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**THE ROLE OF NARRATIVITY IN RONALD DWORKIN'S
LEGAL THEORY: IS THERE A NARRATIVE THEORY
IN "HOW LAW IS LIKE LITERATURE"?¹**

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ABSTRACT: This paper has the purpose of assessing the role of narrativity in Ronald Dworkin's theory of law. The research question is to know whether Dworkin's theory of law can be considered a narrative theory of law. By narrative theory, we mean a theory that is based on a heuristic characterization of plots, narrative genres, characters etc. Dworkin introduces six theses in order to link literature and law, in his classic "How law is like literature": (1) law, as a practice of identifying valid legal propositions, can be better understood when compared to the practice of literature (*synechist methodology thesis*); (2) the compression of the practice of law always involves a descriptive and valuative dimension (*normative theory thesis*); (3) every judgment about art presupposes a theory about what art is (*aesthetical hypothesis*); (4) every judgment about valid legal propositions presupposes the determination of what law is (*political hypothesis*); (5) the political hypothesis of law depends on understanding the intentionality of the political community (*chain novel*); and (6) The chain novel depends on understanding the institutional history of the political community (*institutional history thesis*). This paper's conclusion is that Dworkin's theory must be seen as a narrative theory, and that without such narrative aspect, his theory would simply be a legal naturalistic theory, since the purpose or value of the law would thus become absolute.

KEYWORDS: Dworkin; narrative; law; literature; hermeneutics.

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1 INTRODUCTION: DWORKIN, PHILOSOPHICAL HERMENEUTICS, AND LITERATURE

To think the law, it is always necessary to analyze or to interpret text. The correct meaning or the righteous application of given norms is a considerable share of the greatest legal debates around the globe. Some innocent jurists have searched for solutions to these problems within the contemporary law and its practices. However, the jurists that have been able to further explore the discussion have realized that the legal universe alone is insufficient to encompass such problems. Thus, as happens in Brazil, several jurists end up becoming legal philosophers, in order to be able to analyze legal hermeneutics based on general hermeneutics or philosophical hermeneutics.

The most famous example in Brazil is Lenio Luiz Streck (2010, 2011a, 2011b), whose ideas, widespread nowadays, has the purpose of philosophically understanding what it is to comprehend and to interpret text – mainly based on the thought of Heidegger and Hans-Georg Gadamer, and their criticism by Ernildo Stein. In such a dialogue between law and philosophy, there is an attempt to solve the problem of legal discretion, judges who issue rulings “according to their own conscience”, rather than using sufficient and clear legal or argumentative parameters.

In this line of thought, Streck also bases his theses on Ronald Dworkin’s ideas, since both of them face the verdict-issuing problem, given their individual contexts. Dworkin belongs to the *Common Law* tradition, whether Streck belongs to the *Civil Law* tradition. And in this appropriation of Dworkin, several controversies and discussions came to occupy a central position in the debates of theory and philosophy of law throughout Brazil. We highlight the following: Is it possible to reconcile Ronald Dworkin, with his correct answer, the chain novel, with hermeneutic-continental thinking? Or is the correct reading of Dworkin possible only via post-Hartian analytic thinking? (Guimarães Filho, 2014; Ricoeur, 1997)⁴

4 This paper is not intended to exhaust such a dense subject within philosophy. The very separation between analytic and continental philosophy, presupposed from the question raised, would require an argumentative effort of its own and unrelated to our purpose. Our intention is only to indicate possible living controversies around the issue and our small contribution to the debate from an analysis of Dworkin’s work.

André Coelho (2014) attempted to answer this question negatively, regarding the link between Dworkin and the so-called hermeneutic philosophy. To do so, he adopted a methodological presumption of personifying hermeneutic philosophy in the work *Truth and Method*, by Hans-Georg Gadamer, in order to compare it with the philosophical statements by Dworkin in *Law's Empire*. In his view, there are three different links (Coelho, 2014, p. 20-21): (a) Direct Influence: Does Dworkin resort to Gadamer's philosophy as a source of discovery or foundation of the ideas he proposes? (b) Theoretical Conciliation: Does Dworkin need to reconstruct his theory as belonging to the hermeneutic tradition as opposed to the analytic tradition? (c) Epistemic Affinity: Can Dworkin's ideas be read fruitfully as analogous to Gadamer's?

The study by André Coelho reaches the conclusion that there is only epistemic affinity, with several reprimands, between Dworkin and Gadamer, given that there are no elucidative references in the work to Gadamer's philosophy and that the fundamental concepts of Gadamerian philosophy seem to be distant from those used by Dworkin.

In a more recent study, Ralf Poscher (2014) confirms the hypothesis raised by Streck, as mentioned, as well as ideas by Castanheira Neves (2003). Poscher (2014) acknowledges a visible link between Dworkin to the tradition of hermeneutic philosophy, especially, Gadamer. Instead of reducing the whole hermeneutic philosophy to a single author, say, e.g., Gadamer or Ricoeur, Poscher (2014) attempts to rebuild a possible tradition of philosophical hermeneutics in law, which is, according to him, related to the defense of constructivism as opposed to descriptive or empirical theories of interpretation, such as, for example, textualism or intentionalism. Instead of drawing a strict line between hermeneutical and analytical philosophy, Poscher recognizes that there are hermeneutical studies in the Anglo-Saxon philosophy, and that the limits of the two areas are in a grey zone.

Following the same line of thought of Ralf Poscher, Saulo de Matos and Victor Pinheiro see the core thesis of hermeneutic philosophy in the following terms: “[...] philosophical hermeneutics argues that it is impossible to reduce the interpretive experience to a mere descriptive question of language use” (Matos; Pinheiro, 2016, p. 190, translated). Based

on this concept, three conceptions of philosophical hermeneutics are presented with reference to characteristics that are relatively necessary and historically constituted, namely, Illuminist hermeneutics, Romantic hermeneutics, and philosophical hermeneutics. Dworkin, in this sense, is clearly linked to the tradition of philosophical hermeneutics because of the adoption of holism, the idea that all interpretation is self-understanding, and the constitutive character of language in relation to reality, which, of course, does not imply that Dworkin is a Gadamerian or Heideggerian scholar.

The bottom line is, thus, to determine which family similarities compose the tradition of hermeneutic philosophy, in order to define whether Dworkin belongs or not to such tradition. In a distant position from the legal debate, Celso Braidia (2014) follows the same idea of Poscher's (2014), as previously shown, that a hermeneutic question leads to a methodological problem regarding the understanding of meaning and the very concept of meaning to be understood, which negatively responds to any descriptive proposition of meaning determination. In this context, Braidia (2015, p. 3) reconstructs the hermeneutic tradition in two fundamental areas: (a) the hermeneutic of comprehension, which treats linguistic manifestation without extralinguistic assumptions of domination, and (b) the hermeneutic of suspicion, which proposes an understanding of interpretation from the idea of a subject without subjectivity, due to elements of domination. In the end, not only does Braidia include Dworkin in this debate, but he also proposes that Dworkin's philosophy represents advance towards the overcoming of Ricoeur's view on hermeneutic comprehension and genealogical suspicion:

My suggestion here was, on the one hand, that the phenomenological basis must be replaced by the genealogical basis and, on the other, that positive correction is not an elimination of the so vehemently praised critical position, nor the incorporation of an analytical technique, as Ineichen suggests, but rather constructive interpretation along the lines of Dworkin's (Braidia, 2015, p. 31, translated).

This is a sensitive matter, and this paper has no pretension of answering it fully. However, it does intend to partially displace such perspective and contribute to understanding the controversy; To consider that a central idea of Dworkin's might be relegated to second place.

Instead of thinking certain elements of his thought are related to philosophy, why not think some of such elements have links to literature – and how so. After all, there is chain novel, narrative coherence, Hercules judge, the concept of authorship, and several other elements that, although are also philosophical questions, are important topics for narrative theory and literary criticism.

Is it possible to read the political-legal writings by Dworkin focusing their relation with literature? Of course, using literature not only as a mere example for the theory, but the very fabric of his law and interpretation view. After all, it is in the field of literature that the question of the validity of interpretations has been debated for a long time and its broad discussion continues without needing an end point, as is the case with law. On the contrary, the same questions continue for centuries to be debated.

With that, in summary, the question we attempt to answer with this paper is: Is it possible to read Dworkin's legal theory as a narrative theory?

The analytical theory of law, especially after the publication of his article *Objectivity and Truth: you'd better believe it* (Dworkin, 1996), and the last book he published in life, *Justice for Hedgehogs* (Dworkin, 2011), began to treat Dworkin's theory as a proposition, among others, of natural law⁵. In addition to the difficult reception of Dworkin's late writings, such misunderstandings are partly the result of the non-acceptance of the aesthetic hypothesis by much of the so-called contemporary Dworkinian scholars. For example, this is the case of Mark Greenberg, who develops, admittedly, a Dworkinian theory without narrativist presumptions, based on a debate about ultimate moral facts that determine the truth of legal propositions (Greenberg, 2004)⁶. Dworkin's philosophy without a narrative

5 "Taken collectively, the essays on the common law in *Taking Rights Seriously* argued the loosely Thomistic point that 'law understood, includes various moral principles, whereas the constitutional law essays in the same volume argued that some morally unjust laws, because of the likely unconstitutionality, they are likewise not binding in courts of law'" (WEST, 2011 p. 23). See also West (2011, p. 46–48); Shapiro (2011, p. 408-409, note 28).

6 For criticism on Greenberg's interpretation of Dworkin's production, see Bustamante (2019).

or analogous assumption becomes, in fact, a form of legal naturalism – surely, however, unorthodox, since it is liberal and therefore skeptical of the common good. And this alone points to the significance of this assumption for a good understanding of Dworkin’s philosophy and, consequently, for overcoming the debate between legal positivism and legal naturalism.

So that the question about the meaning of the “narrative” category in Dworkin’s thought can be answered, we intend to focus on the analysis of *Law as Interpretation*, as it seems to be the key text for accessing literature in his thought. To do so, we initially state (1) the political-constitutional scope in which this approach is visible, the American context where Dworkin sees such approach; Then, we define (2) the central theses in Dworkin’s article in order to clearly understand its main ideas and fundamentals, and, finally, we attempt to (3) understand what a narrative theory is and answer to the question whether, in the previously developed topics, there is a narrative theory or not.

2 THE PROBLEM AND THE CONTEXT FACED BY DWORKIN

Before questioning what a narrative theory is and what Dworkin wrote about it, it is important to understand the reason why it is important to think about these matters to some extent. In the same year Dworkin published *Law as Interpretation*, Sanford Levinson, professor at the University of Texas Law School, published the article *Law as Literature*, which can highlight the legal-political problem that was the background to these literary approaches.

Levinson (1982, p. 374) begins with a very strong debate in the United States about whether interpreting, extracting meaning from words, was a process of submitting to *authoritative* commands (*rule of law*) or a creation of the interpreter’s will – which, in Dworkinian language, corresponds to the opposition between positivist and pragmatist thinkers. Levinson, similarly to Dworkin, believed that interpreting was more connected to the first position, the submission to command, and that is a starting point to search for in literature.

From the 1950s, especially in the Supreme Court of the United States, the biggest controversies regarded constitutional matters. And of course,

the question of the authority of the founding fathers' Constitution was fundamental. Levinson (1982, p. 374) mentions that the famous judge Marshall said the meaning of the constitutional text was obvious. The Constitution was written precisely to limit the meanings, so that there is no extrapolation or error, controlling the will of the interpreter, preserving the original meaning over time.

It was in face of this great challenge of writing and preserving of the identity of the American Constitution that the law began to approach the literary scholarship⁷. It became better to understand the flaws of legal analysis through literature than by the constitutional theory itself.

Thus, Dworkin, Fish, Levinson so many others believed in the duty of jurists' to obey the established norms, but rejected the idea of an original meaning by the founding fathers. They believed that the interpreter always builds something and that he / she must build it while obeying what is established in written laws or jurisprudence.

The greatest problems are no longer in solving simple matters, such as, for example, the traffic of vehicles in a park or the number of witnesses necessary for the validity of a will and testament. Dworkin thinks such questions can be solved with *rules-of-the-road*, which should prevail in the case of social conflict, even if there are substantial reasons or *all things considered* in order to prefer other rules:

In the rules-of-the-road case we have no reason to think that either rule is better. But even if we did have some such reason (to believe that one rule is better than other) [...] our reasons for wanting everyone to drive on the same side would still be much stronger (Dworkin, 1986, p. 145).

Notwithstanding, for Dworkin, the main legal issues of our societies are of a very different type of problem, *theoretical disagreements*. We understand Dworkin's scholarship as a theory for theoretical disagreements. His main concern is to develop a theory on how to decide social conflicts through the coercive power of the state with reference to moral concepts (such as "freedom of expression", "freedom of association" etc.) incorporated into normative texts of constitutional type through

⁷ In the next section, the place of the Law and Literature Movement is made clear in this context.

institutional actions. A theoretical disagreement, in this context, is visible when the authorities involved in the legal settlement of the conflict agree with the facts (institutional or not) involving the case, but disagree as to which legal propositions or legal rights involve these facts:

A different matter [...] é is the so-called *Theoretical Disagreement*. They are disagreements on the very foundations of law, that is, on what allows a legal proposition to be seen as truthful. Thus, it can be agreed that a Brazilian law does not allow smoking indoors, but disagree about what that law really is, about the rights and duties it creates, etc. (Rodrigues; Penna, 2018, p. 17, translated).

Henceforth, the interpretative or hermeneutic problem is to interpret how the American Constitution rules over important matters of the political and civil life. And the most powerful way Western culture has left us to think about how to interpret a text without “inventing” meaning is that of literary criticism and the narrative theory studies. However, in the jurist world, literature has traditionally been a demonstration of scholarship rather than a foundation for any thought.

So, we have the first point of this paper: the approach to literary hermeneutics and literary criticism comes to investigate how to correctly interpret this political genre of writing called “Constitution”. To avoid the confusion that the use of literature and narrative can create, it is necessary to study more specifically what the *Law and Literature* movement is.

3 HOW LAW IS LIKE LITERATURE IN RONALD DWORKIN’S PRODUCTION

In this section, we attempt to underline the central theses of Dworkin’s approach to literature. Such theses are present in the aforementioned article of 1982, named *Law as Interpretation*, published in the journal *Critical Inquiry*, and later included in the book of 1985 *A matter of principle*, with the name *How law is like literature*⁸.

8 This article sparked a fine debate with American literary critic Stanley Fish, who wrote the text entitled “Working on the Chain Gang: Interpretation in Law and Literature” (Fish, 1982). Dworkin responded with “My reply to Stanley Fish (and Walter Benn Michaels): Please don’t talk about objectivity any more” (Dworkin, 1983), and Fish responded with “Wrong again” (Fish, 1983).

This change in title indicates, preliminarily, that the first title was neither interesting nor attractive. At the same time, it tells us, above all, how Dworkin put the relations with literature in the title: instead of *Law as Literature*, as Levinson did, Dworkin wrote *How law is like literature*. Although this title induces a retreat in the proposition of this paper, it is believable that the way law and literature relate in the article is not defined in the title. So we follow the six main theses of this article.

The first thesis is that we better understand interpretation in law if we compare it with interpretation in other areas, especially in literature. From this particular interpretation, which is discussed long before the law is presented in the written form, we are able to better understand interpretation in general, which is of great use to law (Dworkin, 1982, p.179).

Dworkin, hence, adopts a different methodology than that of the *jurisprudence* of his time. Instead of attempting to find the necessary and sufficient characteristics of the concept of law, he prefers to adopt, via analogy, traces connecting the law to other social practices, without, necessarily, indicating which of them should be essential to the phenomenon under analysis. Postema, in more recent research, names this type of methodology as “synechist”:

By contrast, the synechist, no less interested in probing the nature of law, looks for continuities and illuminating similarities (and differences that build on continuities). The synechist ask: “What is law like?” and “(How) is this like law?” rather than declaring, “This isn’t like law, so it’s not law (properly speaking).” It seeks understanding by locating, relating, and integrating. It seeks to locate puzzling concepts in a wider network of concepts, integrating them within that network and tracing out relations among them, thereby deepening our understanding of their content (Postema, 2015, p. 894).

This point, despite disagreeing scholars (Green, 2003), presented as a general thesis of the usefulness of the study of literary hermeneutics to legal hermeneutics, is a simple and well-accepted thesis. Dworkin’s debate with Stanley Fish deals with a number of controversies, but Fish argues that Dworkin is right to relate the practice of literary criticism to legal practice.

That is because they both question: “What is the source of interpretative authority?” (Fish, 1992, p. 47).

Thus, Dworkin points out that the central problem of analytical thinking in law⁹ is about the meaning that we should give to legal propositions, that is, the truth conditions of legal propositions, being legal propositions understood as standards of behavior (Dworkin, 1986, p. 4). Considering, according to the positivist tradition, that they are descriptive, what makes a legal proposition true or false? If they are “*pieces of history*”, its legitimacy comes from legislative acts: if the need for three witnesses is legislated for the will and testament to be valid, that act creates such a need (Dworkin, 1982, p. 180). Mere reference to a descriptive social fact thus creates the law (Greenberg, 2004).

But this case, for Dworkin, is an easy case or a case of *conventional rules-of-the-road*. The analysis as adequacy to what is legislated, however, could fail in a difficult case or involving theoretical disagreements. How could one say, for example, that racial quotas in universities are constitutional without appealing to principles or values? Thus Dworkin’s second thesis (1982, p. 180).

The second thesis depends on the validity of the first one. All legal propositions are not mere historical description, nor are they mere valuations detached from legal history. Legal propositions are interpretations of legal history, thus combining both elements of description and valuation, and they operate in a different way than those two aspects in isolation (Dworkin, 1982, p. 181).

This thesis contradicts the whole tradition of law which opposes what it is and what it should be, description and prescription, as completely different worlds. François Ost (2007, p. 41-42, translated) helps understand the difference seen between analyzed and narrated law:

⁹ For the purposes of this study, analytical thinking of law must be understood as any model that justifies valid legal propositions by appealing exclusively to descriptive social facts or to another descriptive device. At the same time, we understand that analytical thinking also includes evaluative theories of law, such as, for example, that of Dworkin. In this regard, we suggest reading Eleftheriadis (2011).

The analyzed law postulates, with the force of a dogma, the irreducible difference of what is it and what it should be; From this follows, in particular, the distinction between fact and law ('the Supreme Court knows no fact', it is eventually stated). Contrary to this thesis, we have already shown how much the fact is penetrated by more or less valued meanings and, conversely, how, through its constitutive rules, law, like gambling or any other conventional practice, is capable of creating "its" fact. Thus, legal practice does not cease to relativize the canonical distinction of fact and law – especially in terms of the validation of rules – but the prevailing theory still pretends to ignore it.

Clearly, therefore, Dworkin becomes a heterodox thinker in the world of analytic philosophy, since he refuses central elements of this tradition as it was constituted in the twentieth century.

The third thesis is the aesthetic hypothesis. To expose this thesis, Dworkin first specifies the light in which literature can be put to bring benefits to the law. The interpretation concern in literature is about the meaning of the work as a whole. It is less about interpreting isolated elements, such as a specific action of a character, and more about dealing with the meaning of the work as a whole, the set in which the elements of the work have meaning (Dworkin, 1982, p. 182).

Dworkin has no intention to take a side and answer this question, but to grasp the discussion, to bring to the law these previously stated disagreements. He summarizes the aesthetic hypothesis as follows:

[...] an interpretation of a piece of literature attempts to show which way of reading (or speaking or directing or acting) the text reveals it as the best work of art. Different theories or schools or traditions of interpretation disagree, on this hypothesis, because they assume significantly different normative theories about what literature is and what it is for and about what makes one work of literature better than another (Dworkin, 1982, p. 183).

The aesthetic hypothesis states that behind every descriptive perspective of law there always is a normative background theory regarding what describing is. In a more straightforward way: every theory of interpretation contains a subtheory about the identity of the work of art which establishes what is to interpret and what is to modify the work. Even if such subtheory is not conscious, it exists as a background (Dworkin, 1982, p. 183-185). Later on, in *Law's Empire*, Dworkin (1986) reformulates the aesthetical hypothesis emphasizing a necessary presumption for the

interpretation act. In this sense, he argues that every act of interpreting social facts presupposes essentially the recognition of the genre to which that act belongs. The criteria for correct interpretation follow from this identification of the genre to which the act belongs.

Hence, the very definition of interpretation, in Dworkin's theory, depends on the combination of theses 2 and 3. Interpreting means, thus, identifying to which genre a certain human action belongs to and presenting it the best possible way based on adequacy criteria (Dworkin, 1986, p. 52).

At the same time, however, it is possible to accept thesis 2 without necessarily accepting thesis 3. In this sense, it is possible, for example, to say that every theory of law consists of systematic and rational investigation in search of the truth of theoretical generalizations about institutions and practices of law, obtained by selecting a set of relevant facts. (Eleftheriadis, 2011, p. 120). On the one hand, the normative theories that accept thesis 2 understand that the selection of relevant to obtain truthful generalizations about institutions and social practices depends, necessarily, of a reference to a certain value or purpose. The legal naturalistic theories in the area of interpretation are a clear example of this type of theory. On the other hand, theories that accept thesis 3 state that the selection of relevant facts to the aforementioned theoretical generalizations also depends on the identification of the genre to which the hypothesis belongs, and this genre is the product of interpretation. In this case, generalizations cannot happen without a deeper understanding of the object to be interpreted, sensitive to the purpose of the practice.

Dworkin's fourth thesis is that, if there is an aesthetical hypothesis in art, there must be a political hypothesis in law. If, for instance, in the aesthetical hypothesis, art has no specific end, law is a political enterprise, solving social dispute through the coercive power of the Government. Thus, the interpretation of law "must show the value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve" (Dworkin, 1982, 194)¹⁰. The very definition of law for Dworkin depends on the political hypothesis: "the law of a community [...] is the

¹⁰ Here, Dworkin, once again, accepts a presumption that contradicts the legal positivism (Gardner, 2014, p. 149-176).

scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from past decisions of the right sort” (Dworkin, 1986, p. 93). In his last publication, Dworkin (2011) extends his explanation of the political hypothesis on law, and divides the moral aspect (in a broad sense) into ethics, personal morality, and political morality, the law being part of the latter.

Thus, according to that view, the law has a political hypothesis that any description of the legal system or rules is based on a value or purpose. That is, every theory of interpretation in law is based on a normative theory that values social practice, from which facts that are relevant to law can be identified, and which depends on the identification of which gender (aesthetic, political, moral, ethical, historical, etc.) is at stake in this process. As in the aesthetic hypothesis, there is no such thing as pure description of law, and every legal proposition is based on prior choice. There is therefore no mere law enforcement (Dworkin, 1982, p. 194). Dworkin (1982, p. 196) straightforwardly says that “interpretation in law is essentially political”¹¹.

The fifth thesis is called *chain novel*, and it is actually a kind of epistemological thesis on how to identify the purpose of the law once the political hypothesis is accepted. In this sense, it is important to remember that Dworkin (1986) denies that the purpose of law can be identified with reference to individual intentions or to natural values or laws. The intentionality of law is the product of understanding the purposes of collective action, which cannot be reduced to individual actions, but to some extent depends on them.

Thus he explains thesis 5:

¹¹ Dworkin (1982, p. 200) further explains: “It may be a sensible project, at least, to inquire whether there are not particular philosophical bases shared by particular aesthetic and particular political theories so that we can properly speak of a liberal or Marxist or perfectionist or totalitarian aesthetics, for example, in that sense. Common questions and problems hardly guarantee this, of course. It would be necessary to see, for example, whether liberalism can indeed be traced, as many philosophers have supposed, back into a discrete epistemological base, different from that of other political theories, and then ask whether that discrete base could be carried forward into aesthetic theory and there yield a distinctive interpretive style. I have no good idea that this project could be successful, and I end simply by acknowledging my sense that politics, art, and law are united, somehow, in philosophy”.

Suppose that a group of novelists is engaged for a particular project and that they draw lots to determine the order of play. The lowest number writes the opening chapter of a novel, which he or she then sends to the next number who adds a chapter, with the understanding that he is adding a chapter to that novel rather than beginning a new one, and then sends the two chapters to the next number, and so on. Now every novelist but the first has the dual responsibilities of interpreting and creating because each must read all that has gone before in order to establish, in the interpretivist sense, what the novel so far created is (Dworkin, 1982, p. 193).

For Dworkin, deciding hard cases at law is “rather like” a chain novel endeavor in literature, especially for judges who have to decide cases in Common Law, where the arguments previously used are stronger than those in Civil Law (Dworkin, 1982, p. 193). Thus, as previously stated, Dworkin leaves behind, on the one hand, his theory of a descriptive theory, concerned with the mere description of intentions or speeches of individuals, and, on the other hand, of purely normative theories that disregard the social practices in determining the law. Therefore, every judge is like a chain novel writer, and must write the current page of a story that has already begun, which forces him or her to be consistent with what has already been written.

Another interesting aspect regarding thesis 5 is that Dworkin’s law theory has no explanation for the validity of the founding norm of the legal system, such as, for example, Hans Kelsen’s fundamental norm, since his theory begins as Homer’s Iliad, *in media res*. Thus, in Dworkin, the determination of valid legal propositions depends on the acceptance that valid legal standards already exist and function as paradigms for the determination of subsequent valid legal norms. There are, it is noteworthy, propositions that underlie the system, but rather a set of more or less determined basic convictions to which the interpreter is bound as a way of life. (Macedo Junior, 2013, p. 234–235).

The sixth and last thesis is about the judge’s duty to interpret the legal history (Dworkin, 1982, p. 196). That is, all the elements that literature brings to light are not supposed to guide the way judges act, but clarify how they should act to avoid the pure creation of law. It is the judge’s duty to be

a good “chain novelist”. By legal history, Dworkin refers to the institutionally created social facts to which magistrates are bound by virtue of democratic principles or values. Thesis 6 seems different from thesis 5 in the sense that it includes, reportedly, the need for the interpreter to seek a historical understanding of an interpreted social practice in order to identify the relevant values or purposes from which social facts are selected. Thus, it imposes that the legal judgment must be sensitive to the historical context of its realization, what Dworkin (1986), later, with certain modifications, will call virtue of integrity.

At the same time, thesis 6 states that every theory of law for theoretical disagreement is a specific reading of the political morality of a given community, as its theoretical explanation depends on a historical interpretation of the chapters of the institutional history of the community in question. Dworkin leads, therefore, the debate on the theory of law to a historical debate on the best narrative for the political morality of the community¹².

These are the six core theses of the article. Let us now follow to explore what a narrative theory is.

4 DO THESE THESES MAKE UP A NARRATIVE THEORY?

Now we need, firstly, to investigate what a narrative theory is, in order to assess whether Dworkin’s thoughts have elements that could constitute a narrative theory of the law.

If Dworkin’s theses were explained in logical schemes, defining what a narrative theory is is not so clear. In fact, the idea of narrative goes beyond the organization of meaning separated into theses. It is necessary to address the issue at this crossroads.

The first fundamental perception is that the legal discourse, following what happened to all areas of knowledge, defined science as a parameter of truth, and science refuses the value of art and narratives, since they are fictitious and obviously there is no truth by conformity between their

¹² In contemporary literature, Shapiro (2011, p. 307-330) is one of the few authors who well observe this aspect, and offers an alternate reading of the American political morality.

narration and reality. If the Roman law of the twelfth tablets was written in Adonian¹³ verses, this style being reproduced by Cicero, because of their concern for the harmony and beauty of writing – for the just must be beautiful, it has been lost in direct, objective, neutral language, such as “Killing someone: penalty – six to twenty years imprisonment”.

But, after all, what is a narrative theory of the law? Firstly, it is necessary to establish that a narrative theory is in the movement called “Law and Literature” – which is in the broad-sense philosophy of the law. But there are several distinct objects and methods within law and literature, and it is important to situate well where dwells what Calvo González calls “narrative *theory and criticism of the law*” (González, 2007, p. 310).

There are three movements in the theoretical approach of law and literature (Ost, 2007, p. 48; González, 2007, p. 310): a) law of literature, which refers to the legal aspect (in a practical sense), such as laws and jurisprudence, regarding the dissemination of literary works; b) law as literature, which deals with the legal discourse through literary analysis – also called law and narrative, where this present paper is inserted; c) law in literature, which analyzes, in literary works, to what extent questions of justice, the meaning of law and other diverse elements concerning the legal world are represented and thought within literary works – the most popular demonstration, is to analyze procedural issues in novels, such as *The Trial*, by Franz Kafka¹⁴.

The study of narrative theory, which is a discipline within literary theory, allows the understanding of narrative in a much broader sense, which makes it possible to see the legal narrative as one of the ways humanity developed for narrating its world, together with other modes, be they fictitious or not, such as with the *Bible*, *Hamlet*, *Don Quixote*, or *folklore* narratives, as well as personal narratives, in which people share

¹³ Verses composed of a dactyl, which in the Greek and Latin versification corresponds to one long syllable followed by two short syllables, and one sponday, which corresponds to two long syllables. These verses originated in the chants in honor of Adonis in the pagan religion.

¹⁴ Regarding the relation between law and literature, we suggest Taxi (2018).

experiences or events via verbal reports. It is from the methods and understandings about narrative and writing that the importance of this movement arises, since it is indisputable that there is some narrative trait in law, starting with the evident, as testimonies in court, moving on to the narrative that makes up the sentence, etc. Even in the controversial *Law and literature* by Richard A. Posner (2009, p. 425), narrative is placed as fundamental to the law: “Narrative plays an important role in law, a role that is not without an element of fiction”.

Calvo González (2007, p. 322-324) points that there are countless ways for narrative to be of interest to the law, be it for studying the oral narratives uttered in court, or even the narratives used to define the nature of social institutions. But it is interesting to highlight, from the ideas of González, that, in the theories of law, there is a narrative element, a narrative or narrativist theory – González points out that the aesthetic hypothesis is not sufficient, probably criticizing Dworkin himself.

And now we return to the question: what characterizes a narrative theory? Narrative theories deal with what a narrative (literary or not) is, what characterizes a character, a story, time, space, narrative genres etc. In the twentieth century, studies of narrative, thanks to structuralism and its popularity, reached another level and began to be used to think of various objects other than literature.

A theory from another area of knowledge that is grounded in elements of narrative theory is therefore considered a narrative theory – such as a narrative theory of law, as is the case of this article. Therefore, it is any theoretical construction based on elements of narrative theory or literary criticism. We must then consider whether Ronald Dworkin’s theory of law is a narrative theory, or his literary ideas are merely a didactic example.

This discussion, especially for taking into account other works by Dworkin, is because literature is used just an example for the theory. Being an example implies something is not necessary, but helps to clarify a previous idea. However, I believe that in the aforementioned article, including its title change, the meaning of literature is stronger, as Dworkin himself states: “I want to use literary interpretation as a model for the

central method of legal analysis” (1982, p. 192). By “model”, Dworkin does not mean a method of law interpretation, such as formalism, intentionalism, or constructivism, but rather which metaphysical and epistemological presumptions can be adopted in order to correctly characterize law as a social practice. Dworkin sought to use literary interpretation as a model for his method of interpretation, and the six theses previously discussed make this model of law practice be similar to literature practice. Thus, unlike other theories that presuppose naturalistic models or linguistic pragmatics, Dworkin adopts a literary model as the foundation for his conception of law. Therefore, it seems to us very difficult to disqualify Dworkin’s article as a work of law and narrative, or a narrative theory of what it is to interpret in the field of law.

There are other possible arguments to that, as in Dworkin’s quote “Deciding hard cases at law is rather like this strange literary exercise” (Dworkin, 1982, p. 193). However, this part of a hypothetical example does not offer the actual experience of literary interpretation, being a weaker argument to consider it as a narrative theory.

However, let us once again observe the aforementioned theses:

The first thesis (1) is that we better understand interpretation in law if we compare it with interpretation in other areas, especially in literature.

The second thesis (2) is that true legal propositions are not a consequence of a mere description of social facts or a pure value construct, but rather a union of a valuative *explanans* and a factual or dependent of social practice *explanandum*.

The third thesis (3) is the aesthetic hypothesis, according to which every description of art is based on a valuative definition of what art is.

The fourth thesis (4) is that there is also a political hypothesis regarding law, and every identification of valid legal propositions has a political-valuative background.

The fifth thesis (5) is that of the chain novel, which qualifies thesis 4 since it requires the political hypothesis to be the result of an understanding of the intentionality underlying the political community.

The sixth thesis (6) is that the judge must interpret the legal or institutional history before deciding whether or not to authorize the use of coercive power by the Government, which makes thesis 5 related to the historical context of the political community.

Of all six theses, numbers 1, 2, 3, 5, and 6 have literature as their bases (even if taking into account several other aspects). This way, without literature, such arguments would not be possible. There is no defining them by using only the law.

The purpose of thesis 4 is to unfold thesis 3 in the legal field. Its bases are in the legal world itself and in its political aspect, which is not clarified by the aesthetic hypothesis – which could only serve as an example.

Thus, not all the central theses (nor all the arguments) of the article are based on literature; but the basis of Dworkin's line of thought and most of the theses are derived from an understanding of literature and the category of narrative.

There are no established objective elements to say what is and what is not a narrative theory; But since a narrative theory does not need to be pure, that is, it does not need to have all the arguments grounded in narrative theory, it is consistent to say that Dworkin's theory does establish a narrative theory.

5 FINAL CONSIDERATIONS

The association of Dworkin's theory with philosophical hermeneutics has been the subject of intense national and international debate in recent decades. Rather than discussing whether or not Dworkin belongs to the tradition of philosophical hermeneutics, this study seeks to discuss what role narrative plays in his theory and, therefore, whether Dworkin's theory of law can be considered a narrative theory of law.

Dworkin's scholarship must be read in this context as a theory for theoretical disagreements. In this sense, it is not a theoretical approach that seeks to justify methods applicable to any case of legal interpretation, but rather, restrictively, to cases involving interpretative or moral concepts,

incorporated into the Constitution through institutional facts of relevant type.

Dworkin, in his classic article *How law is like literature*, identifies six theses about the relations between law and literature, which serve as a model for defining law. The six theses follow: (1) law, as a practice of identifying valid legal propositions, can be better understood when compared to the practice of literature (*synechist methodology thesis*); (2) the compression of the practice of law always involves a descriptive and valuative dimension (*normative theory thesis*); (3) every judgment about art presupposes a theory about what art is (*aesthetical hypothesis*); (4) every judgment about valid legal propositions presupposes the determination of what law is (*political hypothesis*); (5) the political hypothesis of law depends on understanding the intentionality of the political community (*chain novel*); and (6) The chain novel depends on understanding the institutional history of the political community (*institutional history thesis*).

In order to answer the question about the role of narrativity in Dworkin's theory of law, narrative theories were defined, in a third moment, as any theory that starts from a heuristic characterization of characters, plots, narrative genres, etc. Thus, the conclusion of the study is that Dworkin's theory of law presupposes a narrative theory, given theses 2, 3, 5, and 6, which refer to the narrative character of the theory. Moreover, it is important to point out that, without narrativity, Dworkin's normative theory of law resembles a classic legal naturalism, which seeks to identify the relevant facts of social practice from absolute values or purposes. Narrativity makes Dworkinian law theory an attractive way out of the dilemma between legal positivism and legal naturalism.

It is not in the intention for this paper to hold a final word or to positively or negatively qualify Dworkin's theory as a narrative theory. There are certainly problems with this, as law can be made dependent on the will of subjects, who impute their worldview to the political community. Our intention is to make clear that this perspective should be taken into account when analyzing the author's publications and that, in some points, their understanding should yield more to narrative theories.

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