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The law is (not) moral: turnaround of values on the current legal theory

El derecho (no es) moral: cambio de valores en la teoría legal atual

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Abstract: To better understand the nature of law and its relation to the world of values that instigate researchers all over the world. Therefore appealing to the bibliographical review method, this article intends to point out some of the conceptualbases that enable a structuring of a positive legal experience, as well as the reasons that propitiated the disruption of an axiological dimension, particularly in the first decades of XX century. Our aim consists in identifying the turnaround values that enable the rapprochement among law, moral and justice.
Keywords: Legal positivism, values, Plain theory of law, pos positivism

Resumen: Para comprender mejor la naturaleza del derecho y su relación con el mundo de los valores que instigan a investigadores de todo el mundo, este artículo recurre al método de revisión bibliográfica. El objetivo es señalar algunas bases conceptuales que permiten estructurar una experiencia legal positiva, así como las razones que propiciaron la interrupción de una dimensión axiológica, particularmente en las primeras décadas del siglo XX. Nuestro propósito consiste en identificar los valores de cambio que posibilitan el acercamiento entre el derecho, la moral y la justicia.
Palabras clave: Positivismo jurídico, valores, Teoría pura del derecho, postpositivismo

1. Introduction

The Troy War was eternalized in Romero's Iliad. The narrative evidenced the effort of the kidnapping of queen Helena by the young prince

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Páris. Menelau, the king of Sparta and Helena's husband, declares war on the Trojans, beginning an armed conflict that would last the next ten years. The epic battle that follows, was closely monitored by the sight of gods, in a contest that involves honor, bravenes and justice.

It was from Homeric poetry that the law became exalted with supreme value, constituting as a reality that should be seen by all. The poet shows what justice does, although not by what it really is, hence, the great questions to be investigated, and this will be a task assumed, in particular by Socrates philosophers, that consist in indicating the nature of justice, as well as its probable relation with moral and the law. It is true to say that among the elder greek there wasn't any specific word to refer to the law. just as IUS, as The Roman for exemple, which made the term even more confusing as a right or or equity. A great part of them considered research for justice as its essential meaning, many times intending the law concept. However, it was Platon the pioneer to invest the subject with a philosophical caracter converting justice in a normative principle, basing, afterwords, to Aristotle's Legal Philosophy.

Among many possible approaches, it is legal to assume that the finality of law consists in legally general discipline of the society. Although, it is not about regulatingall and every single human conduct, however the ones that are only fundamentals to enable a peaceful life in an organized society. If a happy life in society is the craved ending, law is the path that makes possible reaching the end (GRANERIS, 1961).

Presented with the undeniable relevance of the question, it is not surprising that currently, among many legal matters of singular importance, the concept of law occupies a privileged position in academies once again. It is known that law philosophy, the only discipline engaged with the study of truth of law, philosophers, law philosophers and jurists have been discussing the subject, seeking for a new direction to it. Appealing to the bibliographic review method, our effort is added to many others that search to understand what is the law, identifying its presumably relation with the moral, specially

with justice.

2. The philosophical roots of contemporary law

The philosophical study of law can be divided into two parts, though apparently antagonistic, they are as a matter of fact complementaries; it regards the pre contemporary law and the contemporary law. Although this division could be useful from the methodological point of view, its values abide a lot more on the content that each part preserves, once indicating in a timely manner the change of perspective that the theme suffered along the history, specifically regarding the study developed by western law tradition.

The pre contemporary law refers to intellectual efforts disposed initially by thinkers pre socratic, known up to Illusionism, with the final cooperation and decisiveness of Kant. During all the course, the studies about law can be considered indirect or implicit, according to Miguel Reale´s lessons (2013, p. 280), once the object in analises wasn´t related to law itself, but the law related to other elements considered more imperious.

The elder Greek thinkers were preoccupied with the cosmos order and the social order then the law itself, as well as the philosophers theologians that succeeded them, the same ones who converted the law into a set of religious canons, they were more interested in theological inquiries. Despite the undeniable progress, with modernity it was not at all different, as the law became a means used sometimes by the monarchy to legitimize its power of command, sometimes by the bourgeoisie, to claim natural and universal rights. In the contours of this picture that presents itself, from ancient to modern, law could not be considered science, since it did not have an object of its own, such as physics, chemistry or biology does.

Later, specially with the changes arising from bourgeois revolutions, that law could delimit its own object, thus guaranteeing, on the one hand, legitimacy, on the other hand, autonomy. If law was once constituted by a

set of abstract rules derived from superiors metaphysical authority, henceforth it is carried out as a technical activity, manifesting itself through norms state.

If until then the horizon that was glimpsed was so much more dispersed, sincelaw was conditioned by multiple external motivations, such as the nature (physis) or the divine will, from that point on it breaks all the barriers, not only conquering autonomy and assuring its own legitimacy, but, mainly, constituting while strict science. Operate law becomes a technical activity, far from what experienced previously, distant, including, ethics and morals, according to what follows.

3. Law is not moral: the normative legal positivism

Even though the School of Exegesis has led the law towards a more technical-instrumental approach, moving away from axiological discussions, and the Historical School has, with the enactment of the German Civil Code in 1900, followeda relatively similar trend, the most radical positivist lurch would only come some time later, in the first decades of the 20th century. Hans Kelsen was responsible for the development of the Pure Theory of Law. Among its merits is that of having separatedthe "law phenomenon" of the "science of law".

In a practical way, it is undeniable that law is one more social phenomenon among many others, as religion, politics and moral. However, while it engages with subjectivism, of all kinds, the science of law strives for technical objectivity. Its facts, traditions and mores are part of the gross law, but they are not the guardians capable of revealing the truth of law, but rather the normative interpretation of thosefacts and mores. This means that the norm works as a scheme for interpreting the facts: "the judgment in which it is stated that an act of human conduct constitutes a juridical act (or unlawful) is the result of a specific interpretation, namely, of a

normative interpretation." (KELSEN, 1998, p. 4). It is not the fact that determines the norm, but the norm is what gives legal meaning to the facts.

Kelsen, in his analysis of norms, has precisely delimited the boundary that must have between law as a social fact and law as a legal science. His mission was to free legal science from all the metalegal elements that are foreign to it[2].Thus,law should not be concerned with being, but with what should be (KELSEN, 1998). Apurity aspired to by Kelsen's theory concerns only the science of law, and not its concrete manifestation as a gross phenomenon, which is a matter reserved for other sciences. The purity of law abides, therefore, within the limits of the legal norm.everything that is beyond the normative boundaries determined by the authority that has the power to edit the norms, it is not part of the science of law[3].

As it is an autonomous entity, the method to be employed by the science of Law cannot be confused with the methods used by other sciences, since the law has itsown object of study. Kelsen (1998, p. 1), in Pure Theory of Law, points out that:

> In an entirely uncritical way, jurisprudence has become confused with psychology and sociology, with ethics and political theory. This mess can be perhaps explained by the fact that these sciences refer to objects that undoubtedly have a closer connection with law. When the Pure Theory undertakes to delimit the knowledge of law facing these disciplines, it does, not for ignoring or, much less, for denying this connection, but because it tries to avoid a methodological syncretism that obscures the essence of legal science and dilutes the limits imposed on it by the nature of its object.

As a pure theory that excels for objectivity and accuracy, the only

[2] In the Preface of the Pure Theory of Law, the following is stated: "For more than two decades I have undertaken to develop a pure legal theory, which means, one purified of all forms of political ideology and all elements of natural science, a legal theory aware of its specificity because aware of the specific legality of its object." (KELSEN, 1998, p. XI).

[3] "The 'purity' of a theory of law that proposes a structural analysis of legal orders consists in nothing more than to eliminate from its sphere problems that require a method other than which is suited to its specific problem. The postulate of 'purity' is the indispensable requirement to avoid the syncretism of methods, a postulate that traditional jurisprudence does not respect or does not respect sufficiently." (KELSEN,1998b, p. 291).

commitmentof the science of law consists in knowing its object, which is determined from sources states, regardless of ideological variations, social and moral flows exist. "The legal norms", asserts Kelsen (1998, p. 80), "the object of legal science". According to the lessons of Lenio Streck (2011), it is thus refused that the approach to the legal phenomenon is about external elements to what was produced in terms of social regulation by the State. This implies, once again, the complete separation between law and moral, once the positivist theory doesn't present itself concerned with the adequacy or not to a historically established moral system. In theory, the norm must be neutral regarding the current moral. The values and the justice cannot be an object of study from this science, being in guardianship of sociology and philosophy. But then, to have guarantees about the validity[4] of legal norms?

Riddall (2008, p. 164) shows that "Kelsen has been called doubly pure: pure inhow much you exclude elements such as the sociology of your theory and how muchyou exclude the moral of the question about legal validity". Thus, for Kelsen (1998), the sum of a plurality of norms constitutes a unit, a system or order when its validity ultimately rests on a single, fundamental norm. This unique and fundamental norm is superior to the others and its purpose is to serve as a basis for the legal order and, in addition, confer validity to all other norms that will compose the same ordering. "In the legal system, norms are not sparse, without logic: on the contrary, they are structured from a hierarchy (MASCARO, 2013, p. 350). In short, a legal norm is valid when, first, has been created in a particular way, that is, according to determined rules and according to a specific method and, second, when it

[4] Validity should not be confused with effectiveness. Validity "means that legal norms are binding, that is, that men must conduct themselves as such norms prescribe, or that they must fulfill and apply them. Efficacy of Law means that men actually conduct themselves in accordance with norms or that dictates standards are actually enforced and enforced. Validity is a quality of law; the so-called effectiveness is an attribute of the actual conduct of men, and not, as the use of language seems to suggest, of the Law itself." (KELSEN, 2000, p. 40).

obeys the superior norm that regulates the production of inferior norms. The inevitable consequence of this conception is that, as John Austin (1995, p. 157) had already pointed out, law can assume any content, since, "the existence of the law is one thing; your merit or demerit is another."

Legal normative can not be confused with the natural laws, since each one – the legal norms and the laws of nature – has a system of its own functioning. The laws that regulate nature (natural laws) operate by obeying a relationship of cause and effect, different from legal norms that have a logical functioning closer to imputation than to causality. To a citizen who committed a deviant act is imputed a sanction.

> Legal laws in which the positive norms established by a legislator or through custom are, for example, the following: when someone commits a crime, they must be punished; when someone does not pay what they owe, it must be executed for its assets. The distinction between causality and imputation lies in that – as we have already noticed – the relation between the presupposition, as cause, and the consequence, as the effect, that is expressed in natural law, it is not produced such as the relation between preposition and consequence established in a legal or moral law, through a law set by men, but it is independent from all intervention of this specie. (KELSEN, 1998, p. 101, our underlined)

Once again what stands out is one of the fundamental epistemological guidelines of the Pure Theory, the dualism between the dimension of being (sein) and of having to be (sollen). The principle that governs the world of being is the principle of causality (kausalprinzip), so that everything that happens presupposes a cause. Conversely, in the world of duty be in force the principle of imputability (zurechnungsprinzip), by virtue of which a consequence due to the practice of a certain act (REALE, 2002). In nature things impose and present themselves as they are as a matter of natural necessity. Thus, it is necessary for the temperature to reach a certain degree for the water to turn to ice, regardless of human will. In the world of men, so conversely, things must be as defined by the competent authority.

3.1. The Interpreter's Role

Different from the legalistic legal positivism of the School of Exegesis, which admitted no interference that did not come from the action of the legislator, legal positivism Kelsen's normative approaches seems to be quite more lenient, at leaston this point, since that recognizes the possibility of different meanings for different concepts that builds the law. It is what Hart will later call the “open texture of the law”.

Through the method of interpretation and hermeneutics, Kelsen does not ignore the possibility of the judges, faced with the concrete case, decide in divergent ways and, even so,correct equality, as long as they are aware of the semantic limits of the norm. “The interpretation is a mental operation that accompanies the process of applying the Law in its progress from a higher to a lower echelon.” (KELSEN, 1998, p. 241).

This means that the interpreter's job is not completely free and open, as there is a frame that is delimited by the superior norm and that fixes the possible limits of the interpretation. There is a bound of action that can be greater or lesser, dependingon the particular case.

> In all these indeterminate cases, intentional or not, from an inferior echelon, there will be offered a variety of possibilities to legal applications. The legal act that gives effect or performs the norm can be conformed in order to correspond to one or another of the various verbal meanings of the same norm, in order to correspond to the will of the legislator – to be determined in whatever way it may be – or, alternatively, to theexpression chosen by him, in order to correspond to one or theother of the two norms that contradict each other or in order to decide how the two norms in contradictions cancel each other out. The right to apply form, in all these hypotheses, a framework within which there are various possibilities of application, therefore it is in accordance with the law any act that remains within this framework or frame, which fills that frame in any possible sense. The right to apply forms, in all these hypotheses, a frame within which there are several possibilities of application, so it is in accordance with the law any act that remains within this setting or frame, which fills this molding in any possible way. (KELSEN, 1998, p. 247)

From the interpreter is required impartiality, neutrality and objectivity at the time of choose among the possible alternatives applicable

to the case under study.In the interpretive process norms of other types are not admitted, such as religious and moral ones, although the choice of one normative sense over another always results from an option that deeply cames up to be ideological and political. Following Sgardi's conclusion (2007), every assertion of an interpretative meaning to the detriment of other possibilities derives from the ideological posture that the interpreter assumes in his political handling of the legal system.

The hermeneutics produced by the Judiciary, when applying the norm, is considered authentic, regardless of its accuracy, since he acts as the legitimate creator of the law. It is the law itself that grants judges the attribution of filling in the indeterminacies left by the legislator. Any other interpretation of the rule other than that of the competent authority is an interpretation not adopted, that is, doctrinal (MASCARO, 2013). This means that the interpretation carried out by the science of law is also not authentic.

4. Law is part of morals: ethical legal positivism

It is undeniable Kelsen's influence over the law contemporary way of thinking, more specifically on the ones that developed from the second decade of last century. The Austriacphilosopher represents the highest point of normative legal positivism, managing to consolidate a universal understanding method of the law and operate it technically. His work was so successful that it achieved global recognition, becoming a unanimityamong practical jurists.

Member of the Vienna School, and influenced by the novelties arising from philosophy analysis, Kelsen came to the conclusion that the error of the legal positivists of the past was to have unfoundedly reduced the right to the law, in addition, of course, to not having observed the distinction that must exist between gross law and the science of law. Kelsen sought to obtain the full understanding of the law, without having to resort to the statements of sociology, economy, history, politics or even psychology. The "Pure Theory" presents a plain view of law science, which is only accessible

by jurists point of view.

It is true that he self-critically revised his incipient theory and realized significant modifications throughout his three phases of intellectual production, in 1910, 1930s and 1960s. However, the fundamental point that still sustains the normativism of Pure Theory remains unchanged. Twentieth-century legal positivism, although indebted to Kelsen for a good part of his accomplishments, cannot in any way be reduced to him. Many other scholars, jurists and legal philosophers have followed this path, whether to agree, or to oppose him, which reveals that his theory was not able to close once and for all the discussions surrounding the concept of law.

4.1. New winds blows after Kelsen

Miguel Reale, developing a type of legal culturalism – or legal realism –, showed that the law is constituted by three phenomenal dimensions interdependent and, therefore, complementary: norm, fact and value. There is not any ontological precedence or hierarchical privilege among these three components. It is the sumof them that makes it possible to understand the legal experience in its entirety, evidencing the axiological-normative structure of law.

> Law is not just a rule, as Kelsen wants, Law is not just a fact, as the Marxists or legal economists, because law is not economics. Law is not economic production, but it involves economic production and interferes with it; the law is not primarily value, as the supporters of the Thomistic Natural Lawthink, for example, because the Law is at the same time a norm, a fact and it is a value. (REALE, 2003, p. 91)

The three-dimensional theory of law teaches that the norm is not only thought by the legislator, interpreted by the judge and observed by society. The norm is the result of a constant dialectical movement, which is at the same time legislative, but also historical-cultural. To deny this is to promote a one-sided view of the normative phenomenon, resulting in incalculable losses.

In addition to Reale, other legal thinkers, such as the German Jurgen Habermas and Robert Alexy, and the Americans John Rawls and Ronald Dworkin, insecond half of the 20th century and the beginning of the 21st, proclaimed even more incisively the epistemological and sociological damage that the reduction of the right to a system of rules could cause. "One lived right, for long, long years, under the dark room and dusty of legal positivism. Under the dictatorship of logical-subsumptive schemes of interpretation, of the almost absolute separation between law and morals. (SCHIER, 2007, p. 253). Although these are thinkers froma broader core of legal positivism, are often presented as post-positivists, in the sense that they have overcome the postulations of strict legal positivism of which Kelsen is the greatest exponent.

Traveling through paths that are often different, but in general rediscovering the ethical horizon as part of the legal phenomenon, they began to claim the reintroduction of morality in the constitution of law. This proposal does not represent a distance from the state order, which is why they continue to be, to some extent, "legal positivists", but seeks to establish a dialectical experience between law and society, having consensus, democratic and plural, as a founding element.

Ronald Dworkin (2010) even considers that law is a segment of morality, each with its specific substance. There is no separation between law and moral, there is an interconnection that should not be confused with attachment or with complementarity. Law is embedded in morality, in such a way that the existence of law is a moral justification for the coercion exercised by the State (GUEST, 2010).

Somehow, the fact is that Kelsen's ideas served to irrigate and stimulate a legal debate of the first magnitude, which can still be seen today among its several interlocutors of different legal shades. Despite this, by reducing the right to a purely normative system, ended up excluding the most interested party from the debate, which is society, denying it authority or

legitimacy to do so. Echoing the criticism of Arnaldo Vasconcelos (2003, p.208): “mainly because he discarded the logic material or dialectic, Kelsen falls into the trap of transforming his anti-ideological ideas into ideology." The winds that blow serve to indicate that the debate remains open and in solution search.

5. Conclusion

Contradictions are part of history and, inevitably, of the sciences. The human being is contradictory, and not necessarily bad. The law itself has been shrouded ina series of contradictions in the course of recent history. Not by different reasons, a series of legal philosophers and jurists sought to redefine the concept of law at that time. To say what is and what is not the law, delimiting in a precise way its field and object, has become an arduous task assumed by many contemporaries thinkers.The answer, however, remains far from a unanimous agreement.

Hans Kelsen has endeavored to give a definitive answer to this question. Your Pure Theory is the result of a truly ingenious process, an architecture exemplary juridical, but that lacks,perhaps, some sociological foundation. By condemning to exile other sources of law in favor of a single rigid and formal source, it precluded a natural connection between law and society, between law and culture (GROSSI, 2005). There can beno legal relationship without a social substratum. If it weren't like that, there wouldn't be resistances and new legal models would not be produced and tested from the second half of the 20th century.

Both for the theorist as for the operator of law, it is essential to answerleast to the question about the nature of law. Knowing what it is is a necessity that cannot be ignored by anyone. To the law naturalists , in that splendid moment oflegal pluralism, law is the fair norm. Separating law and justice would be simply impossible. To the eclectic legal positivists

of the Historical School, law is the effective norm. The only effective rule is the one which derives from the wishes of thepeople, being in harmony with the way of being of a particular group. It is effective because it is born of what is the most precious thing for a people: its identity. Radically speaking, for strict legal positivists, affiliated with the school of Kelsen, the law is nothing more than the valid norm.

Valid because those who produced it have the competence to do so. Valid because it is packed in a logical system of rules. Valid because of the fundamental norm like this expression[5].

Kelsen was victorious, at least for a time, as his theory dominated the legal world like no other. The resistance to it only revealed its traits a little later, in the Age of Rights, when principles began to be increasingly invoked by society. Neoconstitutionalists, post-positivists and moralists raised the banner of morality,and the debate between ethics and law was again re-established. Although it's hard to say precisely what law is for this multifaceted group, surely everyone agrees, whether to a greater or lesser degree, that law is inseparable from morality. The specificity of law lies in being a social phenomenon that emerges from the very human consciousness. Although it is licit to distinguish its limits in order to study it with more scientific rigor, one should not forget that, at the end of the day, law is a social fact and, as a social fact, it only makes sense if it has society as its horizon and limit.

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[5] According to Norberto Bobbio (2008, p. 39): “for a legal naturalistic, a norm is not valid if it is not fair; for the opposite theory (legal positivism), a norm is only fair as long as it is valid.”

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