ON SEN'S NOTION OF COMMITMENT - A DIALOGUE WITH DWORKIN

SOBRE A NOÇÃO DE COMPROMETIMENTO EM SEN - UM DIÁLOGO COM DWORKIN"

Johannes Servan[1]

Orcid: https://orcid.org/0000-0003-1025-7582 /

Abstract:¨In this paper I simply compare Amartya Sen's critique of economic man as a self-seeking and gain-maximizing egoist, to Ronald Dworkin's critique of legal positivism and the rule-model of law. Central to both anti-reductive critiques is the idea that one is in need of a more complex notion of rationality in order to account for the actual behavior of economic agents and judges respectively. My basic claim is that this comparison might provide us with a better understanding of Sen's notion of commitment. This paper is meant as an initial sketch of an idea, more than a fully developed argument, hence I conclude by pointing out the potential for future research.

Keywords: Rationality; Legal Positivism; Maximization; Commitment;

Resumo: Neste artigo irei apenas comparar a crítica de Amartya Sen ao homem econômico enquanto egoísta e maximizador de ganhos, à crítica de Ronald Dworkin ao positivismo jurídico e ao modelo de lei de regras. Central para ambas as críticas anti-reducionistas é a ideia de que precisamos de uma noção mais complexa de racionalidade, a fim de explicar o comportamento real dos agentes e juízes econômicos, respectivamente. Minha alegação básica é de que essa comparação pode nos fornecer uma melhor compreensão da noção de comprometimento em Sen. Este artigo pretende ser um esboço inicial de uma ideia mais do que um argumento totalmente desenvolvido, daí a conclusão apontando o potencial para futuras pesquisas.

Palavras-chave: Racionalidade; Positivismo Jurídico; Maximização; Comprometimento;

[1] Professor Adjunto, Departamento de Filosofia - Universidade de Bergen - Noruega. Johannes.servan@gmail.com

Introduction

In "Rational Fools" (1977) Amartya Sen points to a specific concept of man - as a "self-seeking egoist" - which is ingrained in the questions of modern economic theory and the highly influential model of rational choice theory. Further, Sen introduces two possible departures from this concept: sympathy and commitment. Sympathy, Sen argues, gives reason to care for the welfare of others to the extent that it affects your own welfare. If the torture or extreme poverty of others makes you sick, then you have a reason to help others. This reason is however not, strictly speaking, non-egoistic. Therefore, in order to move clearly beyond the current framework, Sen claims, we have to consider commitment as the most promising option.

As a first step, Sen defines "commitment" in contrast to sympathy or plain self-interest, as the only reason that allows "a person choosing an act that he believes will yield lower level of personal welfare to him than an alternative that is also available to him". (SEN, 1977, p. 327) Moving towards a positive definition of commitment, Sen introduces the Kantian requirement of acting for 'the reason of duty' - regardless of which level of personal welfare the act produces. Although this second step follows the Kantian distinction between acting based on sentiments (such as compassion) and acting based on a sense of duty, it would be too hasty to conclude that what Sen means by commitment is simply 'practical reason'. Actually, Sen is quite explicit on the point that commitment is usually not given in the form of a universal ethics, neither in the form of the duty of utilitarianism nor any duty consistent with the categorical imperative (SEN, 1977, p. 335). He wants to move beyond the dichotomy between egoism and universalized moral systems, grounded in the empirical assumption that many actions involving commitment are motivated by group identity, such as class or community (SEN, 1977, p. 344).

Besides pointing out a few areas of research where this new notion of commitment might have promising explanatory force, related to the metaranking of preferences and negotiations on public goods, Sen does not give this notion much more substance. To explore his notion further, I will in this paper pursuit a possibly fruitful comparison with Ronald Dworkin's discussion on principally grounded decisions in legal practice.

In order to shed light on the different levels of rationality that Sen seems to have in mind - from the lowest sense of "revealing no inconsistencies" (SEN, 1977, p. 336) to the complexity of including commitment and reasons of duty - I will make a suggestive parallel

reading of Dworkin's classic article "The Model of Rules" (DWORKIN, 1967). In his article on legal philosophy, Dworkin raises a similar critique to Sen against the concept of the judge as a simple rule-following agent. My basic point is that Dworkin's descriptive account of decisions in legal cases, as guided and bound by principles, might bring us closer to what Sen's notion of commitment entails.

I conclude by reflecting on the educative value of accurate descriptions of decision-making, and point out some worrying tendencies in our society that a reductive model of choice and judgement seems incapable of accounting for, and hence incapable of responding to in an adequate manner.

Dworkin - following rules, exercising discretion

As mentioned, Sen is critical to economic theory's one-sided reliance on self-serving or gain-maximizing rationality to explain economic behavior. Although he admits that even this reductive account of behavior might be criticized for having too much structure applied to some contexts, the opposite problem is usually the case. Sen points out cases where decisions are made on public goods as in particular need of accounts having a more elaborate structure. His account implies a certain levelling of rationality from the lower and less structured, to the higher and more structured.

On the lower level consistency seems to be a sufficient criteria, as seems to follow from this claim: "Economic man might be rational in the lowest sense of "revealing no inconsistencies in his choice behavior." (SEN, 1977, p. 336) The higher level is not given much form or content by Sen, except perhaps some clues given in a rather long quotation of the Norwegian economist Leif Johansen emphasizing the necessity of "norms and rules of conduct" to explain cases where mere economic incentives do not suffice. (SEN, 1977, p. 332) This is certainly the case in negotiations on public goods, given the issue of "free riding".

In this section I want to push this line of argument even further by doing a comparative reading of Dworkin and Sen. Through Dworkin's distinction between rules and principles, I argue, we might have good reasons to claim that what "commitment" refers to is not simply consistent rule-following, but something more similar to what Dworkin understands to be acts of judgement guided by principles.

Dworkin's critique of legal nominalism and positivism

In "The Model of Rules" Dworkin points out the failure in legal theory to account properly for legal obligations as a "continuing source of embarrassment" (DWORKIN, 1967,

p. 14). Although he recognizes the temptation to take the nominalist position of scepticism to legal obligations, Dworkin also points out that to claim that these obligations are mere myths has severe drawbacks. Dworkin does not, however, refute the claim directly. Instead, he simply dismiss the relevance of the nominalist position for attacking a strawman conception of legal obligations as mechanical rule-following. Most lawyers, Dworkin notes, has a much more dynamic conception of these obligation as changing and evolving (DWORKIN, 1967, p. 16). In other words, Dworkin seems to claim that the idea of the practice of law as merely consistent rule-following is simply false.

To account for a more common conception of legal obligations, Dworkin turns the tradition of legal positivism. Legal positivist, according to Dworkin, understand the law as a special set of rules that regulate behavior by the means of punishment or coercion. These rules are not identical to the legal text and cannot be followed mechanically, but will always require a sense of interpretation and discretion (in the weak sense) in order to articulate the rule in each particular case.

Positivists will usually also emphasize that legal rules, in contrast to other norms and rules of conduct in society (such as those mentioned by Johansen above), are sanctioned. There is in other words a strong incentive to follow these rules. These special rules are valid, not because of their content, but due to their pedigree. For instance, John Austin claims legal rules to be valid if they are authored by the sovereign. Hence, for Austin legal obligations are general orders of the sovereign, backed by the threat of sanctions in cases of disobedience.

Dworkin is sympathetic to H. L. A. Hart's critique of Austin, especially when it comes to the implication of Austin's theory that legal obligations is not much different from the orders of a gunman. In short, Hart explains the rules in a community to be conceived as binding, in contrast to mere conformity or brute force, because they rest on general acceptance of these rules, or because they are validated by a 'rule of recognition'. Binding rules take on the distinct form of "law" only when they are validated by this rule of recognition, i.e. the "fundamental secondary rule that stipulates how legal rules are to be identified" (DWORKIN, 1967, p. 21).

Further - and central to Dworkin's critique of legal positivism - even though Hart makes a better case for this position than most positivists, he still retains the assumption that:

The set of these valid legal rules is exhaustive of "the law," so that if someone's case is not clearly covered by such a rule (because there is none that seems appropriate, or those that

seem appropriate are vague, or for some other reason) then that case cannot be decided by "applying the law" (DWORKIN, 1967, p. 17).

In these “hard cases”, as Hart would refer to, judges have and exercise free discretion. On this point, Dworkin clearly disagrees on the descriptive premises of the positivist account, stating that:

My strategy will be organized around the fact that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards (DWORKIN, 1967, p. 22).

In many ways, this sums up Dworkin’s crucial insight in one sentence. Similar to Sen, Dworkin saw that the behavioral accounts of his discipline (although simplified for the sake of the argument) failed to recognize essential aspects of the actual behavior. It seems true that legal theorists in general are conscious of the problems associated with a mechanistic abstraction of the rationality of a judge. Legal judgement, like economic rationality, is simply not reducible to consistency. In Hart’s theory there is also a quite sophisticated account of legal obligations beyond the simple structure of negative incentives of sanctions. Still, the recognition of “commitment” to legal obligations, seems to be limited within the paradigm of rule-following. This limitation leaves the behavioral account with empty spaces in the fringes of the field of legal conduct, similar to those pointed out by Sen and Johansen in the field of economic behavior - unexplained behavior where the rule of law or the rule of incentives do not apply.

On Dworkin’s distinction between rules and principles

From the concluding comparison of the last section one might speculate if not Sen’s solution could be closer to Hart than to Dworkin. One could, perhaps, suggest that Sen’s notion of commitment is understood as a withdrawal from the sources of reasons internal to the field of economics. Confronted with questions of public goods, economic agents might - similar to Hart’s judges faced with a hard case - fall back on free discretions with the general social or moral “norms and rules of conduct” at their disposal. Although this seems like a plausible suggestion, I find it unattractive for the same reason that Dworkin direct against Hart: it seems to implode Sen’s notion of commitment into a kind of “anything goes”-argument. For this reason, I want to entertain (at least for a moment) the possibility of understanding the notion of commitment as rather pointing towards something similar to

Dworkin's idea of principles, inherent to the practice in the field itself. I'm thinking here of economic principles associated for instance with conceptions of the competitive market as a "fair playing field", which obviously has a very different practical interpretation in the Nordic context than others, such as the Brazilian.

In his distinction between rules and principles, Dworkin emphasizes two central aspects. First, rules and principles are different in their logical structure. Rules have a "if-then" structure which is applied in an "all-or-nothing fashion". If the factual conditions of the rule are met, and the rule is valid, then the result it supplies must be accepted (DWORKIN, 1967, p. 25). Principles on the other hand, though also setting a standard to particular cases, does not dictate a particular outcome. Drawing on his example of the Riggs vs Palmer case, Dworkin argues that a principle like "No man may profit from his own wrong" does not set out conditions that necessitates a particular response. As a consequence, the applicability of a principle does not rely on determining general conditions or any supplementing list of exceptions. Second, the logical difference between rules and principles entails a dimension of weight or importance that applies only to principles. Principles may intersect, for instance the freedom of speech may intersect with the right to privacy. Such conflicts between principles must be resolved by taking into account the relative weight of each principle in the particular case. Conflicting rules, in contrast, cannot be valid at the same time (DWORKIN, 1967, p. 26).

In order to compare this distinction with Sen's critique of economic theory I will not go into a full account of Dworkin's discussion on discretion, and its implications for legal positivism's use of the term. I shall rather focus my attention on some crucial points of comparison.

Although there are obvious differences between the kind of behavior Sen and Dworkin considers - one spanning in a range from impulsive private consumption to deliberations on public goods, the other from the routine case of the lower courts to the hard cases of supreme court - there seems to be a case to be made for a parallel in the way they account for the increasing complexity or elaborate structure of the choices and judgements made as revealed in behavior.

On the lowest level Sen speaks of consistency as the main requirement. This mechanic requirement is, as mentioned above, not very common in legal theory, given the broad recognition of the need for interpretation of the law and its dynamic character in constant adaptation to the society it is operating in. There seems, nevertheless, to be certain similarities

if we compare the logical form of legal rules to preference rankings. Both rules and ranking of preferences implies an if-then structure and - although operating on a level somewhat above the lowest would entail being able to assess if the rule or preferences should apply to the particular factual conditions - they would both quite concretely determine the outcome of the decision. Preferences, like rules, do not seem to allow for conflicting preferences to be "valid" at the same time.

On the higher level of rationality the open and undetermined character of the principles makes the comparison easier, but also somewhat unsatisfying. It seems plausible to claim that commitments understood as metaranking of preferences have certain similarities with the ability to assess the importance of rules. Both imply a structural complexity that is not very well studied in behavioral psychology, nor accessible from this perspective. It seems promising, despite the lack of detailed scrutiny, to understand commitments as concerns with a certain weight, which does not exclude other accompanying commitments, even conflicting ones, as being valid at the same time. The constant tension these days between solidarity to one's fellow citizens and one's fellow human beings, wherever they might be, should suffice to illustrate this point.

The perhaps most striking parallel between the two perspectives is, however, the way the account for higher level rationality reveal highly inadequate descriptive accounts of actual behavior in each field distinctly. Both the model of economic man and the model of rules, Sen and Dworkin demonstrates, tend to leave certain choices as empty pockets at the fringes of their models. The problem is not that these shortcomings might be well-known in the theories, but that the lack of an adequate notion of rationality leads economic and legal theorist to describe these cases in an unsatisfying and misleading manner.

Some lessons

Based on this comparison, I find it reasonable to suggest that Sen's notion of commitment might be able to draw some valuable lessons from Dworkin's critical discussion on leaving these empty spaces in the model for free discretion of the individual judge. Obviously the legal obligations rests more heavily on a judge, than economic commitments rest on a regular consumer or ordinary citizen. Strictly speaking, discretion is probably not applicable to the latter, since, as Dworkin notes: "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction" (DWORKIN, 1967, p. 32). Still, some lessons might be transferable to the choices made, especially in cases where citizens negotiate on public goods.

Even in a minimal state, public goods like defense and police force will have to be financed collectively. Unlike private consumption, agents do not have full control of the outcome, say through a referendum. In explaining high voting turn-out, something other reasons seems to be needed than gain-maximizing. Through several examples Sen shows how running "an organizations entirely on incentives of personal gain is pretty much a hopeless task" (SEN, 1977, p. 335). Although economic choices are not surrounded by a belt of restrictions in the same sense as legal judges, there is a sense of social "discretion" associated with restrictions beyond the requirement of consistency and egoist consequential concerns. These social and cultural restrictions is quite powerfully articulated by Sen himself in the potential social shaming of a man unable to accommodate them: "The purely economic man is indeed quite close to being a social moron." (p. 336) In this loose sense, "hard choices" such as those of public goods, can be said to be acts of discretion in the weak sense of the term. The exact character of these restrictions would have to be studied further, and is expected to be stronger in societies with high level of trust. Its relevance is linked to the integrity of a profession in the sense of "herd immunity" to social idiocy in the economy.

Further, when Dworkin, reflecting on the notion of discretion, points out that although most theoretical accounts would reasonably allow for discretion in the weaker sense, of say interpreting the written law or a given order, the problem arises when these empty pockets are left with no binding requirements. In both Sen's and Dworkin's cases, the theories they criticize seem to leave too much room for the agent in question to take unconstrained decisions with no strings attached, leaving the emergence of new laws or preferences unexplained and in many cases with the suspicion of being made on irrational grounds.

The reasoning Dworkin aims to articulate is in many ways indeed more difficult to grasp than the model of rules and consequently is perceived to have less authority:

It is true that generally we cannot demonstrate the authority or weight of a particular principle as we can sometimes demonstrate the validity of a rule by locating it in an act of Congress or in the opinion of an authoritative court. Instead, we make a case for a principle, and for its weight, by appealing to an amalgam of practice and other principles in which the implications of legislative and judicial history figure along with appeals to community practices and understandings (DWORKIN, 1967, p. 37).

The benefit is on the other hand a way to articulate the kind of legal obligations that cannot be articulated by the theories modelled by the lower levels of rationality. For Dworkin, this amounts to a defense of an understanding of legal obligations that also apply to the cases

at the fringes of theories such as legal positivism. For Sen, it might amount to the ability to account for seemingly irrational economic behavior. Like Dworkin, Sen is open to the more qualitative and hermeneutic approaches to behavior in this sense. Exactly how to define the whole of economic practice and its relation to the community at large, is yet to be accounted for in detail. One possibility is to follow the development of Sen's capability approach.

Discussing the relevance of commitment in relation to cases such as work-motivation, or the lack thereof, Sen underlines the extreme importance of social conditioning (SEN, 1977, p. 334). Perhaps because legal scholars and lawyers is a more defined social group, a highly institutionalized professional culture, it is easier for Dworkin to articulate the kind of commitments shared beyond the scope of incentives and obligations articulated by legal rules:

The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense of appropriateness being sustained. [...] We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards (DWORKIN, 1967, p. 41).

As a descriptive account, there is no direct preferences for which principles that are appropriate and that should be sustained over time. An accurate descriptive account of the changes in ideology and attitudes will, however, position us to promote or resist the development. In the legal system, there is an obvious tension between liberal-progressive and more conservative, even anti-liberal positions. The fact of Donald Trump (a social moron by any standard) appointing judges for the supreme court is a striking image of an offence against the liberal-democratic regime, which seems to have been dominant at least since the 90's. Similar tendencies to control the legal system and steer it in a non-liberal direction is found in several European countries, perceived by many as a backlash of the kind of ideals that Rawls took for granted as parts of a shared political culture.

A similar description of changes in consumer attitudes and commitments, could perhaps give us a better idea of how to sustain or resist developments that are relevant to questions of public (or even global) goods - most importantly the global concerns with climate change and exploitation of labor.

Although, I am personally in favor of a liberal regime, I also recognize that commitment to these principles alone are not (and have not been) able to sustain themselves over time. A similar problem is seen in the economic sphere, where "externalities" to a free market are causing major problems of social and environmental sustainability, which is threatening the very possibility of economic growth. In both cases, a normative position on sustainability seems to clearly benefit from more adequate descriptions of behavior - including complex notions of decision-making - and the conditions that sustain sustainable behavior.

BIBLIOGRAPHY

AUSTIN, J. The Province of Jurisprudence Determined. [s.l.] J. Murray, 1832.

BAYLES, M. Hart vs. Dworkin, Law and Philosophy, 1991. Disponível em: <http://dx.doi.org/10.1007/bf00127410>

CAMPBELL, D.; THOMAS, P. A. The Province of Jurisprudence Determined by John Austin. [s.l.] Routledge, 2019.

DWORKIN, R. M. The Model of Rules. The University of Chicago law review. University of Chicago. Law School, v. 35, n. 1, p. 14–46, 1967.

HART, H. L. A.; HART, H. L. A. The Concept of Law. [s.l.] OUP Oxford, 2012.

MILL, J. S. Utilitarianism and On Liberty: Including Mill's "Essay on Bentham" and Selections from the Writings of Jeremy Bentham and John Austin. [s.l.] John Wiley & Sons, 2008.

SEN, A. K. Rational Fools: A Critique of the Behavioral Foundations of Economic Theory. Philosophy & public affairs, v. 6, n. 4, p. 317–344, 1977.