I

Setting the terms of the debate: moral realism and Dworkin's ametaphysical thesis

The goal of this chapter is to challenge Dworkin's ametaphysical thesis, which is the main aspect of Dworkin's ontological project. The first part examines Dworkin's ontological project[1] and the second part explains the metaphysical debate between moral realism and anti-realism and criticises Dworkin's ametaphysical thesis. It begins with an analysis of realism and extends this scrutiny to both morality and Dworkin's ontological position.

The purpose of this study is to show the relevance of metaphysical and meta-ethical reflections in both our understanding of the nature of law and the relation between moral and legal judgements. Dworkin's ametaphysical view challenges directly this latter idea. Thus, Dworkin argues that metaphysical judgements about morality such as " 'Genocide is wrong' is objectively true" might either be reduced to substantive moral claims or be unintelligible. Consequently, Dworkin argues, meta-ethical controversies such as between moral realism and anti-realism are irrelevant to determine whether a moral judgement is objectively true or false. Our aim is to undermine Dworkin's ametaphysical thesis.

This chapter is merely one aspect of our criticism of Dworkin's ametaphysical thesis. As we mentioned earlier, it begins with the elucidation of Dworkin's ametaphysical view. Then, we discuss the nature of the debate between moral realism and anti-realism, since it is crucial to understand Dworkin's ontological project. Finally, the conception that meta-ethical[2] or metaphysical reflections are unintelligible or might be reduced to substantive ethical claims is challenged.

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[1] Dworkin's ontological project is initially propounded in *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), chapter 3, but it is developed in his article 'Objectivity and Truth: You'd Better Believe It', Philosophy and Public Affairs, 25 (2) (1996):87–139. Both his interpretive and methodological projects are explained in Law's Empire.

[2] Meta-ethics is a term extensively used in modern moral philosophy. It gestures towards reflections of second-order of inquiry whose character might be metaphysical, psychological or semantic. Indeed, meta-ethics considers that there are first-order and second-order judgements about morality. In this way, questions such as whether slavery is wrong are first-order judgements and questions such as whether 'slavery is wrong' is true are second-order judgements. Cognitivism and non-cognitivism are meta-ethical perspectives; the former asserts that moral judgements express beliefs about the way things are, which may be true or false, and that under the right conditions constitute knowledge. By contrast, non-cognitivism advocates the idea that moral judgements express attitude or some kind of preference. For a discussion of the distinction between cognitivist and non-cognitivist ethics see Julian Nida-Rümelin, *Ethische Essays* (Frankfurt: Suhrkamp, 2002).

The other aspect of our criticism of Dworkin's ametaphysical view is developed in chapters II and III. In the former we argue that there is a tension between Dworkin's ametaphysical view and a need for a more robust notion of morality within his interpretive project whilst in the latter we discuss the tension between Dworkin's distinction between 'genuine' theoretical and semantic disagreements, and his ametaphysical conception.

The result of our criticism is that Dworkin's ontological thesis should be revised if his legal programme is to explain and understand the nature of law together with the relation between moral and legal judgements.

Let us then examine Dworkin's ontological project and his criticism of moral realism and anti-realism.

I.1 Dworkin's ontological project: a criticism of moral realism and anti-realism

The core of Dworkin's ontological project is a negative one, since it argues that no ontological commitment is necessary to preserve objectivity. In other words, it advocates an ametaphysical perspective. The project is divided into two general argumentative strategies. The first argument aims to show the failure of archimedeanism. Although the central strategy is to criticise sceptical archimedeanism, the challenge is also addressed to general archimedeanism. Thus, general archimedeanism is an epistemic project that aspires to justify moral judgements from both neutral and austere points of view. In other words, it purports both to justify moral propositions without taking sides on positive moral convictions and to rely on non-moral arguments. On the other hand, sceptical archimedeanism is a sceptical position within the general archimedean project. Therefore, it aims to defeat the face value of morality from a neutral and austere perspective. Archimedeans use meta-ethical claims, which are called by Dworkin external propositions (e-propositions). Thus, there are two forms of moral archimedeanism: moral realism and anti-realism. Dworkin claims that the two necessary and sufficient conditions of archimedeanism are neutrality and austerity. Thus, he purports to show that both conditions cannot be met. The outcome of this latter failure is the rejection of any form of archimedeanism.

The second argumentative strategy aspires both to show that objectivity might be reached without archimedeanism and that objectivity is not threatened by sceptical archimedeanism. The core argument is that the rejection of archimedeanism involves the rejection of moral realism and anti-realism. If this is so, sceptical positions might argue that our moral convictions are not objective, since moral realism and archimedeanism are false. Dworkin shows that this latter conception also fails, because it involves sceptical archimedeanism. Dworkin's central thesis is that our

moral convictions might still be objective, although there is no *a priori* justificatory strategy that guarantees the truth and objectivity of our moral convictions. Dworkin's response to the question of whether we might preserve objectivity without moral realism is that objectivity involves the idea that there is a right answer, which is reached only through a process of constructive interpretation and argumentation within our moral convictions. His conclusion is clear: only moral convictions can justify moral convictions. In a similar vein, only moral convictions defeat moral convictions.

In the next two sections, we will elucidate both Dworkin's ametaphysical thesis and his notion of moral objectivity.

I.1.1 *A challenge to archimedeanism*

Dworkin's primary target of attack is what he calls archimedean theories. The main aspect of these theories is their externality. They purport to stand outside a whole body of beliefs.[3] In a similar vein, moral sceptical archimedeanism purports to stand outside any evaluative premise.

Dworkin contrasts external or archimedean conceptions to internal ones. Thus, an internal sceptic presupposes the truth of a positive value judgement. According to Dworkin, a positive moral judgement ascribes a moral predicate to an act, person or event. By contrast, a negative moral judgement denies this latter ascription.[4] These ascriptions or their denial might also be conditional or counterfactual.

Dworkin also characterises what he calls global internal scepticism.[5] This kind of scepticism is internal, because it presupposes a positive moral claim. According to Dworkin,[6] the sceptical moral judgement that morality is empty, because there is no God, presupposes that a supernatural will is the only plausible basis for morality. On the other hand, the idea that morality is empty, because all human behaviour is causally determined, presupposes the truth of a positive claim such as that it is unfair to blame people for what they cannot help doing. Dworkin concludes that global scepticism entails the truth of a counterfactual positive moral judgement.[7]

This latter characteristic of global scepticism, Dworkin tells us, also applies to internal scepticism. A second feature of internal scepticism is that it has direct implications for action. By contrast, external or archimedean scepticism neither has implications for action nor relies on a positive or counterfactual moral judgement.

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[3] Dworkin, R., 'Truth and Objectivity: You'd Better Believe It', p. 88 see *supra* note 1.

[4] Ibid., p. 90.

[5] Ibid., p. 91.

[6] Ibid.

[7] Ibid.