they are verified by empirical facts). In fact these arguments support the first part of the 'no right answer' thesis and not this second one. It is because legal propositions are descriptive of facts and can be distinguished from normative judgements, that the propositions 'it is the case that the law declares the contract valid' and 'it is the case that the law declares the contract not valid' do

not contradict each other and can be both false (whereas the *norms* stipulating 'the contract x is valid' and 'the contract x is not valid' do contradict each other). This depends on those propositions being descriptive of facts, whatever the nature of those facts (that is, this holds even when we accept that they may describe states of affairs other than empirical facts). Dworkin argues that, in so far as the legal propositions p and $\neg p$ are taken to be truth-functionally equivalent to the propositions about law-making acts $L(p)$ (for instance, 'the legislator has commanded p ') and $L(\neg p)$ ('the legislator has commanded $\neg p$ '), the logical opposition the former two propositions must generate a similar opposition between the latter two. But here Dworkin again confuses the logical negation of p with the assertion that the law has normatively qualified the act in a contrary way to that described by p . If p is truth-functionally equivalent to $L(p)$, $\neg p$ must be truth-functionally equivalent not to $L(\neg p)$ but to $\neg L(p)$ (viz. 'it is not the case that the legislator has commanded p '). The proposition $L(\neg p)$ must be represented as equivalent to a different proposition r . Obviously, the propositions p and $\neg p$ cannot be both false and both true, but the opposite is the case in relation to p and r , which can be both true—in which case there is a contradiction in the law—and both false—in which case there is a legal gap.

Admittedly, there would be fewer gaps in the law, though there is no guarantee that they would be completely eliminated, if we accepted that legal propositions can be demonstrated by taking into account not only empirical facts, but also other types of facts. Dworkin suggests that there could be 'moral facts' relevant to the verification of legal propositions, and he maintains further that such propositions can also be demonstrated in relation to other kinds of 'facts', like the internal consistency of the system. This development touches at last—albeit in an oblique way—on the central thesis of positivism (that which we have mentioned as thesis (9)). For positivists would argue against this reasoning that, in so far as the law can be described as a social phenomenon without taking an evaluative attitude towards it and without intending to propose ways for consistently developing it, moral facts and consistency are not relevant to that descriptive enterprise. The analogy with literary criticism resorted to by Dworkin is not appropriate, because that activity is not similar to the descriptive task positivists have in mind. What Dworkin's literary

critics do is more a 'recreation' of the material under study than a pure description of it. Obviously lawyers can, and in fact do,¹ recreate the legal system in a way which resembles literary criticism. Positivists do not deny that lawyers contribute to the reformulation of the legal system, but what they want to stress is the possibility of a mere descriptive account of the law.

This last topic connects with an underlying assumption in the whole of Dworkin's reasoning. To bring this assumption to light will greatly help to understand his general trend of thought and to explain many of his contentions to which I have so far objected.

IV

The clue for interpreting the basic assumption which pervades Dworkin's arguments against positivism can be found in an incidental passage included at the beginning of his second article on the subject. The passage reads as follows:

There is a further objection, which might be made, but which I shall not try to answer. I have no answer to the argument that the term 'law' can be used in such a way as to make the positivist's thesis true by stipulation. It can be used, that is, in such a way that the speaker recognises as 'legal' standards, only those standards cited by judges and lawyers which are in fact identified by some commonly-recognised test. No doubt 'law' can be used in that way, and perhaps some lawyers do so. But I was concerned with what I took to be an argument about the concept of law now in general employment, which is, I take it, the concept of the standards that provide for the rights and duties that a government has a duty to recognise and enforce, at least in principle, through the familiar institutions of courts and police. My point was that positivism, with its doctrine of a fundamental and commonly-recognised test for law, mistakes part of the domain of that concept for the whole.²

What is striking of these remarks of Dworkin's is that he does not seem to realise that the first definition of 'law' he mentions is precisely the definition which, with some modifications of detail

1 For a description of this, see my *Consideraciones sobre la Dogmática Jurídica* (Mexico, 1974).

2 This passage is on p. 856 of 'Social Rules and Legal Theory'.

from author to author, positivists have been defending all along as their main *Leitmotif*, against attempts to characterise the concept of law along the lines of the second definition referred to by Dworkin. Therefore, Dworkin's remarks to the effect that he has no argument against using the term 'law' according to what is in fact the positivist definition is, indeed, quite extraordinary. Even more strange is his supposition that the positivist thesis assumes his second definition of 'law' since that assumption would make positivism, to borrow his own expression, 'false by stipulation'.

In order to see this point it is necessary to concentrate our attention on the phrase contained in the second definition, according to which legal standards are those which provide for the rights and duties that a government has the *duty* to recognise and enforce. Obviously, the term 'duty' is here, as in many other contexts, ambiguous. It can be used in the way which Hare¹ has called 'inverted commas' in order to describe what is established by a rule accepted by other people and not necessarily by the speaker; or else, it can be used with a direct normative force which implies that the speaker himself thinks that what the rule establishes is justified. If the second definition of 'law' differs relevantly from the first one mentioned by Dworkin, that is so only because the word 'duty' is used in it, not with a purely descriptive meaning, but with a normative one. Otherwise, the second definition would only be an expansion of the first one which might be stated as follows: 'Legal standards are only those which judges and lawyers cite and which are in fact identified by some commonly-recognised test contained in a practice which stipulates that judges have the duty to apply these standards.' This expanded version of the first definition (which reflects, by and large, Hart's concept of law) relies on the actual acceptance by judges of the standards which are identified as part of the legal system and does not suppose any kind of value-judgement as to the rightness of that acceptance.

In most of his arguments against positivism, Dworkin assumes the interpretation of the second definition which presupposes a normative use of the word 'duty'. According to it, the law consists of the standards giving rise to rights and duties which the state is under the (morally) justified duty to recognise and enforce.

1 R. M. Hare, *The Language of Morals* (Oxford, 1961).

This definition implies that in determining whether or not a standard is part of a legal system it is necessary to formulate a value-judgement about whether or not judges are justified in recognising that standard. This sort of definition is the main target of the positivists' offensive since it contradicts their basic tenet (thesis (9)) that the law is a social phenomenon which can be identified on the basis of empirical facts alone without making value-judgements about the moral justification of its standards.

That Dworkin assumes this anti-positivist definition of 'law' in his attack on positivism is clearly shown by his discussion of the thesis that social practices can give rise to duties. The reasonableness of this thesis obviously depends upon how the word 'duty' is used in its formulation. A social practice may certainly be described as prohibiting, justifiably or not, a certain action, and consequently, as imposing a duty to do the opposite action. Therefore the thesis is perfectly sound in so far as the word 'duty' is used in its formulation with a purely descriptive force. On the other hand, Dworkin is right in attacking this thesis, if it is interpreted as stating that a social practice is a sufficient justification for the value-judgement that somebody is morally bound to do what the practice prescribes. It is quite true that, in general, to point out what other people actually do as a matter of practice is not a conclusive reason for justifying doing the same action. But Dworkin is mistaken in thinking that Hart's rule of recognition implies this kind of moral conservatism. Hart asserts that judges follow a practice of recognition whose content can be described by saying that it imposes on judges the duty to apply the standards it identifies. This does not imply that one must accept that judges are indeed morally bound to recognise those standards for the only reason that they follow a practice that requires them to do so; nor does it imply that judges themselves can give as the sole reason for their value-judgement that they are bound to apply those standards, the fact that there is a general practice to that effect. The position that Dworkin attacks is, in fact, the political conception that Ross has called 'pseudo-positivism' and which maintains roughly, in one of its forms, that the currency of a practice grounds its moral justifiability. This conception corresponds to thesis (3) mentioned above; it has nothing to do with the sort of positivism Hart and other contemporary authors defend. To misinterpret positivism in this way is the natural outcome of, firstly, assuming that positivists accept a definition

of 'law' according to which legal standards are those which judges are under the moral duty to apply, and, secondly, combining this assumption with the positivist claim that legal standards can be identified on the basis of factual properties alone (like the judicial recognition of them). The result of this spurious mixture of an *anti-positivist* definition of 'law' and the positivist basic tenet is the highly questionable moral conception that judges are justified in applying any standard which is generally accepted.

Dworkin is probably right when he says that judges' judgements (to the effect that they have a duty to apply certain standards) presuppose their acceptance of some evaluative or normative conception whose validity is not related to the fact of its being generally accepted in judicial practice. But Dworkin's further remark that the differences between the normative conceptions judges presuppose in the recognition of valid standards impede the constitution of a common practice of recognition is not so reasonable. If the normative conceptions which underlie each judge's recognition of legal standards differ so much as to prevent us from saying that there is, among the judiciary, a more or less uniform practice of recognition of standards which satisfy a certain set of conditions, there would be reasons for doubting, as Hart says,¹ that we are confronted with a *single* legal system and not with several different systems. Evidently, the differences between the normative conceptions which judges presuppose, might lead them to recognise some different standards, but if we are to say that the legal system is a unitary whole, the judges of that system must converge in the recognition of an ample set of central standards and that recognition must be accompanied by a critical attitude towards deviations. This allows us to say that a common practice of recognition exists among judges of the same legal system.

If we conclude, therefore, that the fact that judges assume certain evaluative conceptions (when they declare themselves to be under the duty to apply certain standards) does not prevent a common practice of recognition from arising, it is hard to see why an external observer, who is interested in determining which standards belong to the legal system in question, cannot take into account this practice in order to identify those standards.

When Dworkin discusses this point, he seems to confuse the situation of such an external observer with that of the judge.

¹ See *ibid.*, p. 112.

Judges do not usually concern themselves with the theoretical problem of describing the content of a legal system, but with the practical one of determining which standards they should justifiably apply in their decisions. The fact that judges cannot responsibly solve this practical problem without articulating a sound evaluative conception, does not imply that the observer intending to describe the legal system must also take an evaluative position in order to accomplish his theoretical task. Hart introduced his idea of the rule of recognition in order to show how an observer proceeds when he identifies the rules of any legal system, and not to explain how judges come to accept these rules.

Dworkin's confusion determines to a great extent his position regarding judicial discretion and the existence of indeterminacies in the law. If a judge holds an articulate evaluative conception, he will be in a position to find out which solution should be given to a certain case whether or not the case falls under the rules of the system which the judge recognises. In both cases, judges' propositions to the effect that they are under a duty to apply a certain solution presuppose an evaluative conception. If the case is clearly solved by authoritative rules, the judge's assertion that he is bound to apply the solution prescribed by these rules, presupposes principles of his evaluative conception which give authority to the source whence those rules emanate. If, on the other hand, the case is not clearly solved by authoritative rules, the judge's assertion that he is bound to solve it in a certain way, presupposes other principles of his evaluative conception which do not refer to the legitimacy of certain sources of standards but directly prescribe a solution for that type of case. If a judge says that he cannot determine which solution should be given to a certain case and that, therefore, he has the choice to decide it either way, this would amount to a confession that he lacks a coherent and comprehensive evaluative conception which would allow him, after due reflection, to reach a conclusion about the right solution for the case. This is probably what Dworkin has in mind when he attacks what he thinks is the positivist point of view about judicial discretion. He implies that when judges profess adequately articulated evaluative conceptions they can always infer conclusions about how a case should be solved, and that the assertion of a judge that there is no such solution, but discretion to decide the case in one way or the other would be dismissed by his colleagues and lawyers as a manifestation of his inability to

develop sound reasoning on evaluative matters. Moreover, he points out that judges' propositions to the effect that they have a duty to solve a case in a certain way when the case does not clearly fall under recognised rules, do not differ relevantly from similar propositions formulated in easy cases; this is because in the latter situation those propositions do not exhaust themselves in the description of social practices but presuppose principles of normative conceptions.

All this is correct but, nevertheless, Dworkin is wrong in his attack on positivism. He does not realise that when positivists say that legal systems can present uncertainties which must be overcome by judges resorting to standards not included in them, they are adopting the point of view of an external observer. Such an observer can perfectly well notice that the standards that he identifies at a certain time as part of a legal system, do not impose upon judges a duty or give them a positive authorisation as to the resolution of a given case. This does not mean that the observer is blind to the fact that judges profess underlying evaluative conceptions from which a solution for the case will probably be inferred. All the observer concludes is that those evaluative conceptions of judges have not so far converged in the common recognition of a standard in such a way that the system could be described as including that standard which establishes a solution for the case.

Therefore, Dworkin's mistaken account of the positivist viewpoint about judicial discretion derives from his confusion between the situation of a judge who must solve a case and the situation of an external observer who wants to describe how the legal system treats that case. This latter confusion derives, in its turn, from a wrong assumption about the definition of 'law' positivists presuppose; an assumption which implies that positivists accept a concept of law which cannot be used (at least without modalisations) in the sort of descriptive enterprise whose feasibility is defended by positivists as their central creed. This wrong assumption is the basic mistake which pervades the whole of Dworkin's arguments against positivism.

V

Despite these serious confusions, Dworkin's thesis can be reconstructed so as to represent an interesting challenge to current

positivism. In order to do this, Dworkin would have to alter radically the strategy he has chosen for countering the positivist position. Instead of assuming that positivists accept the concept of law he presupposes and refraining from criticising the alternative concept, Dworkin would have to attack frontally the definition of 'law' positivists propose in favour of the definition implied in his own arguments.

Dworkin and natural lawyers, in general, ascribe to the term 'law' a normative meaning. According to it, to say that a certain rule or principle is a *legal* standard implies saying that judges and other officials *ought* (prescriptively speaking) to recognise and enforce that rule or principle. Positivism, as stated above, distinguishes itself by combating this way of defining 'law' and proposing in its stead a descriptive concept whose application has no implications whatsoever as to what officials and the public ought to do in relation to the standards it identifies.

Now, Dworkin might have two lines of argumentation in favour of recognising a normative (or prescriptive¹) concept of law. The first would be related to the currency of that notion in linguistic usage. The second would be directed to questioning the alleged advantages of a descriptive concept of law.

With regard to the first point, Dworkin might argue—as in fact he does in some passages of his writing—that in the discourse of judges and advocates, the concept of law is not only used to refer to standards which already meet the conditions set out by the courts' practices of recognition or which have been already applied in previous judicial decisions, but also to refer to standards which are being proposed as principles that the judiciary *ought* to recognise and enforce. When a judge concludes or a lawyer claims that a standard, which has not been so far recognised, ought to be recognised in the instant case, they frame their proposition in terms of a statement about what the law stipulates (and not as a statement about what the law should stipulate).

1 I vacillate about whether to use the expression 'normative' or the term 'prescriptive' to characterise the meaning or the concept (of law) which I want to distinguish. While 'prescriptive' has the advantage of precluding a possible confusion between my characterisation of that concept and the mere claim that it is used to describe norms, it has also the disadvantage of excluding the possibility, stressed by ethical descriptivists, that this concept and all those used in practical judgements (like those of good or right) are descriptive of some 'facts' (like moral ones). What I want to circumscribe is a concept which is defined in relation to deontic properties (however they are analysed).

Therefore, a concept of law which serves adequately to interpret legal statements formulated in that sort of contexts, must permit the elucidation of those statements as normative judgements about what courts ought to do. This is not achieved by a concept of law which refers to the standards that judges actually recognise but by a concept which refers to the standards that judges ought to recognise. If we presuppose a descriptive concept of law, those statements are systematically distorted, and we are compelled to resort to bizarre explanations of the linguistic behaviour of judges and lawyers (for instance, that when they *say* that the law is such and such they *mean* that the law should be such and such, and that this manner of speaking is due either to a chronic misuse of language or to the attempt to cheat people into believing that what is, in fact, a mere opinion consists in an objective description).

That judges and advocates sometimes presuppose a normative concept of law when they formulate legal propositions is shown by the fact that they usually understand such propositions as establishing operative reasons¹ for justifying the decision. This can only be so if propositions of the form 'it is the law that . . .' imply practical judgements about the duty to recognise or to apply certain standards. Only a normative concept of law permits one to explain why, when a justification for a decision is required, to refer to what the law stipulates is generally accepted as a sufficient (even when disputable) answer. On the other hand, if such propositions presupposed a descriptive notion of law, they would never express operative reasons for a decision, but only auxiliary ones which must be conjoined with some further reason, of operative character, for justifying a course of action. However, when a judge says, for instance, 'The law is such and such; therefore I ought to decide the case accordingly', his reasoning is not usually considered incomplete (because resting in some suppressed normative premise, like the judgement that he is morally obliged to apply the law), nor is it generally understood that this reasoning involves a *non-sequitur*. This implies that the normative force which is transmitted to the conclusion lies in the very premise stating that the law is such and such (which requires a normative concept of law).

The contention that legal propositions express in certain contexts operative reasons for a decision, implies that a normative

¹ For the concepts of operative and auxiliary reasons, see J. Raz, *Practical Reasons and Norms* (London, 1975), pp. 33-35.

notion of law is presupposed not only in propositions which refer to standards which do not yet meet the conditions required by judicial practices of recognition, but also in propositions which refer to statutes, customs or precedents which satisfy those conditions. For it is also the case that a proposition which refers to a standard commonly recognised is taken to express an operative reason for a decision, whereas if that proposition were interpreted under a descriptive concept of law this would not be so. These propositions have also normative force and they presuppose an evaluative standpoint about the legitimacy of the standards they mention.

To say that the concept of law employed by judges and advocates is a normative notion, implies assimilating it to ethical concepts like those of good, right or just. As a normative notion, the concept of law referring to the standards that ought to be recognised and enforced, cannot be applied without presupposing an evaluative conception which assigns to it a certain content. Here we should make the same distinction as Rawls¹ proposes between the *concept* of justice and the different *conceptions* of justice which specify that concept, so that persons with different conceptions of justice may use, nevertheless, the word 'justice' with the same meaning. Similarly, the normative concept of law that Dworkin would defend should be specified resorting to evaluative conceptions determining which standards judges ought to recognise. The fact that people differ in these conceptions does not necessarily prevent them from using the same concept of law as the set of standards (whichever they are) which ought to be recognised and enforced.

But obviously, positivists have been aware of the currency of a normative concept of law in some contexts.² At least they have realised (much better than their opponents have done in relation to the nature of the positivist definition of 'law') that natural lawyers have presupposed a notion of that sort in the presentation of their theories. Even though some of the arguments positivists have advanced in favour of a descriptive concept of law seem to

1 *A Theory of Justice* (Oxford, 1973), p. 5.

2 This is clear in the case of Hart when he says (*ibid.*, p. 99) that the expression 'It is the law that . . .' usually manifests an internal point of view towards the rule of recognition, implying the acceptance of the rules of the system, whereas the external point of view is usually expressed by propositions like 'In England they recognise as law . . .'. This can only be so if the word 'law' is used in those expressions with a normative meaning.

be based on assumptions about current usage, they never have relied on these assumptions alone. They have given reasons for preferring a purely descriptive definition of 'law', even if that implied abandoning current linguistic habits. So, in order to defend his position, Dworkin would have to counter those reasons in addition to describing how lawyers use the word 'law'.

Positivists have advanced two main arguments in favour of a concept of law defined in relation to factual properties alone and without resorting to evaluative or normative properties. One is stressed mainly by Kelsen and Ross and consists in saying that legal philosophy has no independent object of its own but, like other branches of philosophy, it should concern itself with the conceptual scheme and methodology of a particular science, in this case, legal science. As legal science can only be a true science in so far as it is descriptive of some states of affairs, the concept of law that legal philosophy must reconstruct and characterise should be one which is appropriate to the descriptive function of legal science. The second argument has been advanced by Kelsen, Ross and Hart alike, as well as by many other authors, and it emphasises the theoretical advantages which follow from a clear distinction between the law that 'is' and the law that 'ought to be', a distinction that is only possible under a descriptive concept of law.

With regard to the first argument, Dworkin might essay several replies. First, it is not at all clear why legal philosophy should limit itself to the analysis of the conceptual apparatus employed in the work of legal scientists, neglecting the analysis of the practical discourse of judges and advocates. While it is true that American jurisprudence has been almost obsessed with judicial activity, without paying much attention to the structure of legal discourse developed in theoretical contexts, it is also true that continental jurisprudence, as represented by Kelsen and Ross, has concentrated too much on the work of legal scientists, with disregard of the system of concepts and methodology underlying practical discourse about the law. It seems, therefore, that some equilibrium between these opposing tendencies is needed, and the way of beginning to achieve it is by recognising that the conceptual apparatus which is appropriate for a theoretical account of law is, perhaps, not so effective for the practical discourse of judges and lawyers (and vice versa). Secondly, even if we take into account what in the countries of the civil law tradition is called 'legal

science', or 'legal dogmatics', we will soon come to the conclusion that, despite what jurists usually declare, it is not fundamentally a descriptive enterprise but mainly a normative one which is directed to 'recreate' or reformulate the legal system so as to eliminate its indeterminacies and to adapt it to ideals of justice.¹ This is not only a fact—recognised (and regretted) by Kelsen and Ross—but, moreover, there is no reason why jurists should abandon the sort of activity they now develop in favour of a pure description of positive legal systems. If continental legal dogmatics has played such an influential rôle in the development of the legal systems it deals with, it is because it predominantly accomplishes normative functions. Philosophers like Kelsen and Ross would have hardly paid any attention to the conceptual apparatus of legal science if it had limited itself, as they propose, to a mere description and systematisation of the rules in force (as legal reports do). So, perhaps, a purely descriptive concept of law is not even required for the task legal dogmatics does and should develop.

With regard to the second argument in favour of adopting a descriptive concept of law (the theoretical advantages which ensue from a clear distinction between the law that 'is' and the law that 'ought to be'), Dworkin might simply counter that the use of a normative concept of law permits us to make an exact equivalent distinction: the distinction between what people and officials of a certain community 'consider to be' the law and what 'is' the law (that is, the standard that this people ought to recognise and enforce). The use of normative concepts, like the concepts of good or justice, does not prevent us from distinguishing what is considered to be good or just and what is good or just; so the same distinction applies in relation to the normative concept of law. Therefore, the *basic* distinction that one should make, in order to achieve the theoretical benefits positivists look for, is not between the law that 'is' and the law that 'ought to be', but between the use of a descriptive concept of law and the use of a normative one (that is to say, between the use of a concept referring to the standards actually recognised and the use of a concept referring to the standards which ought to be recognised). Once we are clear about whether the expression 'law' is being used with a descriptive or a normative meaning, many current

1 See my *Consideraciones* . . . , chapters II, III and IV.

misunderstandings disappear and everybody readily distinguishes, in one case—under a descriptive concept of law—between the law that ‘is’ and the law that ‘ought to be’ and, in the other—under a normative concept of law—between what ‘is considered to be’ the law and what ‘is’ the law. The differences between the two distinctions are merely linguistic. Natural lawyers do not usually confuse, as positivists accuse them to do, between the existing law and the ideal one; they express this distinction resorting to a different terminology.

Of course, this reconstruction of Dworkin’s thesis would not show that the positivist basic tenet is in any way wrong. For positivism has successfully made inroads in the traditional tendency to think about law in exclusively normative terms (having, thereby, achieved a sort of self-confirmation) and has demonstrated that it is possible to reconstruct a concept of law defined on a factual basis alone, and that concept is extremely useful for a variety of descriptive activities (like those involved in historical, sociological and comparative legal research; law-teaching; legal counselling, etc.). What the thesis, thus reconstructed, shows is that a normative use of the term ‘law’ (and derivative expressions like ‘legal right’, ‘legal obligation’, etc.) is perfectly legitimate in practical contexts, including the formulation of normative theories about the rules and principles that ought to be recognised by officials (which is what natural law theories are all about).

Since the controversy between positivists and anti-positivists is mainly caused by their failure to recognise that the expression ‘law’ (and ‘legal right’, ‘legal obligation’, etc.) can be legitimately used either with a descriptive or a normative meaning and by their reluctance to accept that analytical jurisprudence must concern itself with the rational reconstruction of both concepts of law, the controversy is almost completely trivial.¹

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