The Interpreter's Attitude Regarding the Principles of Interpretation. Dworkin vs Hart

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Abstract: The solving of tensions between judicial naturalism and positivism may lead to conciliation and finally to their rapprochement in a judicial interpretation area. They seem to lead to a greater number of common results in the judicial interpretation domain regarding a real convergence between diverse conceptions of different author or referring to an agreement on a common interest or to a combination between the two variants. From this perspective a judicial interpretation can be qualified as being partial or arbitrary. The principles of interpretation have, mainly, a functional nature. They contain, on one part, an ontological basis, ensured by general law principles, configured from a functional and in a technological-methodological point of view. On the other side, the principles of interpretation, regardless their involvement from an organic point of view can be involved in norm application, without taking a normative form. If they obtain a formal-normative investment they lose their main nature, transforming into norms, but we must have to mention the fact that, the principle guides, enlightens, it does not obligate. They represent values, expressed into ideas, desires, but not norms, because these ones build on principles.

Keywords: normative demands, interdependence, duality, empirical disagreements, theoretical disagreements

1. Interpretative debates regarding the problem of autonomy of positive law in connection to natural law and the principles that govern it

The connection between positive law, the principles that govern it and natural law, together with its principles, intervenes in the connection with the research of the foundation of positive law and its autonomy on the basis of a certain limitation. The

duality of law was strongly studied by jurists who tried to offer solution in the matter of the distinction between natural law and positive law.

A first aspect to be discussed refers to the foundation of the idea of positive law, as it was exposed and sustained by Kerhuel, idea that is sustained not only on the rejection of any reference to the principles of natural law (Kerhuel, 2007, pp. 292-300), but also, on the obeying of the freedom of speech right. Thus the author has affirmed the fact that the idea of positive law is not justified by the principles of natural law. We access this point of view, knowing the fact that certain positivist or existentialist currents understand positive law by excluding any references to natural law.

Judicial positivism denies any reference to an ideal in justice or to any source of law that would impose in its positive reality. According to the opinions shared by scholars of Kerhuel's theory and reasoning, there is no other law than the codified one.

To the opposite pole, positive law and natural law represent two law orders, the development of is realized through a reciprocal interaction.

The articulations observed between them result from an essential contribution of the natural law principles to positive law, and reciprocally, the role of positive law in the understanding and accepting of natural law principles in social life. Positive law appeals to the natural law principles in order to attenuate its own deficiencies, in this position not existing in the service of justice, but in the measure of its conformity to natural principles.

These hold an essential role in searching and guaranteeing an ideal in justice, underlining the essential contribution of natural law to positive law, which result from the fact that positive law extracts its lawfulness and if compulsory force from the principles of natural law. When we observe a possible difference between the terms of positive law and those of the natural law, the positive law must be interpreted according to natural law, in the terms of positive law. The readjustment of positive law to natural law is the result of a regulations unity and to the fact that natural law prevails; the limiting to the terms of positive law there is an exigency of formalization.

The interpretation is not only present in different area of activity, but it also structures different domains or it formulates modalities under which they are presented (law or other sociologic sciences) (Eremia, 1998, p. 1).

It gains through law new coordinates, determined on one side by the legislator and on the other side by the judge's activity, the judicial domain being the one that offers to interpretation special characteristics that allow not only the manifest of reason and of human intelligence, but also the their expression in a determinate social frame (Popa, 1992, p. 173), as professor Nicolae Popa sustains.

A judicial interpretation refers not only to the analysis of judicial area, but also of those that once entered into the reality component, have relevance for positive law (Troper, 2001, p. 72).

According to a general definition, law refers to a just order that consists in a certain equality loomed between reciprocal report of individuals and social group. Certain authors refer to natural law (Gurvitch, 1933) as to „*the idea of a necessary regulation of any positive law*" (Leonard, 1991, pp. 268-269), idea that approaches the identification of natural law as „*an intuitive positive law"*. This idea is also seen in Kant's writings for who the expression „*intuitive positive law"* refers to a notion the objective content of which cannot discern an exhaustive and definitive manner, considered to be necessary and prior to the demarche prosecuted. (Kant, 1994, p. 54) The language used by Kant allows the idea of a just order integration, anterior to positive law, which represents in this case an indispensable basis of law, without being transposed into reality in an immediate and complete manner.

The interdependence of the two law orders can not lead to the conclusion according to which what is admitted in a legal manner, it is *de facto* according to the principles of natural law. If all regulations are presumed to contribute to the realization of common good, it doesn't mean that all these are according to natural law, creating situations when the law tolerates, without sanctioning, contrary situations to natural law. (Jestaz, 1990, p. 528) For example, if an injustice is not qualified as being a crime, the judge cannot punish it, even if it can be punished through natural law.

Positive law extracts its moral force from natural law, the latter one being able to sustain itself, in an independent manner from the existence of civil law and outside any connection to an organized and recognized judicial system. According to the example of all humanist conceptions, natural law aspires to its contour in a shape with roots in positive law. (Aillet, 1993, pp. 51-52)

The legislator has predicted correctly, in a presumptive way, starting from natural law, a certain number of principles or fundamental rights, some with value of constitutional principle, fact which offered them a supreme value in judicial norms hierarchy, in which the state has the role of a values guarantor and for democracy

itself. (Del Vecchio, 1979, p. 92) Building, in a social field, the principles of natural law, positive law attenuates the deficient in the knowledge of natural law, whose meaning, subjected to different interpretations, may be dissolved in a variety of individual, social and historical interpretation. We may sustain the fact that the principles of natural law are expressed in a coherent and unified manner, only with the hand of positive law. "*When there is no relation with what was established and known, when it is about a totally new fact, the problem of natural law principles is raised. If the legislators' providing is limited, nature is infinite and applies to everything that interests people*" (Bobbio, 1965, p. 76).

Still, it is certain that natural law and positive law complete each other, positive law offering to natural law a part of its essence and getting in its turn an opening towards authenticity, fact which creates an independence report between them, without leading towards a proper assimilation.

Positive laws represent the result of free choice of concrete and contingent means for the prediction of natural law in judicial order, thus constituting, a practical condition of a natural law which enjoys in its turn of a social efficiency.

For the sustainers of sociologic positivism, the foundations of laws is found in social relations, having as purpose the evolution of human's mentality, thus contributing to the normalization of more human's behavior or opinion, regardless any exterior principle.

According to other opinions, any referring to natural justice, by adopting an interpretation conform to judicial positivism, according to which a constitutional decision must be founded on the principle of hierarchical superiority of the latter, is refused[1]. The debates in this case have their origin in the past as it results from the decisions of the United States Supreme Court, mainly the case Calder vs. *Bull*.[2] This aspect is applied in order to realize a just and efficacy equilibrium between unity and diversity. The tension between naturalism and positivism may represent a source of instability. Naturalism cannot guarantee impartiality, while positivism cannot avoid arbitrary. The lack of impartiality of naturalism has its source in the incapacity to formulate neutral interpretation in connection to any of the competitive conception.

[1] Case *Calder vs Bull.*

[2] *Calder vs Bull* was one of the first constitutional decisions debated by the USA Supreme Court, regarding constitutional limits regarding governmental power. The legislator from Connecticut has pronounced a resolution of allowing a hearing during a trial. Calder, disappointed by his inheritants, has contested this action as a breach of the interdiction in article I, point 10 on the reason *ex post facto legis.*

Examining the assertions of the authors presented in this paper, I believe that, in this context, we cannot speak of an influence of natural law on positive law or about a conditioning from the part of positive law over the natural law, but more of a mutual intake essential to the evolution of the two domains in order to search – without exhaustion – of an ideal in justice.

The law must benefit from an absolute autonomy, independently from the exterior principles, in the context in which positive law affirms as an absolute starting point.

The autonomy of positive law is considered autonomy based in the respect of the freedom of speech, because, in the frame of a democratic regime, the legislator has to obligation to protect and to respect the autonomy of individual consciousness.

Still, I consider that a too radical autonomy between positive law and natural law seems to have certain limits that are seen not only in the search of the law foundation, but also in what refers to the reduction in actuality of the objectivity criterion, which constitutes the guarantee of absolute neutrality.

In face of positivist radicalism what denies the existence of any natural foundation; a demarche may take place that ends with the apparition of a principle which was anterior considered positive law.

2. Particularities of judicial interpretation principles in Ronald Dworkin's theory

The main field of debates between different theory schools of law belongs to the interpretative space. The jurists reasoning, either they are theoreticians or practicians, centers on solving different problems regarding: judicial decision, relation between law and moral, the problem of normative system lagoons etc. Explaining the evolution of judicial order through their way of taking shape and their internal history, implies a priority task and in the same time, a challenge for the law general theory. (Pfersmann, April - June 2002, p. 282)

Dworkin's theories have opened a new field of reflection on a functional reflection between principles and law, thus configuring a global network that results between principles, complex elements of the judicial system and positive law. For Dworkin, law does not represent but the means through which we each principles, reminding e

G. Vedel used to call "judicial gangway", making references to the content of positive law.

According to the opinion of this author, the principles of interpretation do not represent an arbitrary work because they are extracted from positive law, thus allowing the discovery of law in general and in particular the solution to which the judge – interpret reached in difficult cases. Thus, law becomes the median point between different sentences: moral, political, ethical, economic, all brought together and crystallized in principles of interpretation put to the service of the interpret principle of the system, the judge.

Dworkin has a proper and original name for the judge – interpret, calling him "Hercules" due to the superhuman work volume that he accomplishes, in order to shape through his decision a new interpretation, but a logical, developmental and normative one of the judicial system. The judge – interpret has to obey all principles in order to obtain an ideal in justice: "the sufficient reason", "perfection", "democratic society", and "existential constitutional demands".

These are simple sentences for some authors, but true principles, towards which the transformation into procedures of laws does not fulfill its mission. Rawls proposes in the center of his doctrine the notion of equitability, which involves other tow basic principles for the search of an ideal in justice: the principle of equality (equal rights with freedoms) and the principle of difference (which underlined the elimination of inequalities and the obtaining of equality chances). These two principles dominate and in the same time represent the basic structure of society. (Rawls, 1993, p. 200)

Dworkin has formulated an interesting theory about the American judicial system which may be extended, in my opinion, to order national systems.

I consider that the problem regarding the reception of Dworkin's theory, mainly of his theory regarding principles, supposes and opening towards a so called "sociologic law", which leaves an extra freedom for the judge in interpreting positive law. In his vision, the interpreter must understand must understand the political and social reality of society, without mentioning law in an autonomous manner. Also, the interpreter has the obligation not to complete discretionary law and not to apply in practice only the norms of an etatic law system, as Kelsen proposes.

The unity of internal judicial order, in Kelsen's opinion results from the fact that the validity of a norm is tied to another norm and is sustained by it, the creation of the latter one is regulated by norms which represent in their turn the basis of its validity. (Kelsen, 2000, p. 58) We observe that his theory shifts away from conceptualist and logic positivism, the partisans of which are Austin, Jellinek, Hart and Perelman.

According to Dworkin's theory, a judicial phenomenon must be understood as being developmental through what the principles shape, what sustains an interpretative horizon.

We may thus conclude, the idea according to which, the text of a normative act must be the object of a constructive interpretation, so that the text, its lecture, the law reality and the interpretation of the law reality to be able to represent axes of a study made on a original work in a historical judicial plan, because it aims at the elimination of any distinction between text (structure) and lecture. This system in which laws are being taken seriously, supposes "an attitude of interpreting law", conceived as "a concept of interpretation", so that a practical interpretation can support on the existence and the spreading of its results in a "system of principles". (Kitaeff, 2007, pg. 305-308) But, in the same time, interpretative practice must represent the object of putting "a judicial order" in a "narrative coherence". (Lenoble, 1988, pg. 121-139)

Reticent to the idea that a judicial order is not build only of norms, in which we can distinguish main norms from secondary ones (according to Hart's opinion), Dworkin build a new theory regarding „constructive" interpretation, which completes the functioning of law theories care with the fact that, through its reasoning principles receive a characteristic arguing method.

Judicial norms, standards of compulsory conduit, have an especially important role in the law system frame. But law is not complete, according to Dworkin's opinion, if it is build only of norms and is subjected to a subjective interpretation. Law understood as an interpretation concept, also keeps in mind values, maintaining, in the same time the interpreter in an internal coherence of the system, through the principles shifts that direct it.

Dworkin's distinction between rules (norms) and principles is not confounded with the distinction established by Hart between main and secondary rules. A judicial order represents a logical system – analyzable according to conventions of semantics and syntax – different from the value system. But, a society where we meet only rules considered standards of compulsory conduit, doesn't have a law.

Law is built starting with the moment in which main rules, considered norms which impose obligations, are guaranteed and organized by secondary rules, which attribute competencies and allow the offering of validity to main rules.

In Hart's theories, these judicial rules must derive from ***the recognition norm***. Unlike kelsian normativism, this does not represent a logical-deductive norm, but a consensual and empirical acceptance of the main norms by its addresses. Recognition norm, in Hart's opinion, cannot be considered valid or invalid, because if offers conditions of validity to all norms that compose a judicial system, representing its basis. The author turns over the construction of Kelsen's pyramid, in order to sustain the fact that recognition norms do not represent a presupposition, nor a fiction but a social fact. (Billier, 2001, p. 207)

I believe that the recognition norm, which Hart speaks of, does not represent a postulate of integral recognition of the top judicial system, but a norm found at its basis; because a collective existence supposes an empirical acceptance of an obedience to law rules.

Dworkin considers that and adaptation of interpretation principles to the rule proposed by Hart is impossible, because it cannot form from an ensemble of principles. According to this solution, offered by Dworkin, a tautology arises: "law is law", fact which results from the theoreticians desire to mention all existent principles, so that if we propose ourselves to inventory them, our action would fail because they would represent the object of new controversies (Pfersmann, 2001, pp. 22-30).

Another contradiction, influenced by Hart's theory, resided in the measure in which this knows a great influence in an Anglo-Saxon world, Dworkin considered that law does not represent but an ensemble of judicial rules whose validity is appreciated according to what is called "*a test of identifying the origin of norms*". (Pfersmann, 2001, p. 31) The author of the work „*Prendre les droit au serieux*" (Dworkin, 1995, p. 79), presents law as an ensemble of rules and principles, considering principles as being prior to the application of law due to their global character of spreading in the society and in judicial texts. Where Hart believes that the judge disposes of a discretionary power, Dworkin sees in principles the „antithesis" of discretionary power. The idea of moral truth, independent from a judicial system, based on the intuition of basic values, also deductible ones, is today protected by the Australian professor John Finnis, who opposing skeptics, considers that principles, which refer

to the value of life or to the priority of human beings, may represent the starting point for a judicial reasoning. (Finnis, 1980, p. 45)

For Dworkin the distinction between judicial principles and law norms is a logical one. This ensemble of standards impose particular decisions in the domain of judicial obligations, being applicable in the style "all or nothing". Thus, if the facts that a norm stipulated are produces, either that norms is valid, case in which the answer it offers must be accepted, or it is invalid, case in which it contributes with nothing to that decision. (Dworkin, 1995, p. 82) We may mention the fact that a norm is more important than another in a functional plan, because if plays a more important role in regulating behaviors, the same thing is not possible at the level of normative systems.

For Dworkin a judicial reasoning represents a constructive interpretation (Dworkin, 1994, pp. 273-278) of the law as integrity, this being the most efficient model, after the conventional and the pragmatic one, capable to get in the American judicial system. Starting from this concept, Dworkin builds its own definition of law, distinguishing these way empirical disagreements from theoretical ones.

Empirical disagreements on law represent daily events met by a jurist in his activity. The problem that appears is to know is such a normative disposition is contained by a law or the other, fact which does not represent anything else but the contingent notions that is not capable of bringing interpretation differences, being sufficient to report to a certain text in order to find the answer.

Theoretical disagreements serve Dworkin in order to explain his vision of the law and of the origin of the interpretation concept. Thus, a judicial sentence in a dworkinian sense, that anyone's affirmation, either of a judge's affirmation, part public agent, part simple citizen, regarding the existence of law, supposes a reference to a source of validity on which this sentence is based on. Next the problem regarding finding out what could constitute a grounds of law is met, fact for which a theoretical disagreement does not refer to the existence of the fact considered to be a founding one, but on the ground value, and this represents the function of quality interpretation proposed this way by judicial practice

Courtesy rules of an imaginary community serve Dworkin in establishing an analogy with judicial rules. He considers that these courtesy rules are obeyed without anyone asking himself about their lawfulness or their souse. Later, an interpretative attitude got member of the community to think, they have begun to ask themselves about the ground of these norms and of a deeper meaning.

Their answers represent the start of interpreting courtesy rules. Thus, the participants to social practice will develop a "creative interpretation" which can be considered a "constructive interpretation". Unlike conversational interpretation, a constructive interpretation will seek to elaborate conditions for recognizing the system at a purpose level and at its potential level. Francoise Michaut considers that a creative interpretation implies an internal point of view from the participant. (Michaut, 1988, p. 113)

In the dworkinian view of the law, the judge doesn't have a discretionary power, what the author denotes thorough the collocation „droit-integrite", fact which represents the way in which he describes law as "an interpretation concept" (Millard, 4th series 2000, p. 13). The consequence appears in the fact that the authority for the application of rules is dependent on judicial order, starting from this it consecrates to interpretation, to its history, moral and finally but not laws to the principles of interpretation.

The solution to be imposed is conform to the principles if a judicial system consists in finding one answer resulted from the demarche made – *one right answer*. The use by the judge of the principles of the law system can be subjective, but this subjectivity is framed by the necessary connection of the interpret to the unity of the system in order to find the best solution that should, equally, keep in mind the opinions of other judges and that of the rule of precedent. This framing of interpretation by principles comes from a consensus of a proper judicial practice of common law

Listing to the practice of interpretation regarding the agreement on the meaning of law for the positive judicial order, the judge contributed in this way to the collective history of principles which have an ontological and a methodological character.

In Dworkin's opinion, the landmarks of this interpretative practice represent "judicial paradigms". These are qualified as axioms of the judicial system base, having as consequence a suspect consideration of the result of any interpretation which is not conform. They alloy the realization of a "*normative form of arguing*", thus proceeding to a confrontation of interpretation to a paradigm that it cannot be explained. Paradigms represent. Limits, but in the same time they may represent the base of a judicial system having the purpose to mark the interpreter's arguing normative form, that is to offer coherence to the interpretation concept which represents the constitutive element of law. Masking these paradigms has as consequence the interpreter's dis-credibility.

For us, judicial paradigms represent unique rules of the judicial system and their identification, together with the judge's discretionary power leads to the definition of constructive interpretation.

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