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DWORKIN ON ADJUDICATION: AN OVERVIEW ON JUDICIAL DECISION-MAKING

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RESUMO

O presente trabalho pretende dar uma visão sobre o processo a partir do qual juízes decidem os casos que lhes são apresentados, tendo como base a teoria de Ronald Dworkin sobre adjudicação. Nesse sentido, serão apresentados os seus conceitos basilares, bem como os processos que o autor considera nucleares para a tomada de uma decisão. Assim, será a partir do mapa mental apresentado que se retirarão conclusões mais generalizadas sobre como os órgãos jurisdicionais decidem (ou, melhor, como devem decidir), procurando assim justificar o porquê da existência de decisões que, por vezes, demonstram a aparência de inovarem e de irem além da letra da lei.

Nestes termos, em primeiro lugar, serão analisados os conceitos fundamentais de Dworkin, em específico, o que ele apelida de *argumente of principle* e *argumente of policy*, distinção basilar para determinar até onde podem os juízes ir no que toca ao seu poder de decisão.

Em segundo lugar, será analisado o processo mental defendido por Dworkin, a partir do qual deverão os juízes decidir os casos a si submetidos, prestando particular atenção à forma como se deve ter em conta a legislação e os precedentes de outros tribunais.
Por último, será analisada a posição do autor relativamente àquilo a que ele apelida de erros e falta de consistência no sistema jurídico, bem como a forma de colmatar esse problema.

PALAVRAS-CHAVE
Ronald Dworkin; Decisões Jurisdicionais; Princípios; Precedentes; Interpretação.

ABSTRACT
This paper intends to give an insight into the process used by judges to decide the cases presented to them, based on Ronald Dworkin's theory on adjudication. In this sense, his basic concepts will be presented, as well as the processes the author considers pivotal for the making of a decision. Thus, it will be from this roadmap that more general conclusions will be drawn about how courts decide (or, better, how they should decide), thus seeking to justify why there are decisions that sometimes appear to innovate and go beyond the wording of the law.
Firstly, Dworkin's basic concepts will be analysed, specifically what he calls arguments of principle and arguments of policy, a basic distinction to determine how far judges can go in terms of their decision-making power.
Secondly, the mental process advocated by Dworkin will be elaborated, on the basis of which judges should decide the cases submitted to them, paying particular attention to the way in which legislation and the precedents of other courts should be taken into account.
Finally, the author's position regarding what he calls mistakes and lack of consistency in the legal system will be analysed, as well as how to overcome this problem.

KEYWORDS

Ronald Dworkin; Judicial Decisions; Principles; Precedents; Interpretation.

1. Introduction

One of the most important institutions of the EU is the Court of Justice ("CJEU"), tasked with interpreting and applying EU law in an uniform way. For that reason, the cases that arrive at the CJEU are those where the wording of the applicable norms do not show a clear path on how to proceed and, more often than not, the reasoning adopted by the Court seems innovative, in the sense that it goes beyond what is stated by those legal propositions. So, the objective of this paper will be to analyse how hard cases like those should be decided, by taking a comprehensive approach to Ronald Dworkin's theory on adjudication, analysing his fundamental concepts as well as his stance on how judicial decision-making should be tackled, in order to ascertain the way Courts - in particular the CJEU - should decide the judicial affairs. Of particular importance to that task is an article written by the author in 1975, entitled *Hard Cases*[1], where Dworkin develops to great lengths his main ideas and concepts on this particular topic. Thus, that article will be the backbone of this paper.

[1] DWORKIN, Ronald, Hard Cases, p. 1057-1109.

Nevertheless, before delving into it, it is important to understand Dworkin's broader theory of law, from which his understanding of adjudication derives from. In fact, judicial review is closely linked with the concept of democracy, since the former gives a few - judges - the power to apply what was decided by the many. This is particularly evident within the EU, since there is the idea that it lacks a democratic element, where EU Citizens are detached from the people that represent them at the EU Institutions, something reinforced by the notion that the CJEU goes beyond what is legally enshrined.

That being said, Ronald Dworkin was an american philosopher, jurist and scholar, who gave fundamental contributions to philosophy of law and political philosophy, being known for his interpretivist approach to law and morality. In particular, he was an avid opponent of positivism, in particular HLA Hart's legal positivism, having written the *Law's Empire*[2] to that end. Here, Dworkin argued for an interpretive theory of law, meaning that law is what stems from the interpretation of the institutional history of the legal system.

But, Dworkin's theory on law is also influenced by his notions on democracy. In fact, it is Dworkin's stance that judicial review is what protects substantive democratic values, so that when judges use their own interpretation of contested concepts, they are doing precisely what democracy demands from them[3]. Thus, his theories go against two convictions that people generally hold: that democracy requires a decision-procedure that has the will of the

[2] DWORKIN, Ronald, Law's Empire, 1986.
[3] LATHAM, Alexander, Dworkin's Incomplete Interpretation of Democracy, p. 156.

majority as its foundation; that judges should not rely on their own political opinions but base their decision in the law[4].

When tackling the first notion (as he calls it, the "majoritarian premise"[5]), Dworkin argues that if we take into consideration the claim that democracy means collective self-rule, then we should view democracy as a form of partnership between all members of society. That being the case, it does not require a majoritarian decision-making procedure but only the need to protect citizens' rights, ensuring that everyone is treated as a true member of the partnership[6].

Regarding the second notion, Dworkin takes particular caution when it comes to the distinction between judges' personal convictions and the reasoning they should adopt when deciding judicial affairs. He considers that the values that judges uphold must be those that are embedded within legal and political practices. Thus, when a judge strikes down a specific legal norm, having in mind a "moral reading" of the Constitution, he is not doing so based on his personal moral beliefs, but aiming at being faithful to the core values of the political community that is subject to those rules[7].

These conclusions derive from Dworkin's general theory on democracy and the three main values he considers it should pursue: the symbolic value according to which all citizens are free and equal; the agency value which accrues when politics are connected to each

[4] LATHAM, Alexander, Dworkin's Incomplete ..., p. 156.
[5] DWORKIN, Ronald, Freedom's Law: The Moral Reading of the American Constitution, p. 19.
[6] DWORKIN, Ronald, Equality, Democracy and Constitution: We the People in Court, p. 384.
[7] DWORKIN, Ronald, Law's Empire, p. 399.

individual's moral experience; and the communal value of a cohesive and fraternal political community[8].

When it comes to the first one, it could be interpreted as "political equality"[9], since it is associated with voting rights. Nevertheless, the way these voting rights are structured by the political system in order to ensure political equality greatly depends on several historical aspects. Thus, he argues that what is considered as an infringement to citizens' political equality depends upon the community's political understandings. For example, Dworkin conceives as possibilities societies where people gain votes as they grow older, or in which people acquire more votes by pursuing a certain course of study[10].

A final note worthy of mention is that it does not stem from this understanding of the symbolic value that each citizen ought to have an equal impact on political results. In fact, according to Dworkin, such a conception would exclude models of representative government, due to the fact that this structure logically attributes a greater political impact to those that represent over those that are represented[11].

Regarding the agency value, Dworkin identifies two main traits of democracy: the fact that it is both practical and social[12]. It is practical, since democratic processes would not be as important as they are if they would not lead to important political decisions[13]. For example, when talking about voting rights, they are only a respected symbol of democracy due to the

[8] DWORKIN, Ronald, What is Equality? Part 4: Political Equality, p. 4.
[9] LATHAM, Alexander, Dworkin's Incomplete ..., p. 163.
[10] DWORKIN, Ronald, What is Equality?...., p. 19-20.
[11] DWORKIN, Ronald, What is Equality?...., p. 10-11.
[12] LATHAM, Alexander, Dworkin's Incomplete ..., p. 164.
[13] LATHAM, Alexander, Dworkin's Incomplete ..., p. 164.

fact that they have practical consequences[14]. But it is also important for democratic politics to have a social pursuit, meaning that it is of paramount importance for citizens to be able to engage into discussion and discourse with their peers in a public sphere[15].

Lastly, the communal value of democracy refers to the idea of self-government[16]. According to Dworkin, in a pure democracy, laws are created by the collective agency of the people. Thus, citizens who dissent from particular political decisions are expected to accept that course of action, for they are also part of the community which transcends that concrete decision[17]. To Dworkin, this amounts to a "partnership conception of democracy", where government is not meant as the majority's authority over everyone but the political action of the people as a whole, acting as partners[18]. That being said, this conception does not depend on an hierarchical conception of community over the individual, but simply on a shared attitude of its members. According to these concepts, democracy enables citizens to take part in political action and to view themselves as part of a joint venture so as to share the profits derived from the community's achievements[19].

From his theory on democracy, Dworkin derives direct conclusions on the legitimacy of judicial review. His starting point is the fact that it gives a limited number of individuals - judges - the power to overrule policies supported by the majority of the members of the

[14] LATHAM, Alexander, Dworkin's Incomplete ..., p. 164.
[15] LATHAM, Alexander, Dworkin's Incomplete ..., p. 164.
[16] DWORKIN, Ronald, What is Equality?...., p. 5.
[17] LATHAM, Alexander, Dworkin's Incomplete ..., p. 164-165.
[18] DWORKIN, Ronald, Justice for Hedgehogs, p. 384.
[19] LATHAM, Alexander, Dworkin's Incomplete ..., p. 165.

community[20]. Nevertheless, Dworkin does not consider that judicial review goes against the values democracy pursues.

When it comes to the symbolic value, he considers that judicial review does not impact equal voting rights, since it does not reflect any contempt for any group within the community[21]. Secondly, judicial review supports the agency value by providing "a forum of politics in which citizens may participate, argumentatively, if they wish, and therefore in a manner more directly connected to their moral lives than voting almost ever is"[22]. Lastly, judicial review supports the communal value of democracy, since it protects individual rights against government violations, thus preserving the political community as an inclusive democratic community[23]. Thus, Dworkin sees judicial review as a way to protect the community against legislative decisions that would possibly go against the egalitarian foundation of democracy, without infringing citizens' equal status[24].

That being his stance on the legitimacy of judicial review, then the next logical step is to analyse the processes through which that review should take place. As previously stated, that will be the scope of this essay, notwithstanding an introductory and brief explanation of Dworkin's main conclusions.

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[20] LATHAM, Alexander, Dworkin's Incomplete ..., p. 167.
[21] DWORKIN, Ronald, What is Equality?...., p. 29; DWORKIN, Ronald, Justice for Hedgehogs, p. 396; DWORKIN, Ronald, Equality, Democracy and Constitution: We the People in Court, p. 337-339.
[22] DWORKIN, Ronald, What is Equality?...., p. 29; DWORKIN, Ronald, Justice for Hedgehogs, p. 396-398; LATHAM, Alexander, Dworkin's Incomplete ..., p. 167; DWORKIN, Ronald, Equality, Democracy and Constitution..., p. 340-342.
[23] DWORKIN, Ronald, Equality, Democracy and Constitution..., p. 342 to 346; DWORKIN, Ronald, Justice for Hedgehogs, p. 398; LATHAM, Alexander, Dworkin's Incomplete ..., p. 167.
[24] LATHAM, Alexander, Dworkin's Incomplete ..., p. 167.

Dworkin argues that in order to decide, courts need to interpret legal information so as to to arrive at the interpretation that best explains and justifies past legal practices. From that, Dworkin concludes that if law is an "interpretative" reality, then even when people's legal rights become controversial, there is a right answer as a matter of law which is up to the courts to arrive at.

That is not to say that every legal interpreter will reach the same conclusion, nor that even if they do, the justification will be the same. Rather, it means that there will necessarily be an answer for each individual if he interprets the applicable law correctly. Thus, judges are called upon to construct the theory that best justifies the law as a whole in order to decide any particular case that reaches them.

So, the next pages will be dedicated to explain Dworkin's theory on adjudication to greater lengths. The first chapter will be dedicated to the core concepts he employs which lay the foundation of the decision-making process he later develops. Specifically, the distinction between arguments of principle and arguments of policy, as well as the difference between rights and goals will be analysed. The second chapter will be focused on describing the way Dworkin applies his theory, first in general terms and then to judicial scenarios where the role of the judge as a legal interpreter becomes the centerpiece. Lastly, the third chapter will delve into Dworkin's response to the existence of judicial mistakes as well as the criteria he deems appropriate in order for the existence of these errors not to jeopardize the much needed consistency of the legal system.

2. Arguments of Principle and Arguments of Policy

In his endeavour to explain how judges should decide hard cases - meaning, cases where the applicable law is contested[25] - Dworkin starts by making a fundamental distinction between two types of arguments used to justify political decisions: arguments of principle and arguments of policy[26].

The first set of arguments are those that justify political decisions by showing that they respect individual or group rights[27]. A clear example, given to us by Dworkin, is the enactment of anti-discrimination statutes, that aim at consolidating the right to equal treatment to minorities. Here, there is an obvious argument of principle at hand: the statute is enacted in order to respect a group's right (the minority's right to be treated in the same fashion as the majority).

On the other hand, we have arguments of policy, which justify political decisions by showing that they bring the community closer to a collective goal it has[28]. Here, the decision is made not due to a pre-existing right, but due to an aim that is pursued by the community. Dworkin gives the example of statutes conferring subsidies to aircraft manufacturers in order to develop the national defense[29], where it is clear that the subsidy is given solely for a policy reason.

[25] DWORKIN, Ronald, Hard Cases, p. 1060.
[26] DWORKIN, Ronald - cit. 1, p. 1060.
[27] DWORKIN, Ronald - cit. 1, p. 1060.
[28] DWORKIN, Ronald - cit. 1, p. 1060.
[29] DWORKIN, Ronald - cit. 1, p. 1060.

Even though these arguments do not exhaust the possibilities of legal argument, Dworkin considers these as the main factors that support political decisions, using them as a foundation for his entire theory on adjudication. In fact, after conceptualizing these arguments, Dworkin explores their usage by legislators and courts so as to conclude which arguments may be used by judges when confronted by hard cases.

When it comes to legislative procedures, Dworkin argues that both arguments may be used, to different extents, when enacting statutes[30]. This means that legislative reasoning may be based both on pre-existing rights or on the pursuance of collective goals. Nevertheless, in Dworkin's mind the same cannot be said of courts, where their officials are not, generally, democratically elected, not being thus responsible before the electorate in the same way as legislators are[31]. By not having this democratic element, judges do not have the power to decide which are the community's goals[32]. Policy decisions must "therefore be made through the operation of some political process designed to produce an accurate expression of the different interests that should be taken into account and not in judges' chambers"[33]. Secondly, Dworkin argues that if judges were to make new rules based on policy and apply them to cases, then that would amount to a punishment to the losing party based on a right created after the event that gave rise to the conflict, and not on the violation of some duty it had beforehand[34].

[30] DWORKIN, Ronald - cit. 1, p. 1060.
[31] DWORKIN, Ronald - cit. 1, p. 1061.
[32] DWORKIN, Ronald - cit. 1, p. 1061.
[33] DWORKIN, Ronald - cit. 1, p. 1061.
[34] DWORKIN, Ronald - cit. 1, p. 1061.

For these reasons, according to Dworkin, there is a difference in legislative and adjudication reasoning based on the ideas of democracy and fairness, that exclude the usage of arguments of policy by judges. So, courts are only permitted to decide cases based on arguments of principle both on hard and easy cases.

Having as settled that arguments of principle are intended to establish rights and arguments of policy are based on collective goals, then the next logical step in Dworkin's theory is to ascertain what are rights and goals[35].

So, the author defines goals as non-individuated political aims that do not call into question "any particular opportunity or resource or liberty for particular individuals"[36]. In other words, collective goals are related to trade-offs between benefits and burdens that a particular community faces in order to produce an increase of well-being for that community as a whole, without calling into question the legal status of particular individuals. On the other hand, rights are related to individuals, thus being individuated political aims[37]. Of course, these distinctions are made in abstract terms, meaning that the classification of a certain political aim as a goal or as a right greatly depends on the concrete political theory that sustains that political aim[38].

Being the centerpiece of his theory, Dworkin categorizes rights according to different standards. Firstly, he distinguishes absolute rights from their relative counterparts, based on the particular weight they have when facing competition from opposing rights, allowing

[35] DWORKIN, Ronald - cit. 1, p. 1067.
[36] Giving the example of economic efficiency as a collective goal, see DWORKIN, Ronald - cit. 1, p. 1068.
[37] DWORKIN, Ronald - cit. 1, p. 1067.
[38] DWORKIN, Ronald - cit. 1, p. 1069.

(or not) them to be overruled[39]. Thus, we may have rights that cannot be overturned by any other competing right - being absolute - or rights that are susceptible of being overturned - being relative. Next, Dworkin distinguishes background rights from institutional rights, where the first ones provide a justification for political decisions taken by society in abstract, while the second relates to the justification for a decision taken by a particular institution[40]. Lastly, Dworkin makes the distinction between abstract and concrete rights, one that he considers of degree[41]. In fact, to him abstract rights are general political aims to be taken into account in particular cases against other political aims, without a specific mention to how to do it. The examples given are free speech, dignity and equality that, even though not absolute, do not determine the way through which they impact particular social scenarios. Concrete rights, on the other hand, are political aims that are more precisely defined in such a way as to concretely express the weight they have against other political aims in specific situations.

And so, the foundation of Dworkin's theory on adjudication is set. According to him, judges must decide cases (even the hard ones) by limiting themselves to using arguments of principle, that is, by confirming or negating individuated political aims that call into question the legal status of individuals, or, in simpler terms, rights.

Nevertheless, this conclusion is not enough for Dworkin's theory. According to him, the rights which lay the foundation for arguments of principle must have themselves certain

[39] Giving the example of limitations of the right of free speech taking into account inconvenience to the public, see DWORKIN, Ronald - cit. 1, p. 1069.
[40] DWORKIN, Ronald - cit. 1, p. 1069-1070.
[41] DWORKIN, Ronald - cit. 1, p. 1070.

traits. In fact, they must be (i) institutional rather than background rights, and (ii) legal rather than any other institutional rights[42].

Dworkin states that judges must decide hard cases through the application of institutional rights rather than background rights based on the idea that the institutional ones are fixed by constitutive and regulative rules that belong specifically to their respective institution. Nevertheless, these rules (namely when it comes to legislative regulatory rules) are rarely sufficient to determine whether a citizen has an institutional right to the enactment of a certain statute[43]. The example given is that rules governing the legislative process do not give citizens a right to a minimum wage[44].

Nevertheless, that is not to be read as to allow for a total disregard of background rights. In fact, situations may arise where officials may need to take background concepts into account in order to interpret the institutional right applicable to a certain situation. This means that background rights have a pivotal role in the interpretation of their institutional counterparts. That being said, we see that the interpretation of institutional rights must take into account the background rights and concepts that sustain it, in order for the correct interpretation to be the one that best ties the institutional reality with the background one.

Secondly, when deciding hard cases, judges have to confirm or negate institutional rights argued by the parties. But, in the adjudication process not every kind of institutional right counts. In fact, what judges need to analyse are legal rights instead of those stemming

[42] DWORKIN, Ronald - cit. 1, p. 1078.
[43] Dworkin uses the example of chess to explain this - See DWORKIN, Ronald - cit. 1, p. 1078-1082.
[44] DWORKIN, Ronald - cit. 1, p. 1078.

from other institutions. And here, Dworkin separates legal rights derived from legislation[45] and those stemming from common law[46], which he develops in later chapters of his article[47].

In sum, Dworkin's theory on adjudication is based on the premise that judges ought to utilize arguments of principle in order to decide hard (as well as easy) cases. This means that they must argue for the existence (or lack thereof) of a right. This right, according to Dworkin, must have certain characteristics in order to be taken into account by judges. So, it must be a right created by an institution and not one derived from the political theory that supports and legitimizes it. It must be, thus, an institutional right instead of a background right. Secondly, it must be a right derived from very particular institutions: it must derive from institutions that are competent to create legal rights. This means that judges must not only confirm or negate rights, they must do so only taking into account the rights derived from the legal system, in other words, legislation and common law.

That being said, what is left to analyse is how Dworkin applies these concepts to practical scenarios. To that end, the next chapter will delve into Dworkin's decision-making process, starting from his general perception on how institutional officials decide and then transposing that to court proceedings, where judges are asked to interpret legislation as well as earlier precedents.

3. Dworkin's Decision-Making Process

[45] DWORKIN, Ronald - cit. 1, p. 1082.
[46] DWORKIN, Ronald - cit. 1, p. 1087.
[47] DWORKIN, Ronald - cit. 1, p. 1082-1101.

A - A General Overview

Having clarified the foundations of his adjudication theory, Dworkin develops the mental process through which it must be applied by institutional officials in general and judges especifically.

First, he starts off by a general process of decision-making, not necessarily related to adjudication or even law. Here, his objective is to demonstrate how institutional officials should regard background rights when interpreting and applying institutional ones.

Dworkin states that when interpreting ambiguous concepts, institutional officials may need to go back to the political theory that serves as a foundation for that institution so as to arrive at the interpretation that best protects the character of the institutional rule and of the institution itself.

According to Dworkin "decisions about institutional rights are understood to be governed by institutional constraints even when the force of these constraints is not clear"[48]. What this implies is that institutional officials need to construct a political theory of the institution they represensent, in order to arrive at these "institutional constraints". For that, they must take an holistic view of the institution: they might start by the institutional conventions, shown throughout history, through attitudes and manners, that will give them an abstract concept of the institution, even if contested[49].

[48] DWORKIN, Ronald - cit. 1, p. 1079-1080.
[49] "If everyone takes chess to be a game of chance, so that they curse their luck and nothing else when a piece *en prise* happens to be taken, then chess is a game of chance, though a very bad one" - See DWORKIN, Ronald - cit. 1, p. 1080.

From that moment on, the official wil pose himself (consciously or unconsciously) questions in order to ascertain which is the most consistent interpretation of the institutional right, when compared with the political theory he arrived at. He will start by asking himself to look more closely at the institution, to determine which of the contested interpretations of the institutional right is supported by its traits and then he will try to decide the meaning of the background concepts themselves, in order to ascertain which of the contested interpretation offers a more successful understanding of those background concepts[50].

Oscillating from one set of questions to the other, the institution's official will test the concepts he arrives at against the institutional rules and practices, in order to exclude those that are not compatible with them, thus narrowing the questions posed and bringing him closer to the correct interpretation of the institutional right[51].

With this mind map, Dworkin concludes that the concept of the institution's character is tailored to give the answer to a certain institutional problem[52]. From the moment when an institution is created, its participants have the institutional rights derived thereof. Nevertheless, officials do not have full discretion when interpreting the applicable legal concepts. In fact, that would mean, according to Dworkin, that neither party had an institutional right supporting its position[53]. In his mind, the role of adjudication is to confirm

[50] Going back to the chess analogy, Dworkin says that the first set of questions aims at deciphering which kind of intellect is at the background of the game. Is it like poker, with an element of intimidation? Or is it like mathematics, where intimidation is not included? When it comes to the second set of questions, here the chess official tries to interpret the concept of intellect itself. Is it the ability to intimidade psychologically or to resist such intimidations? See DWORKIN, Ronald - cit. 1, p. 1080-1081.
[51] DWORKIN, Ronald - cit. 1, p. 1081.
[52] DWORKIN, Ronald - cit. 1, p. 1081.
[53] DWORKIN, Ronald - cit. 1, p. 1081.

or negate rights, meaning that if a party has a certain right, then the counterpart does not have the right it considers it has, having nothing to do with any kind of strong discretion given to institutional officials[54]. Obviously that that is not meant to say that rules are exhaustive and unambiguous. It simply states the responsibilities of officials towards the participants[55]. If decisions in hard cases must be made about the rights of the parties involved, then the official's reasoning in his judgment must be one that justifies the confirmation or negation of the alleged rights. For that, he must analyse and justify why, in his institution, the rules create or destroy the alleged rights[56].

B - Interpretation of Legislation

That being Dworkin's general stance on interpretation, he takes a step forward and applies it to the interpretation of legal rights. When analysing legislation, Dworkin argues that one of the first concepts that judges need to take into consideration is the "intention" or "purpose" of a particular statute or specific rule[57]. With it, the judge is able to create a bridge between the political justification behind the statute or rule and the hard case that asks which rights they create[58]. Secondly, they need to take into account the principles that "underlie" the positive rules of law, in order to create another bridge, this time between the doctrine according to which like cases should be decided alike and the hard case where it is unclear

[54] DWORKIN, Ronald - cit. 1, p. 1081.
[55] DWORKIN, Ronald - cit. 1, p. 1081.
[56] DWORKIN, Ronald - cit. 1, p. 1081-1082.
[57] DWORKIN, Ronald - cit. 1, p. 1082.
[58] DWORKIN, Ronald - cit. 1, p. 1082.

what this general doctrine demands[59]. Thus, Dworkin says that a philosophical judge in hard cases is called upon to develop theories of what legislative purpose and legal principles require, just like an institution's official is called upon to ascertain the character of his institution[60].

But who is this ideal judge that Dworkin imagines? Here, he creates Judge Hercules, "a lawyer of superhuman skill, learning and patience, that accepts that statutes have the general power to create and extinguish legal rights and that judges have the general duty to follow earlier decisions whose rationale extends to the case in discussion"[61]. Thus, from those two main premises (that Judge Hercules accepts both that statutes have the general power to create and extinguish legal rights and that judges have a duty to follow earlier decisions), Dworkin transposes the general decision-making process that was explained beforehand to a legal context.

He starts by applying his interpretation theory to legal rights, while first making a distinction between legislation[62] (encompassing Constitutions and Statutes) and, on the other hand, common law[63].

Starting off with the interpretation of Constitutions, Dworkin states that Judge Hercules must first decide on whether Constitutions have any power to create or destroy rights, sometimes in contradiction with what background rights are believed to be. His answer to

[59] DWORKIN, Ronald - cit. 1, p. 1082.
[60] DWORKIN, Ronald - cit. 1, p. 1083.
[61] DWORKIN, Ronald - cit. 1, p. 1083
[62] DWORKIN, Ronald - cit. 1, p. 1082.
[63] DWORKIN, Ronald - cit. 1, p. 1087.

that question is that Constitutions set out a general political structure considered sufficiently just to be taken as settled for reasons of fairness: if citizens are able to live in a society whose institutions are organized in accordance with the structure set out in the Constitution, then they must submit to the burdens enshrined therein[64].

But then Hercules arrives at another question: what scheme of principle does the Constitution specifically settle? Here, he must take an holistic view of the Constitution in order to create a political theory that justifies it[65]. Therefore, he must look at all the constitutional rules and derive from them a political theory that coherently justifies the constitutional scheme as a whole. From then on, he must interpret its concepts in a way that satisfies the scheme he arrived at, similarly to the general mind map described beforehand[66].

Going now to the interpretation of statutes, Dowrkin's process follows a similar pattern to that used in constitutional interpretation. In fact, to him, the first question that must be tackled by Judge Hercules is on whether any statute has the power to alter legal rights, the answer to which he will find in his constitutional theory, that may provide that a "democratically elected legislature is the appropriate body to make collective decisions" about the rights conferred to individuals[67]. On the other hand, that same constitutional theory will impose responsibilities upon legislative institutions[68]. In fact, it will impose constraints

[64] DWORKIN, Ronald - cit. 1, p. 1083.
[65] DWORKIN, Ronald - cit. 1, p. 1083.
[66] DWORKIN, Ronald - cit. 1, p. 1083.
[67] DWORKIN, Ronald - cit. 1, p. 1085.
[68] DWORKIN, Ronald - cit. 1, p. 1085.

reflecting individual rights, but also duties to pursue collective goals of public welfare, something useful for a judge's decision-making process since he might ask which interpretation more satisfactorily ties the wording of a particular statute to its constitutional responsibilities, returning, thus to the question of the statute's character[69]. He is now asking himself about a political theory that justifies this statute, in light of the legislator's responsibilities, namely the arguments of policy and principle that best persuaded the legislative institutions in adopting a body of law with that particular wording[70].

Having said that, Dworkin makes two clarifications. Firstly, he takes another glimpse at the problem of judges' discretion in interpreting legal norms, when these do not clearly state the result of a case. He says that by adopting this process of decision-making, judges are not supplementing what the legislature enacted, when it runs out at a particular point[71]. According to Dworkin, in fact, the content of acts of legislature does not run out, but simply gets contested in certain situations. Thus, what judges are called upon to do is to create a political theory as an argument about what the legislature has decided to do, regarding that contested situation[72].

Secondly, he takes into account the wording of statutory norms as limits to what judges may decide, stating that when coming up with their political theory to justify the content of a certain statute, they must not go as far as create rights that go beyond what is stated in it,

[69] DWORKIN, Ronald - cit. 1, p. 1085
[70] DWORKIN, Ronald - cit. 1, p. 1085.
[71] DWORKIN, Ronald - cit. 1, p. 1086.
[72] DWORKIN, Ronald - cit. 1, p. 1086.

even if that is coherent with the adopted political theory[73]. According to Dworkin, "the statutory language they did enact enables this process of interpretation to operate without absurdity; it permits Hercules to say that the legislature pushed some policy to the limits of the language it used, without also supposing that it pushed the policy to some indeterminate further point"[74].

C - Common Law

After developing his theory on the interpretation of Constitutions and statutes, he advances to considerations on common law and the matter of precedent. But here, we have a shift of paradigm, since, when considering precedents, judges are not called upon to say whether a statute or piece of legislation gives a certain right to one of the parties, but to decide on whether an earlier judicial decision gives it a right to a decision in its favour, arguing that the principle behind that earlier case demands a similar decision in the present case[75].

So, as a starting point, decision-making should start by answering the question on the character of precedents. Meaning, why do precedents create a right to a decision in favour of the party to which the precedent recognized a right[76]?

To give a general theory of precedents, Dworkin calls upon the concept of gravitational force, something that differentiates judicial practice from the practice of other institutions'

[73] DWORKIN, Ronald - cit. 1, p. 1086.
[74] DWORKIN, Ronald - cit. 1, p. 1086.
[75] DWORKIN, Ronald - cit. 1, p. 1087.
[76] DWORKIN, Ronald - cit. 1, p. 1087.

officials that are only bound by (the interpretation of) established rules[77]. In fact, judicial practice seems to be set on the idea that earlier decisions contribute to the formulation of new rules in some way different from the interpretation of statutory law. That is due to the fact that earlier decisions have a gravitational character towards the subsequent ones, something easily explained by the fact that judicial practice is not independent. Unlike members of Parliament that do not need to show how their votes are consistent with those of their colleagues or those of past legislatures, judges do have to connect the justification they provide for an original decision with those made by previous judges[78].

Thus, Dworkin does not consider the gravitational force of precedents to be justified by any theory that takes its force to be its enactment as a piece of legislation[79]. Dworkin in fact considers that the gravitational force of precedents is to be justified by appealing to the fairness of treating like cases alike[80]. According to him, a precedent is a report of an earlier political decision and, as such, a piece of political history that provides reason for deciding future cases in a similar fashion, being thus justified on ground of fairness[81].

From this general overview, Dworkin derives responsibilities that judges are subject to, the most important of which is that they must limit the gravitational force of earlier decisions to the arguments of principle necessary to justify those decisions[82]. This means that if an earlier decision was taken solely on grounds of arguments of policy, then it has no

[77] DWORKIN, Ronald - cit. 1, p. 1087.
[78] DWORKIN, Ronald - cit. 1, p. 1087.
[79] DWORKIN, Ronald - cit. 1, p. 1087.
[80] DWORKIN, Ronald - cit. 1, p. 1087.
[81] DWORKIN, Ronald - cit. 1, p. 1087.
[82] DWORKIN, Ronald - cit. 1, p. 1087.

gravitational force, since, as Dworkin states, arguments of policy are matters of legislative strategy and not of court adjudication[83]. So, when defining the gravitational force of earlier precedents, judges must only take into account arguments of principle and apply them in a similar way as before[84].

From that, Dworkin derives that since judicial practice assumes the gravitational force of previous cases (based on arguments of principle), then that means that the right thesis must be consistent within that particular community[85]. That is due to the fact that if a certain precedent holds a certain gravitational force which recommends a particular result, then that decision (and the arguments of principle enshrined therein) need to be followed in later cases. This is why judges explain their reasoning by mentioning the principles that underlie earlier case-law, as a metaphor, according to Dworkin, to the rights thesis[86].

But what are the principles that best justify precedents? What are the values that best "build a bridge between the general justification of practice of precedent, which is fairness, and his own decision about what the general justification requires in some particular hard case"[87]? To answer this, Dworkin further develops a distinction between statutory interpretation and the justifiability of precedents. Regarding the first one, judges need to find a theory for the purpose of the statute subject to interpretation, taking into account other pieces of legislation only insofar as these help selecting between theories that fit that

[83] DWORKIN, Ronald - cit. 1, p. 1087.
[84] DWORKIN, Ronald - cit. 1, p. 1093.
[85] DWORKIN, Ronald - cit. 1, p. 1093.
[86] DWORKIN, Ronald - cit. 1, p. 1093.
[87] DWORKIN, Ronald - cit. 1, p. 1093.

particular statute equally well. But when it comes to precedents, if the idea of gravitational force rests on the value of fairness, then it also requires the consistent enforcement of rights. Thus, the principles that justify precedents must be general, in the sense that they must justify all decisions taken within the legal system (including the enactment of statutes) and not only a particular precedent that is being discussed by the litigants in a specific case[88].

What this means is that in their decision-making process, judges need to make a vertical and horizontal ordering of the elements that they take into consideration[89]. The vertical ordering is structured based on layers of authority, where the upper levels (Constitutions) control the decisions taken by the lower levels[90]. The horizontal ordering, on the other hand, requires consistency between the principles taken into account when deciding judicial affairs[91].

Of course, each judge's conception of constitutional theory and interpretation will impact the way he sees the lower levels of the vertical ordering, meaning that each judge has a more or less different theory than that of his colleagues, since the construction of constitutional theories requires complex judgements, which will vary from judge to judge[92]. These different theories will lead to differences on lower levels, but that does not mean that, when statutes and precedents run out, judges are free to decide however they wish[93]. In fact, knowing what statutes and precedents require, based on their previous analysis, they

[88] DWORKIN, Ronald - cit. 1, p. 1093.
[89] DWORKIN, Ronald - cit. 1, p. 1093.
[90] DWORKIN, Ronald - cit. 1, p. 1093.
[91] DWORKIN, Ronald - cit. 1, p. 1093.
[92] DWORKIN, Ronald - cit. 1, p. 1093.
[93] DWORKIN, Ronald - cit. 1, p. 1093.

must uphold the principles they arrived at, which, of course, reflect the judge's intellectual and philosophical convictions[94].

4. Judicial Mistakes

Regarding common law, Dworkin takes one last topic into consideration, that is the possibility of taking a precedent as a mistake.

Dworkin, first of all, tries to justify the origin of judicial mistakes. According to him, since the history of adjudication is a complex reality, the requirement of total consistency demanded by the principle of fairness may prove to be too strong[95]. Thus, in order to adapt the need for total consistency to reality, one needs to develop that requirement in such a way as to take into consideration the possibility of looking at a part of the institutional history as a mistake, since it would be utopic to find any set of principles that may reconcile all standing statutes and precedents[96].

Dworkin concludes that this fact originates from the different traits that defined those who previously took office as legislators or judges, who were not all of the same mind and opinion[97]. Thus, even though one can socially and historically explain any set of rules and decisions, consistency does not requires explanation but justification, which must be plausible and not arbitrary on its concepts and distinctions[98].

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[94] DWORKIN, Ronald - cit. 1, p. 1095.
[95] DWORKIN, Ronald - cit. 1, p. 1097.
[96] DWORKIN, Ronald - cit. 1, p. 1097.
[97] DWORKIN, Ronald - cit. 1, p. 1097.
[98] DWORKIN, Ronald - cit. 1, p. 1097.

Nevertheless, judges may not make use of the idea of mistakes within institutional history in imprudent ways and with no clear justification to do so, or else they would be free to take any incompatible piece of institutional history as a mistake, voiding the requirement of consistency of its content[99]. Thus, the theory on mistakes, according to Dworkin, needs to be developed in two parts: it must show the consequences for further arguments of taking some institutional event as a mistake and it must limit the number and character of events that can be disposed of in such a manner[100].

Regarding the first part of his theory on mistakes, Dworkin takes into consideration two sets of distinctions. On the one hand, there must be a distinction between the specific authority of any institutional event - its power as an institutional act to produce institutional consequences - and its gravitational force[101]. Having those concepts in mind, then Dworkin concludes that if an event is to be rendered as a mistake, then that does not deny its specific authority, but its gravitational force, meaning that judges, when adjudicating, cannot consistently appeal to that force in future cases[102].

The second set of distinctions is the separation of embedded and corrigible mistakes, where the former refers to those acts whose specific authority is fixed in such a way that it survives their loss of gravitational force, while the latter refers to those whose authority depends on their gravitational force, meaning that they do not survive its loss[103]. This means

[99] DWORKIN, Ronald - cit. 1, p. 1099.
[100] DWORKIN, Ronald - cit. 1, p. 1099.
[101] DWORKIN, Ronald - cit. 1, p. 1099.
[102] DWORKIN, Ronald - cit. 1, p. 1099.
[103] DWORKIN, Ronald - cit. 1, p. 1099.

that it is each individual judge's constitutional conception that will determine which mistakes are embedded[104]. For example, a constitutional theory based on legislative supremacy will ensure that any statute threatened by the mistake theory will lose its gravitational force, but not their specific authority[105]. In simple terms, even if judges treat the statute as a (embedded) mistake that does not repeal the statute so that its specific authority survives. Thus, judges must continue to respect the limitations it imposes, but they shall not use it to argue in some other cases[106].

Coming now to the second part of the mistakes theory - limitation of the number and character of events that can be disposed of in through the mistakes theory - Dworkin considers that judges are required to compose a detailed justification for the entire legal system (statutes and common law), through the form of a scheme of principle[107]. Nevertheless, a justification that admits that part of it is a mistake is weaker than one that does not do so[108]. Thus, this second part of the theory must show that it is stronger than any alternative that does not recognize the possibility of mistakes[109], or a different set of mistakes. In order to do so, Dworkin suggests two pathways.

First, he considers that the principle of fairness fixes on institutional history a political program that the government proposed to continue in the future, being, thus, forward-looking and not backward-looking. Thus, if judges consider that a previous decision, whether being

[104] DWORKIN, Ronald - cit. 1, p. 1099-1100.
[105] DWORKIN, Ronald - cit. 1, p. 1099-1100.
[106] DWORKIN, Ronald - cit. 1, p. 1100.
[107] DWORKIN, Ronald - cit. 1, p. 1100.
[108] DWORKIN, Ronald - cit. 1, p. 1100.
[109] DWORKIN, Ronald - cit. 1, p. 1100.

a statute or a judicial decision, is now regretted, then that fact in itself demonstrates that decision as vulnerable[110].

Secondly, Dworkin argues that fairness in the form of consistency is not the only embodiment of that principle, to which judges are bound to. If they consider that a particular statute or decision was wrong because it was unfair, within the community's concept of fairness, then that is enough to distinguish the decision and make it vulnerable. Nevertheless, in order to do so they must take into consideration the vertical structure of their general justification, so that lower level decisions are more vulnerable then the upper level ones[111].

Thus, this second part of the mistakes theory gives us two main criteria. If judges are able to demonstrate, through arguments of history or by appeal to some sense of legal community, that a particular principle has now so little force that it is unlikely to generate any further decisions, or if they show that political morality demonstrates that such principle is unjust, then the argument from fairness that supported it is overruled[112].

5. Conclusion

[110] DWORKIN, Ronald - cit. 1, p. 1100.
[111] DWORKIN, Ronald - cit. 1, p. 1100.
[112] DWORKIN, Ronald - cit. 1, p. 1101.

Dworkin's theory on adjudication aims at explaining the necessary steps that need to be taken by judges when confronted with cases where the decision and the applicable law is not evident.

His theory is thus one of interpretation of legal propositions, where it is up to the judge to discover the interpretation that best suits the legal and political structures that lie at the foundation of modern societies. In his mind, the role of the judge is to take an holistic view of the legal system in order to reach the interpretation that is the most consistent with the background rights that originated those specific legal propositions. On the other hand, Dworkin argues that the interpretation of precedent must also be done taking into account the need of consistency when applying precedents as well as when analysing the principles that lie underneath them.

This seems to explain the problem raised at the start of this essay, regarding the origin of the innovative nature of the CJEU's decisions. In fact, if we look closely, one may argue that these decisions do not go beyond what the law states at all. They simply interpret the existing concepts by taking into consideration the principles that underlie them, in order to reach the interpretation that best respects those principles and the structure of the European Union as a whole. Thus, if we take Dworkin's concepts into consideration, we may give an explanation to the CJEU's innovative nature without jeopardizing its legitimacy to do so or the importance of democratic values throughout the EU.

That being said, a clear understanding of Dworkin's theory is a fundamental stepping stone to everyone that aims at understanding the rationale behind the CJEU's decision-making process, specially when it comes to subjects yet to be extensively developed by the

EU institutions, for two main points: his theory on legal interpretation and his conclusions on precedents, their gravitational force and the need for them to be consistent.

By taking into account Dworkin's theory on adjudication, it becomes methodologically more efficient to understand how the Court shall tackle these new issues. What are the principles that lay the foundations of these cases? What is the best interpretation to be given to the normative concepts used? What are the rights conferred to individuals by the applicable areas of law?

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