

THE BECOMING-OTHER OF LAW:
PRELIMINARIES FOR A CITIZEN'S CONCEPTUALIZATION OF LAW

RICARDO MIRANDA*

ABSTRACT. The author's hypothesis is that modern legal theories view law solely from the standpoint of ruling class or, in Hartian language, from the external point of view. Why? In sum because legal philosophers have implicitly accepted law as the exclusive domain of government and partisan politics. This approach, however, has been disrupted by poststructuralist political developments, which serve as a powerful impetus to modify prevailing concepts. This analysis begins with Benjamin Ardití's idea regarding what he calls 'the becoming other of politics', an argument to radically change how the law is conceived. It then examines a very particular point of the theory proposed by the legal philosopher Herbert Hart, who distinguishes between the "external" and "internal" points of view with respect to how the rules of a legal system may be described or evaluated. In effect, Hart distinguishes between: (i) the *external* aspect, which is the independently observable fact that people tend to obey rules with regularity; and (ii) the *internal* aspect, which is the obligation felt by most individuals to follow the rules. It is from this latter "internal sense" that the law acquires its normative quality. Unfortunately, Hart only applies the internal point of view to government officials, in effect rendering his thesis inconsistent. The paper ends with a brief analysis of Dworkin's Herculean judge theory, arguing that Dworkin also gets trapped between the paradigm of government and partisan politics.

KEY WORDS: Post-liberal democracy, Benjamín Ardití, Apocryphal jurisprudence, Post-liberal law, Post-structuralist legal studies.

Visiting Researcher Birkbeck Law School, University of London (E-mail: mirandam.jricardo@gmail.com). LL. B. Law School, UNAM; LL. M. Law School, UNAM. The author is grateful to two anonymous reviewers of MLR for their very helpful suggestions.

RESUMEN. La hipótesis del autor es que el derecho en las teorías jurídicas modernas ha sido considerado solamente desde el punto de vista de los gobernantes o, en lenguaje hartiano, desde el punto de vista externo, y ello es así porque los filósofos del derecho ven a éste, al menos implícitamente, como un producto exclusivo de la política estatal y de partidos. Sin embargo, este formato en el cual la política ha sido elaborada comienza a ser rebasado hoy en día. Por lo tanto, si el concepto de la política está cambiando, el concepto de derecho debe igualmente cambiar. Ésta es la razón por la cual el autor toma como punto de partida la explicación de Benjamín Arditi sobre “el devenir-otro de la política”, tal explicación es el soporte para sugerir un cambio radical en la manera en que el concepto de derecho ha sido entendido. De este modo, el autor argumenta que, a pesar de ser Herbert Hart el iusfilósofo que hizo la importante distinción entre los puntos de vista externo e interno de las normas, Hart mismo es inconsistente con su tesis ya que refiere el punto de vista interno como exclusivo de los funcionarios estatales. En este sentido, la tesis que se intenta defender es que no habría diferencia alguna en considerar al derecho de esta manera o considerarlo solamente desde el punto de vista externo. Finalmente, el autor realiza un breve comentario sobre el juez Hércules dworkiniano para mostrar cómo Dworkin se encuentra también atrapado en el formato de la política estatal y de partidos.

PALABRAS CLAVE. Democracia post-liberal, Benjamín Arditi, Jurisprudencia apócrifa, Derecho post-liberal, Estudios jurídicos post-estructuralistas

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I. INTRODUCTION

This article attempts to analyze how the underlying logic of current major theories of law, by nature, contravenes democratic principles.¹ The main reason is that all modern legal theories are inherently elitist insofar as the enactment of law requires official intervention. As explained below, this is based on how politics is conceived and put into practice.

To explain this, I start with the notion that legal theory should assimilate and foster democracy, which requires that we discard the idea that legal theory can or must explain every legal system regardless of its nature. This latter idea must be abandoned as Western political (and legal) history has been characterized by ongoing democratization, what Samuel Huntington once termed “democratizing waves”.² If legal theory seeks to understand and explain modern legal systems it can not ignore this reality. Given that these processes seem irreversible³, legal theory can no longer ignore political reality.

In sum, modern legal theory requires a radical transformation. Accordingly, this paper aims to outline some preliminaries of a theory of law that I believe better enables and fosters democracy.⁴ Thus drawing upon the writings of two of the most influential legal

¹ Without going into additional detail here, we shall use Shapiro’s definition: “democracy is better thought of as a means of managing power relations so as to minimize domination”. IAN SHAPIRO, *THE STATE OF THE DEMOCRATIC THEORY* 3 (Princeton University Press, 2005).

² This does not imply that nations have not experienced difficulties with democratic consolidation – “counter-waves”, using Huntington’s terminology. (See SAMUEL HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (University of Oklahoma Press, 1991) regarding contemporary “waves of democratization”). The success of this author is precisely that category which describes the process of democratization in Western culture, however, it should be noted, that the rest of his thesis are rather conservative and have nothing to do with the democratic ideal taken seriously.

³ The irreversibility of democratization in any political regime has depended and will depend, of course, on civil society and not on the ruling elites.

⁴ In this way, this paper serves as a starting point and not as an arrival point of such a radical transformation. Namely, all what is defending here is a first approach to the problem; however, this of course does not exclude the critique that can be made to it.

theorists of the 20th century, Herbert Hart and Ronald Dworkin I focus on what I call the *democratic ambiguity* of modern legal theory.

Broadly speaking, the most prominent legal theories are now based upon legal concepts and ideas, in particular *liberal democracy*, that are deeply rooted in the 20th century. This is problematic for two reasons: (i) these theories universalize a specific concept of law, *i.e.*, they confuse a historical appearance of law with its only possible manifestation; and (ii) this reductionist approach renders the concept of law as abstract and detached from reality. As a result, modern legal theories continue trapped in a logic of democratic ambiguity.

This paper is divided into three main sections. In the first, I start with Benjamin Ardití's analysis of our current political situation. In essence, Ardití supports the idea that politics is beyond the electoral representation; in this way he defines political modernity as a process of continuous territorialization and re-territorialization; that is to say that where the frontier of the political has undergone a series of changes within a migratory arc, ranging from the sovereign state until liberal democracies. Furthermore – and this is Ardití's main thesis – the liberal democratic model of the 20th century is being disrupted by a confluence of social movements, organized interests and networks global issues and actors.

The second part addresses Hart's distinction between external and internal point of view of legal rules, beginning with Hart's critique of the Austinian conception of law as habitual obedience backed by threats. In essence, Hart considers this legal theory to be limited because its normative foundation is rooted solely in the "external point of view". As such, this approach fails taken into account the internal aspect which, in Hart's view, represents a distinctive feature of law. However, despite the democratic potential presented in this thesis, Hart himself ends up undermining it. Thus I will intend to explain, following Peter Fitzpatrick's elaboration on this topic, how Hart's analytical distinction about the normative external an internal point of view is rooted in democratic ambiguity.

The third section analyzes the metaphor of Judge Hercules, one of the key elements of Ronald Dworkin's theory of law. The case of Dworkin ends to eliminate the major democratic trail, that loomed in Hart's theory, by naturalizing –*i. e.* presenting as the only possible and necessary one– the political order of liberal representative democracy making

the idea of a theory of law beyond liberalism virtually unthinkable. Dworkin's elitism is embodied in the figure of the judge⁵ and is therefore not able to break with the juridical and political paradigm that represents liberal democracy, on the contrary he ends reinforcing it. With all that Dworkin sets the grounds on which contemporary legal theory moves, those grounds are also within the liberalism paradigm thus his theory ends up in democratic ambiguity as well.

I should mention here that this article tries to stimulate a discussion about the development of a democratic theory of law from the post-structuralist studies on jurisprudence or, more precisely, from *apocryphal jurisprudence* –borrowing words from Manderson.⁶ In legal theory and philosophy apocryphal jurisprudence has generally been ignored simply because it "fall[s] outside the framework of the [two] parties [the orthodox and the heresy]".⁷ Briefly, taking the term from William Lucy, Manderson identifies *the orthodoxy* with iuspositivism and *the heresy* with CLS.⁸ However, as Manderson claims

⁵ Nowadays, this excessive concern of legal theories with the judge has begun to be reverse it with the appearance of legal and political studies on legislation. Other works regarding this issue include: MANUEL ATIENZA, *CONTRIBUCIÓN A UNA TEORÍA DE LA LEGISLACIÓN* (Civitas, 1991); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (Cambridge University Press, 1999); LUC J. WINTGENS (ed), *THE THEORY AND PRACTICE OF LEGISLATION* (Ashgate Publishing, 2005); and LUC J. WINTGENS & A. DANIEL OLIVER-LALANA (eds.), *THE RATIONALITY AND JUSTIFICATION OF LEGISLATION* (Springer, 2013). However, these works in certain way remain thinking about law as exclusive product of state officials.

⁶ Desmond Manderson, *Apocryphal Jurisprudence*, 26 AUSTRALIAN JOURNAL OF LEGAL PHILOSOPHY 27-60 (2001).

⁷ *Id.* at 29.

⁸ Although Manderson identifies *the orthodoxy* with iuspositivism and *the heresy* with CLS, the terms orthodox and heretical jurisprudence must be understood in a broad way, *i. e.*, in both orthodoxy and heresy we find authors that we would not see as belonging either positivism or CLS. About this issue, see WILLIAM LUCY, *UNDERSTANDING AND EXPLAINING ADJUDICATION* (Oxford University Press, 1999). Also it should be noted that though this paper adheres more to heretical than orthodox jurisprudence, it differs from the former insofar as apocryphal jurisprudence poses "very different questions and derive[s] from different and irreconcilable concerns", see Manderson, *supra* note 6, at 29.

"[t]he choice for scholars is not just between the orthodoxy or thesis of positivism and the heretical antithesis of Critical Legal Studies; not yet to accomplish a species of synthesis, which perhaps deserves the label *ecumenical*. These are all ways of maintaining a tradition. But it is also possible to look where the tradition is blind".⁹ The idea of seeking where the tradition is blind takes the form of "an emerging non-traditional literature [...] This emergent literature is not orthodox. Neither is it heretical. Rather, what is being developed here is a new genre of legal theory [...]".¹⁰ Thus this paper aims to keep developing that new genre of legal theory: apocryphal jurisprudence.

II. THE BECOMING OTHER OF POLITICS

Let's begin with arguments made by Benjamin Arditi regarding what he terms *the becoming other of politics*. With this Arditi explores the ontological basis of current politics which, according to him, must be understood not as completed but as something in continual construction or reconfiguration.¹¹

What is the becoming other of politics?¹² Benjamín Arditi's describes it as the decentralization of politics, *i. e.*, politics can not only be circumscribe to the set of actors,

⁹ Manderson, *supra* note 6, at 29, 30.

¹⁰ *Id.* at 31. Specifically, the ideas outlined in this paper align more with Fitzpatrick work. See PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW*, ch. 6 (Routledge, 1992).

¹¹ It is not my intent to exhaustively review Arditi's theory of politics for two reasons. First, this is not the main purpose of the paper and second, the theory is, in Arditi's words, still under construction. My purpose here is simply to outline Artidi's thesis as a reference to what I argue here. For Arditi's main ideas on politics see BENJAMÍN ARDITI & JEREMY VALENTINE, *POLEMICIZATION: THE CONTINGENCY OF THE COMMONPLACE* (New York University Press, 1999); and BENJAMÍN ARDITI, *POLITICS ON THE EDGES OF LIBERALISM: DIFFERENCE, POPULISM, REVOLUTION, AGITATION* (Edinburgh University Press, 2007).

¹² Before proceeding, I'd like to clarify the analytical distinction made by Arditi between politics and the political – as this is central to the arguments made herein. Stated simply, the political is the instituting moment of politics –*i. e.*, the never conclusive declarative/performative act (*e. g.*, 1917 Mexican constitution) which founds a particular form of politics–, thus politics would be what is instituted. For this reason the political can

relationships and institutions belonging to the state and partisan format. Arditì justifies this assertion in two ways: first, if politics refers only to government authorities and partisanship interests “we would be reducing it to its 20th century liberal-democratic format, tacitly committing us to accept the thesis of the end of (political) history”;¹³ secondly, “such a reduction would leave the political condition of organized interest groups, social movements and global actors in a conceptual limbo”.¹⁴

These two reasons may be viewed as two faces of the same coin. In light of the impact of organized interest groups, social movements and global actors on public affairs it is difficult for social scientists to simply ignore their role in the (re)configuration of politics –and even law.¹⁵ And this is a clear indication that our actual politics exceeds the 20th century liberal democratic format (a state and partisan focused format) and the thesis of the end of political history should be abandoned.

Note that Arditì’s thesis encompasses more than the simple idea that current politics would be better understood as a cluster of subsystems –government and partisan actors and

always exceeds the confines of institutional politics. The former is the larger system by which a society is unified despite its divisions; while the latter is the particular sphere or subsystem in which modern societies circumscribe politics activity. Benjamín Arditì, *The Becoming-Other of Politics: A Post-Liberal Archipelago*, 2 *CONTEMPORARY POLITICAL THEORY* 307-309 (2003).

¹³ *Id.* at 310.

¹⁴ *Id.*

¹⁵ This is especially important in Mexico where civil society’s impact in the public sphere has major significance. Examples include recent social movements and organized interest groups such as *Movimiento por la paz con Justicia y Dignidad* (Movement for Peace with Justice and Dignity) which achieved the enactment of a major law regarding victims of crime, *Yo soy 132* (I’m 132) which became part of an historic debate between three of the four presidential candidates in the 2012 elections, *Movimiento Ciudadano por la Justicia 5 de junio* (Citizen Movement for Justice June 5) which spurred the enactment of a law on proper child care, and others concerning diverse matter including: *Frente de Defensa de Wirikuta* (Wirikuta Defense Front), *Activistas Pro Animales* (Pro Animal Activists), *Grupos de Autodefensa* (Self-defense Groups), *Congreso Popular* (“Popular Congress”), *Movimiento estudiantil del IPN* (IPN’s student movement), etc.

others— for this would be just to pluralize the singular and that “is not satisfactory, for it suggests a mere arithmetic growth, whereas a condition of polyphony has to account for the qualitative differentiation of sites and modes of political engagement”.¹⁶

Arditi’s reading begins with the idea that we should understand political modernity as a continuous migration to *new topoi*, *i. e.*, politics has always been characterized by a steady colonization of new territories and borders. So with each shift of the border the shape of politics transforms, behaving in effect as a constant process.

Briefly, according to Arditì, modernity begins with the emergence of the absolutist state. Absolutism is therefore the first *topoi* of modern politics. And how politics is seen from absolutism? Bodin and Hobbes viewed absolute rule as a system with its own dynamics that belongs solely to the state.

In absolute rule the monarch embodies and becomes the sole subject of politics. But what follows this model? Migration to a new *topoi*: liberalism. With the advent of liberalism –the democratization of the absolutist state– politics expands to the sphere of parties and elections, emerging the sphere of territorial representation. But “[t]his migration did not cancel the political status of the state, but neither did it leave the original field untouched. It triggered a process of de-territorialization that stripped the state of its purported monopoly over politics, and a parallel process of re-territorialization that inserted it into a new political scene”.¹⁷

Arditi reminds us, however, that this at first not mean a democratic scenario since representation and party competition are compatible with a truly restricted notion of citizenship and political rights, *thus* a liberal state is not always democratic. It is then when in the second half of the nineteenth century, with a surge in civil rights movements and the rise of the popular vote, other *topoi* emerged: democratic liberalism; either as a code for effective practice, or as regulative idea.¹⁸ Thus liberal democracy “empowers citizens *as* voters and backs organized intermediation of interests by conceiving politics along the lines of partisan representation”.¹⁹

¹⁶ ARDITI, *supra* note 12, at 310-311.

¹⁷ *Id.* at 314.

¹⁸ *Id.*

¹⁹ *Id.*

This model, characterized by a “link between electoral citizenship, partisan competition and the nation state [that] inaugurates an epoch when the political is hegemonized not by the state but by the sphere of territorial representation within the physical borders of the state”—²⁰ would be where *prima facie* we are immersed nowadays. I use *prima facie* because another dominant political model is now emerging: post-liberal democracy.²¹

For Arditi politics in its state and partisan format begins to be exceeded, that area is no longer the only one where politics is manifested. Social movements, for instance, are already an “exploration of modes of political exchange that open up spaces, identities, and forms of collective action alongside the party system.” In this way, different social movements “chose to avoid the party format. They managed to create and sustain collectives based on non-partisan means of identification, aggregation, and representation of interests. Their actions contributed to renewing the political culture, expanded the public sphere, and extended the democratic revolution beyond the confines of electoral citizenship”.²²

²⁰ *Id.* at 317

²¹ Stated briefly, post-liberal democracy would be a political model that, whilst trying to overcome liberal democracy, it still works from it. That is to say post-liberal democracy begins with electoral citizenship and partisan competition but it also goes beyond this sphere since it is engaged with new forms of activism and democratic practices. We can see the emergence of this new political model all around the world, examples include: the waves of demonstrations and protests in the Arab world (since 2010), the anti-corruption movement behind Aam Aadmi in India (during 2011 and 2012); the intellectual and activist struggle behind Podemos in Spain (since 2014); the huge mobilizations of poor and working people against the Troika’s austerity plan in Greece (in 2015); the anti-austerity protests against the Tory party across UK (in 2015); the activist and people support behind the new constitutional processes in Bolivia (2006) and Ecuador (2007-2008); the continuous zapatist movement which in December 2012 displayed its strength by mobilizing tens of thousands in a silent march through San Cristobal de las Casas (since 1994) and the Ayotzinapa’s social movement which to this day continues organizing various mobilizations and protests acts (since 2014) in Mexico; and many others.

²² *Id.*

As Arditì states while liberal democracy has hegemonized the political, this should not be confused with total absorption of the political by politics. Liberal democracy –we have to remember the distinction between the political and politics stated above– is just a single politics manifestation of the political, as another is absolutism or liberalism. If the political is always an act of human will, not divine, if it is "the moment of antagonism where the undecidable nature of the alternatives is presented"²³, it is logical that the politics subsystem, where the political is concretized, is not always the same and can suffer also some transformation process at any time.

This transformation, as mentioned above, represents a migration towards a post-liberal democracy, a new *topoi* which, according to Arditì, "focuses on the possible clustering of some voices, spaces, and practices into systematic constellations. We may eventually describe these clusters as political tiers coexisting with the electoral arenas of the national state –the classical site of the liberal format of politics– and characterize the emerging scenario as a political archipelago of sorts, one that is both phocentric and has multiple levels".²⁴

Arditì visualizes this subsystem as three "islands" (archipelago): the first island or level is based on liberal electoral democracy; the second on movements, associations and organized interest groups; and the third takes politics beyond the borders of the national state (supranational). Each "island" has a configuration of interests, demands, identities, institutions and procedures associated with various modes of citizenship: 'primary' or electoral, inherited from the liberal tradition, 'second' or social, and supranational or global, in the making through the outward growth of politics".²⁵

Until recently politics moved in the first mode of citizenship exclusively: the electoral one. As mentioned above, however, social movements, organized interest groups and global actors play an increasingly important role in shaping politics and law. Arditì has taken the first step in order to build a conceptual apparatus that allows us describe and explain better our politics today. But with that setting about the becoming other of politics an interesting problem for theory of law emerges. Legal theory –even more than political

²³ *Id.* at 309.

²⁴ *Id.* at 320.

²⁵ *Id.*

theory— is based upon partisanship and state interests. If politics is undergoing a reconfiguration, should not something similar happen to law? This is especially true considering that law is essentially politics.²⁶ If politics is undergoing a radical transformation, law also experiences some transformation in the same way.

III. HERBERT HART AND LEGAL THEORY'S DEMOCRATIC AMBIGUITY

The first thing to do to explain the becoming-other of law is to see, albeit in summary fashion, how the concept of law has been understood in contemporary legal theory, resorting to two of its greatest exponents: Herbert Hart and Ronald Dworkin. These two legal philosophers show how the theory of law remains trapped in government authority and partisanship politics. Thus these thinkers' approach is mistaken as the disruption of the old paradigm now taking place will have significant implications for our current legal concepts and theories. The following section begins with a brief review of an important element of Herbert Hart's legal theory. This element is strategic to think the becoming other of law *-i. e.* law viewed not from the official or partisan perspective but from citizen's point of view. Despite the fact that Hart highlights this element, his theory of law fails to fully consider its implications.

Hart departs from John Austin's version of positivism. In a sense, Hart renews the methods of legal positivism by bringing analytic, particularly linguistic, tools to legal analysis. Thus, employing linguistic analysis, he argues that the question "what is law?" has become an enigma *-i. e.*, was much too vague— because all the answers given so far make the same error: rest on a linguistic confusion. For Hart the origin of this error comes from

²⁶ On this topic see the different works of critical legal theory, specially: CARLOS CÁRCOVA, *TEORÍAS JURÍDICAS ALTERNATIVAS. ESTUDIOS SOBRE DERECHO Y POLÍTICA* (Centro Editor de América Latina, 1993); ÓSCAR CORREAS, *INTRODUCCIÓN A LA CRÍTICA DEL DERECHO MODERNO* (Fontamara, 2006); ALAN HUNT & PETER FITZPATRICK (eds.), *CRITICAL LEGAL STUDIES* (Basil Blackwell, 1987); DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (New York University Press, 2004).

the need to recognize some phenomena to which the word "law" invariably refers. From this perspective the word "law" has an essential or inherent sense.

We must remember that the philosophy of language comes in clear opposition to such essentialist perspective of correspondence. Thus Hart claimed that up to that time, legal philosophers had committed precisely that error. Two examples include: (i) John Austin, who described law as orders backed by threats; and (ii) Oliver Holmes, who defined law in terms of how judges made rulings. These two concepts clearly show, according to Hart, the type of confusion that blurred the philosophy of language, because they attempted to link the word "law" with factual situations, that is, with certain observable facts and in so doing they obfuscated rather than clarified major legal concepts especially the concept of law. For this reason, Hart advocated that "there is plainly need for a fresh start"²⁷ to the concept of law.

Hart considered the Austinian theory of law, habitual obedience to orders backed by threats, to be limited to the external point of view of the rules. This approach failed to taken into account the internal perspective which, in Hart's view, represented a distinctive feature of law. In Hart's own words:

For such an [external] observer, deviations by a member of the group from normal conduct will be a sign that hostile reaction is likely to follow, and nothing more. His view will be like the view of one who, having observed the working of a traffic signal in a busy Street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the light merely as a natural *sign that* people will behave in certain ways, as clouds are a *sign that* rain will come. In so doing he will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a *signal for* them to stop, and so a reason for stopping in a conformity to rules which make stopping when the light is red a standard of behaviour and an obligation. To mention this is to bring into the account

²⁷ HERBERT HART, *THE CONCEPT OF LAW* 77 (Oxford University Press, 1961).

the way in which the group regards its own behaviour. It is to refer to the internal aspect of rules seen from their internal point of view.²⁸

The internal point of view of the rules represents, borrowing foreign words, "the most distinctive and valuable element in the work of Hart as jurist".²⁹ Paradoxically, however, "it is the same internal aspect that undermines Hart's conceptions of law and legal system"³⁰ impregnated with democratic elements which Hart tries to maintain.

Hart's internal point of view is a valuable contribution for developing a genuinely democratic theory of law for such a perspective enhances our understanding of law in terms of "a critical reflective attitude".³¹ A critical reflection shared by both the rulers and subjects. If we do not take into account the internal perspective of legal rules, citizens become automatons who simply obey rules imposed by authority.

But once Hart recognizes the vital importance of the internal point of view both for legislators, judges and government officials and for ordinary citizens, he explicitly denies it to the latter.³² His justification is that "law-making, law-identifying, and law-applying operations" solely applies to "officials or experts of the system" in contrast to "the mass of the population" or "ordinary citizen". From this perspective, citizens are nothing more than ignorant and passive participants who "may know nothing more about the laws than that they are 'the law'".³³

In this sense, the internal aspect of rules is considered solely from the perspective of those in power as this is its only reason for being. Thus the democratic character of Hart's theory begins to lose force. According to Hart:

There are (...) two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according

²⁸ *Id.* at 87-88. Emphasis original.

²⁹ NEIL MACCORMICK, H. L. A. HART 29 (Edward Arnold, 1981).

³⁰ FITZPATRICK, *supra* note 10, at 188.

³¹ HART, *supra* note 27, at 55.

³² FITZPATRICK, *supra* note 10, at 197-201.

³³ *Id.* at 59-60.

to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens *need* satisfy: they may obey each 'for his part only' and from any motive whatever.³⁴

Hart attempts to provide a general analysis of obligation in terms of a critical reflective social attitude. Although he sees this analysis as clearly distinguishing his view from those of Austin and other positivists, his emphasis on acritical and individualistic obedience places Hart's theory uncomfortably close to Austin's ideas. Nowhere does Hart require citizens to understand and accept laws in a critically reflective manner. This is true despite his assertion that "in a healthy society they [the citizens] will in fact accept [...] rules as common standards of behaviour and acknowledge an obligation to obey them".³⁵ Indeed Hart asserts that the "ordinary citizen":

[...] need not think of his conforming behaviour as 'right', 'correct', or 'obligatory'. His attitude, in other words, need not have any of that critical character which is involved whenever social rules are accepted and types of conduct are treated as general standards. He need not, though he may, share the internal point of view accepting the rules as standards for all to whom they apply. Instead, he may think of the rule only as something demanding action from *him* under threat of penalty; he may obey it out of fear of the consequences, or from inertia, without thinking of himself or others as having an obligation to do so and without being disposed to criticize either himself or others for deviations. But this merely personal concern with the rules, which is all the ordinary citizen *may* have in obeying them, cannot characterize the attitude of the courts to the rules with which they operate as courts.³⁶

³⁴ *Id.* at 113. Emphasis original.

³⁵ *Id.*

³⁶ *Id.* at 112. Original emphasis.

In summary, by exposing inconsistencies implicit in all orthodox or positivist theories of law, Hart's ideas regarding internal and external perspectives contravene fundamental principles of democracy. First, by recognizing that citizens possess a critical reflective attitude (capable of evaluating and following rules), Hart asserts that the internal point of view is critical to understanding a legal system. Second, despite this recognition, however, he claims that this internal point of view only applies to lawmakers –in particular, to judges– since citizens must solely *obey* laws and regulations.

IV. RONALD DWORKIN AND LEGAL THEORY'S ELITISM

In *Law's Empire* Dworkin³⁷ argues that legal theory should not merely identify the rules of a legal system, but also interpret and evaluate them. In other words, legal theory must not only consider the relation between law and coercion (*i.e.* the "force" of law), but the relation between law and rightfulness or justifiability (*i.e.* the "grounds" of law). In this theory of law, the role played by judges is fundamental.

According to Imer Flores the most important chapter of *Taking Rights Seriously* is "Hard Cases",³⁸ in which Dworkin cites Hercules, a judge

[...] of superhuman skill, learning, patience and acumen [...] I suppose that Hercules is a judge in some representative American jurisdiction. I assume that he accepts the main uncontroversial constitutive and regulative rules of the law in his jurisdiction. He accepts, that is, that statutes have the general power to create and extinguish legal rights, and that judges have the general duty to follow earlier

³⁷ RONALD DWORKIN, *LAW'S EMPIRE* (Harvard University Press, 1986).

³⁸ Imer Flores, *¿Ensueño, pesadilla y/o realidad? Objetividad e (in)determinación en la interpretación del derecho*, in *PROBLEMAS CONTEMPORÁNEOS EN LA FILOSOFÍA DEL DERECHO* 187 (Instituto de Investigaciones Jurídicas, 2005).

decisions of their court or higher courts whose rationale, as lawyers say, extends to the case at bar.³⁹

In this way, Hercules is a deific super-judge, endowed with unmatched knowledge of the law and unlimited time to consider the implications of legal principle. He fully understands the law's purpose, and makes just, wise and fair decisions in ways that best facilitate proper adjudication. Based on this, Dworkin reconnects law with political morality as for him "[l]aw is an interpretive concept, which does not have an identity apart from the activity of interpreting law".⁴⁰ In this sense, understanding law as an interpretative activity leads Dworkin, as Fitzpatrick states, to adopt an internal point of view on law.⁴¹

Despite these virtues, however, Dworkin –similar to Hart and other positivist legal theories– still falls into democratic ambiguity. Why? Because he makes a clear division between rulers and subjects. For Hart, this division did not pose any problem, as the internal point of view of judges, lawmakers and other officials ensure the protection of citizens' rights. Neither is this problematic for Dworkin, but for a different reason: a metaphorical judge like Hercules, in all his wisdom, ensures the protection of citizens' rights.

Considering all the virtues of Dworkinian interpretative and argumentative model, it appears feasible that judges have the last word in resolving hard cases. After all such cases, in a democracy, can not be unresolved, someone has to resolve them. But the Dworkinian model really justifies judiciary as the ultimate decision-maker? My claim is that the argumentative model does not solve the problem about the legitimacy of the last decider in post-liberal democracies. Legal theory should address this problem without obviates the question of the political model in which law is immersed. To be clear, I do not advocate the disappearance of current judiciary institutions. I argue that the problem must be understood beyond the common answer that this is just a technical question –*i. e.*, a matter of mere

³⁹ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105, 106 (Harvard University Press, 1977).

⁴⁰ DWORKIN, *supra* note 39, at 413.

⁴¹ FITZPATRICK, *supra* note 10, at 5.

institutional design. The problem could be technical but it is also an epistemological and political one.

In a theory like Dworkin's the problem of the political model in which law is immersed is not taken into account and judicial review becomes the last guarantee of protection of citizen's rights. For Dworkin, Hercules and his rational arguments maintain the law's integrity and represent the ideal form of adjudication. Imer Flores notes that by accepting Hercules, we assume that there is one right way to decide a case, and that the judge is capable of always finding the right solution. The problem, however, is not whether or not the correct answer exists but that the discovery of it is the exclusive privilege of a super-judge, a metaphor which fails to account for "the political context within which he decides or that indeed generates the cases that come before him".⁴²

In this sense, what supports Hercules's rulings –and ultimately the basis for judicial review– would be his "claim to a special and higher rationality"⁴³ as:

He may live amid that mass of irrationality that is our tax and immigration law, the decadence of administrative agencies and the perpetual threat of and preparation for war, but the Rule of Law and the rule of reason will reign if judicial decisions are grounded in appropriate rules, principles and standards and rationality defended. The province of judicial action is indeed a very wide one. In choosing which of the two parties before him is right the truly knowing judge need not only look to the rules to come to a rational decision, he may also grounds his argument on the principles inherent in the political order of which he is a member and to its implicit standards of political morality. In doing so he does not legislate or exercise discretion, because his arguments *are derived from hierarchy of norms*, not from considerations of policy, efficiency, or public welfare.⁴⁴

⁴² Judith Shklar, *Political Theory and the Rule of Law*, in *POLITICAL THOUGHT AND POLITICAL THINKERS* 34 (Chicago University Press, 1998).

⁴³ *Id.* at 35.

⁴⁴ *Id.* at 34, 35. Emphasis added.

It is here that we find the grounds of judicial rationality as “Dworkin, of course, knows that policy choices can easily be translated into the language of principles. Indeed legislators and private persons do it all the time. The rationality of judicial discourse, nevertheless, does depend on this formally normative characteristic. As long as it remains within the limits of normative logic its rationality cannot be impugned”.⁴⁵

Thus, if “judiciary is not alone in claiming a rational standing; [and] other agencies of government also have their share of “tribunality”, that is, principled reasoned decision making”,⁴⁶ it is clear that citizens enter here as well. In this way there is not enough reason to completely assign the power to decide hard cases to the courts. When they are located in their proper political context and we are aware of “their relative position in the political order as a whole” and if, as Dworkin argues, the concept of law implies a necessary recognition of the community’s political morality, judges are no longer the best placed to decide the difficult disputes but the citizens themselves. That as long as we dare to overcome the legal positivist epistemology –and the political base underlying it: liberal democracy– with its radical division between rulers and subjects within which judges possess a privileged status because of its special and superior rationality.

Once we discover the foundation of judicial review in “a special and higher rationality” –compatible with the democratic ambiguity typical of contemporary theories of law– it will be necessary to acknowledge that the problem of judicial review, and law in general, should be rethinking in a post-liberal democracy since, as with Hart, for Dworkin law only exists because “officials [...] take [...] decisions that commit a community to rights and duties that make up law”.⁴⁷ This especially makes sense if we take into account, as Judith Shklar states, that “[t]he only political order in which the kind of principled reasoning that Dworkin attributes to the rational judge is possible at all, is of necessity a representative democracy, and as such it is particularly given to jurisdictional and open-minded interminable disputes”.⁴⁸

We may be well-advised to remember the words of Harold Berman who said that:

⁴⁵ *Id.* at 35.

⁴⁶ *Id.*

⁴⁷ DWORKIN, *supra* note 39, at. 97.

⁴⁸ *Id.* at 35, 36.

We need to overcome the reduction of law to a set of technical devices for getting things done; the separation of law from history; the identification of all our law with national law and of all our legal history with national legal history; the fallacies of an exclusively political and analytical jurisprudence (“positivism”, or and exclusively philosophical and moral jurisprudence (“natural-law theory”), or and exclusively historical and social-economic jurisprudence (“the historical school”, “the social theory of law”). We need a jurisprudence that integrates the three traditional schools and goes beyond them. Such an integrative jurisprudence would emphasize that law has to be believed in or it will not work; it involves not only reason and will but also emotion, intuition, and faith. It involves a total social commitment.⁴⁹

And if we accept that current theories of law have serious problems due to the democratic ambiguity that characterize them, it does not seem appropriate to take into account just the official view (legislator, judges and so on) for explaining law since law is not the exclusive product of ruling class. In this way, citizens should be those who decide what is law as “[t]he ability of Hercules to prevail in such a polity [a representative democracy] depends less on the rationality of his specific style of argument than on his power, which is in any case what his name implies. The rationality of his office depends not merely on the rational quality of his decisions, but far more on his relatively aloof place in the political order as a whole”.⁵⁰ In sum, if we want to take democracy seriously law, paraphrasing Dworkin’s statement, does not exist because “officials [...] take [...] decisions that commit a community to rights and duties that make up law” but rather because citizens, with their daily political struggle, decide so.

⁴⁹ HAROLD BERMAN, *LAW AND REVOLUTION. THE FORMATION OF THE WESTERN LEGAL TRADITION* vi, vii (Harvard University Press, 1983).

⁵⁰ Judith Shklar, *supra* note 42, at 36.

V. CONCLUSION

Everything to this point can be summarized as follows: any legal theory that distinguishes between rulers and subjects fosters "democratic ambiguity" and, as such, fails to match the realities of contemporary post-liberal democracy. As mentioned in the introduction, some elements from both Hart's and Dworkin's theories provide an excellent starting point for the construction of a theory of law in the service of democracy. Both give us two distinct features that may be utilized to build such a theory. Hart's ideas shed light on the importance of participants' internal point of view. Dworkin's thesis, on the other hand, illustrates the necessary link between law and political morality.

Nonetheless, as shown above, Herbert Hart's theory contains a paradox; although he advocates a genuine democratic theory of law by considering both internal and external points of view, he undermines this principle by applying it solely to the ruling class. He thus limits the participation of citizens in the legal system to mere obedience. This is not too far from the tradition espoused by Hobbes, followed by Austin and found in other modern legal philosophers including Kelsen, Ross and Raz, among others. With Dworkin, the dilemma does not appear to the same extent as it does in Hart. But he also limits citizens' participations as for him the sole valid interpretation is the official one –especially that of judges.

As I have argued liberal representative democracy can no longer be the political basis for the construction of a democratic legal theory. For this reason, the disruption of this paradigm can start with the two important ideas mentioned above, both of which are present in Hart's and Dworkin's work. No democratic theory of law can rest entirely on the elite perspective of lawmakers – in particular judges – as it has been in contemporary legal philosophy. For this reason, the inclusion of citizens is necessary in building institutions and greater participation in decision-making. This is the lesson of Arditì's work, that current politics requires going beyond the state and partisan format. If we talk about the conditions of possibility of a legal system, and therefore the power that supports it, it is mandatory introduce in the explanation of law, a popular item, namely, democratic.