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Philosophy and Philosophy of Law: Between the Limits and Possibilities of Justice

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Abstract

This article, in the form of a dissertation-argumentative text, aims to reflect on the concepts and scopes of philosophy and the philosophy of law in order to, having stripped away its objective of modifying empirical reality in order to achieve a better society, demonstrates how philosophy in law is relevant in dealing with one of the most intriguing themes involving the theory of law, namely judicial activism, and the possibilities and limits of justice. Inquiring into the organic division of state power, based on the assumption that justice is privately administered by the Judiciary, embodied in the person of the judge, it asks about the limits and possibilities of justice in contemporary society and to what degree it has the ability to modify or constitute reality and the law around it, especially in view of the provision implemented by art. 8 of the Code of Civil Procedure, which significantly innovates in relation to what is dictated by art. 5 of the Law of Introduction to the Norms of Brazilian Law.

Keywords

Philosophy, Philosophy of Law, Theories of Law, Interpretation, Judicial Activism

1. Introduction

"There is no Philosophical error is so enormous as to only count philosophers as philosophers, when all men of a certain greatness have necessarily formed their own philosophy." (Valéry, 2007: p. 147)

Excerpt from the work Cuadernos, written by Paul Valéry, although it is counterproductive to begin a scientific article with a direct quote, within the philosophical environment in which this manuscript is found, the infringement of this technical standard is considered admissible, given that the quote introduced above is of significant relevance for understanding the research problem.

Even though it is a priori intended to reach a particular audience, this manuscript tends to become universal in order to spread to law graduates the importance of becoming jurists.

Touched by the warning formulated by Goffredo da Silva Telles Junior in the chapter entitled Two Words, where he asserts that the "Philosopher of Law is the scientist who does not restrict himself to the explanation of the legal order and is committed to the mission of understanding it", upon realizing that, today, Brazilian legal education institutions are based almost exclusively on a manual culture, making it clear that legal experience is acquired and transmitted in a hermetic and atomic way, with law being one of the most relevant applied social sciences for ordering human relationships, it is up to philosophy, precisely the philosophy of law, to rescue the debate on the objects of culture, so that professionals in the legal field acquire knowledge of the universal whole.

By engaging in this task, in addition to allowing the law graduate to become a sage, the philosophy of law resumes the position that has always belonged to it, that is, the science of first causes, because, by placing the jurist in the position of the subject of knowledge, it enables them to understand, through in-depth reflection, the ethical world that permeates the legal system.

Capable of helping to dissolve some solids that still subsist as a historical reminiscence in contemporary society, characterized by liquid modernity, philosophy allows that, when metamorphosing into a jurist, the law graduate embarks on the zetein, abnegating established or pre-defined truths.

2. Concept of Philosophy

Having introduced the topic, the object of knowledge must now be conceptualized. Taking into account that the philosophy of law is a discipline that branches off from philosophy itself in general, in order to achieve universal knowledge, it is necessary to define what philosophy is.

Nicola Abbagnano, in his Dictionary of Philosophy, citing the idea contained in Plato's Euthydemus, defines philosophy as "the use of knowledge for the benefit of man" (Abbagnano, 2022: p. 514).

It is clear from this concept that philosophy, in addition to trying to modify reality, contains two central aims: to acquire the most valid and universal knowledge possible and to ensure that this knowledge is used for the benefit of man. Although this definition does not constitute an apodictic proposition, among the variants that philosophy can assume, it shares the orientation that the notion presented by Abbagnano (2022) illustrates the object of scientific knowledge, which, paraphrasing René Descartes (1979), means the study of wisdom.

Reduced to the formula cogito, ergo sum, according to the guiding idea of Descartes (1979), which can be found in his third maxim, the reconstruction of philosophy was linked to the subjective dimension since the act of philosophizing belonged to the person of the philosopher.

A completely new philosophy was inaugurated, where the ego established a sol-

ipsistic philosophy, demonstrating how intricate and important criticism is for philosophy. It did not take long for the idea reformulated by Descartes (1979) to be objected to, as is the case of Edmund Husserl (2019), who, in his work Cartesian Meditations, points out the subversion of Descartes and the predominant idea of an absolute foundation of science.

Criticized the ideal of science, which for Descartes (1979) would be situated in geometry, Husserl (2019), despite not abandoning the universal objective of the absolute foundation of science, advocates that the universal idea be extracted from the factually given sciences and no longer from the axiom of the absolute self-certainty of the ego.

According to Husserl (2019), philosophy is subject to heuristics. Therefore, it must focus on the field of transcendental knowledge. Thus, philosophy assumes, in contemporary times, the concept of contemplation, originating from phenomenology, and the definitions above delimit the conception of general philosophy as a concept of scientific method, which does not admit definitive solutions, but rather a constant deepening of human knowledge.

3. Concept of Philosophy of Law

Based on the considerations presented in the previous section, it becomes clear how complex the task of defining philosophy is, which can be verified based on numerous aspects, ranging from the search for universal knowledge to the critique of life.

Enabling questioning, dissolving solids, re-discussing premises and principles considered absolute, acting like Mozart's allegory of the magic flute, which leads men from darkness to light, instead of deciding, acting, and accepting, philosophy investigates, speculates, and questions.

Of great help in the development of argumentation applied to law, philosophy embodies a deep meditation on the legal phenomenon as it investigates its nature, its foundation, and its purpose. Therefore, according to Lenio Luiz Streck, since Law is not a mere instrumental rationality, "philosophy in law is not just thinking about bringing the analytics of language to this field or that the great problems of law are in the mere interpretation of legal texts" (Streck, 2013: p. 404).

Based on methodological pluralism, the philosophy of law, according to Hegel (2022), constitutes an important advance since not being limited to the legal text to the normative plane, it integrates and incorporates concepts of economics, politics, and history into law. All this, making it flanked by the great themes that drive general philosophy, the philosophy of law breaks the civil society of the State and, as Oliveiros Litrento points out (Litrento 1976), in a philosophical mediation, compares and weighs the criteria of good and evil, right and wrong, just and unjust, etc.

Dealing with three fundamental questions (What is law? How can law be known? What should law be like?) and placing its scope of concern, in the methodological field, on the formal validity of norms, on the effectiveness of norms, and on the justice of the norm, from the notions presented so far it can be inferred that the

philosophy of law is of great importance to the jurist, and, in summary, Eduardo Carlos Bianca Bittar and Guilherme Assis de Almeida present the following tasks of the philosophy of law:

1) to criticize the practices, attitudes, and activities of legal professionals;
2) question and evaluate the creation of laws, as well as offer reflective support to the legislator;
3) carry out an assessment of the role played by legal science and the jurist's own behavior towards it;
4) investigate the reasons that lead to the destructuring, weakening, or ruin of a given legal system;
5) untangle and clean up legal language, philosophical and scientific concepts of law;
6) investigate the efficiency of legal institutions, their social performance, and their commitment to social issues, whether concerning individuals, groups, collective or universal human concerns;
7) clarify and define the teleology of law, its value-based aspect, and its connection with society and cultural desires;
8) rescue the origins and values on which legal processes and institutes are based;
9) assist the judge in the decision-making process through institutional, evaluative, political, and procedural conceptual criticism (Bittar & Almeida, 2001: pp. 44-45).

The philosophy of law, in a warm manner, not only assumes those tasks, but also a critical bias towards the legal phenomenon and reasoning, seeking the foundations of law, all this in favor of its scientificity and its aspiration to realize freedom and justice.

4. The Axiom of the Tripartition of Powers and the Separation of Legislating and Judging Functions

In the preceding sections, the terms philosophy and philosophy of law were conceptualized, and their main scopes presented.

Given that the philosophy of law deals, among many other tasks, with criticizing the process of formation and application of law, narrowing down the research problem, and bringing to light the connecting element, it can be stated that one of the most current issues that the philosophy of law focuses on is legal realism and positivism.

Integral parts of legal theory, realism, and positivism, as schools of legal thought, present the modes of constitution, application, and main sources of law.

Represented by legal realism, the studies of Holmes Jr. (1991), with legal positivism having Comte (2020), Bentham (2018), Austin (1998), Hart (2009), and Kelsen (2021) as its main exponents, in order to understand the gap between the limit and the possibility of justice, one must first contemplate the ideological bases

from which these currents emanated in order to then carry out the legal-philosophical analysis.

Gaining greater importance when studying the realist and positivist currents under the influence of the philosophy of praxis, one can situate as the closest historical antecedent to the discussion involving the creative, or legislative, capacity of the judge the doctrine presented by Charles-Louis de Secondat, Baron de La Brède and de Montesquieu (2000) who, in the book The Spirit of the Laws, advocated the theory of the tripartite division of powers of the State.

Considering that state power is unique and indivisible, in order to establish a government that has virtue as its principle of action, Montesquieu (2000) considered it appropriate to establish a division, a specialization of competencies between the three different and integral bodies of the State.

Relegating to the Executive Branch the power to administer, to the Legislative Branch, which would be the true representative of the people, the power to legislate and to the Judiciary Branch the power to judge, warning about the consequences that could arise from the concentration, in the person of the judge, of the powers to legislate , administer and judge, Montesquieu said that:

> Nor is there freedom if the power to judge is not separated from the legislative and executive powers. If it were united with the legislative power, the power over the life and liberty of citizens would be arbitrary, since the judge would be a legislator. If it were united with the executive power, the judge could have the strength of an oppressor (Montesquieu, 2000: p. 168).

Stating that the judge could not be united with either of the other two components of the State, this is because "the power to judge, so terrible among men, as it is not linked to a certain state, nor to a certain profession, becomes, so to speak, invisible and null" (Montesquieu, 2000: p. 169), despite differentiating the courts from the trials, since the first (courts) should not be permanent, but the second should be, since they constitute the precise text of the law, surrounding itself with a series of cautions regarding the judiciary, from Montesquieu's work it is inferred, as Pedro Bacelar de Vasconselos points out, that "the Judiciary Power must be null and invisible, which leads us to the denial of the tripartite division of powers" (Vasconcelos, 1998: p. 31).

Once that invisibility is admitted by Montesquieu himself, when he asserts, in fact, that "of the three powers we have spoken of, that of judging is, in some way, null. Only two remain; and, as they need a regulatory power to moderate them, the part of the legislative body that is composed of nobles is very suitable to produce this effect" (Montesquieu, 2000: p. 172), denying any possibility of interference by the judge in the process of formulating the law, maintaining the idea that the magistrate should constitute the simple mouthpiece of the law, Montesquieu's doctrine replicates the axiom that dates back to the French Revolution which, doubting the judges of the old regime, extols the principle of the supremacy of Parliament.

Understood, in a distorted Rousseauian vision, as the representative of the general will, Parliament would be the only supreme power.

Leaving this idea implicit, Montesquieu (2000), in his work *The Spirit of Laws*, correlates Parliament with the general will, reaching its peak in the Constitution of the Third French Republic and consisting, in a certain way, in the solemn affirmation that opens art. 6 of the Declaration of 1789, the supremacy of Parliament, as a symbol of law, it is an expression of public opinion, in the context of the doctrine of the tripartite division of powers, implied certain omnipotence of the Legislative, especially when, in addition to being the depository of the aforementioned general will, it also held the constituent power, thus placing itself as sovereign.

This idea, which was extensively developed by Malberg (2001) in his work *Teoría general del Estado*, the law, as an expression of the general will, referred directly to Parliament since, in the words of Manoel Gonçalves Ferreira Filho, it is this that fulfills the main "objective of social life, which is to 'enjoy one's own goods in peace and security', which can only be achieved through laws" (Ferreira Filho, 2012: p. 64).

Assigned to Parliament, as a representative of the Legislative Power, the primary function of legislating, with positivists having as their object of study positive law, that is, the law in force, which emanates from a legislative state authority and, therefore, has validity, there being a convergence between law and the legal system, understood as a set of norms issued by the legislator, for positivism, also understood as legal rationalism, the creative freedom of the judge is removed, who, through the sentence, will apply the current state law, producing only the individual norm, also known as the decision norm.

Understanding legal positivism, in the view of Broekman (1985), that law emerges from legislative authority, unlike what occurs in realism. For positivists, the recognition of the validity of law is not in the contingency of its compatibility with the criteria of justice and correctness, it is enough that it satisfies the question of belonging.

Since those premises are very clear in the studies developed by Jeremy Bentham (2018), a profound critic of English law, which is based on common law, later followed by Austin (1998), the validity criteria are established in a higher-ranking norm, which can be understood, in the Kelsenian conception, as a fundamental hypothetical norm, once the material and formal compatibility with this norm is verified, the legal system will be considered valid.

Therefore, rejecting positivism and legal moralism is a very important point in differentiating between positivism and legal realism since, in addition to the latter granting the judge broad creative freedom, it also allows him to stop applying positive law when it conflicts with the ideal of justice. The following excerpt from Austin's texts illustrates this distinction well:

> The existence of law is one thing; its merit or demerit is another. Whether it is or is not is one question; whether it is inconsistent with an assumed stand-

> ard is a different inquiry. A law that really exists is a law, even if we do not like it... (Austin, 1998: p. 157)

As Oliver Wendell Holmes Jr. explains:

> The life of law has not been logical: it has been experience. The needs felt in all ages, the prevailing moral and political theories, the intuitions of public policy, whether clear or unconscious and even the prejudices with which judges judge, are of far greater importance than syllogisms in determining the rules by which men should be governed. Law embodies the history of the development of a nation through the centuries and cannot be treated as if it comprised only axioms and corollaries from mathematics books. In order to know what law is, one must know what it has been and what the tendency is for it to change. One must consult both history and existing legal theories (Holmes Jr., 1991: p. 1).

In short, the idea of legal realism, in the following sentence by Holmes Jr., "general propositions do not decide specific cases" (Holmes Jr., 1992: p. 3), with the great political and economic transformations that drove the formation of postmodern society, a liquid, heterogeneous and plural society, saw the emergence of the Judiciary Power, which, increasingly in demand, has been called upon day after day to resolve not only conflicts of interest between individuals, but also to mediate the satisfaction of programmatic rights that were introduced by the Constitutions after the disappearance of the Weimar Republic and the emergence of the Welfare State.

Bringing to light the limit and possibility of justice within the science of law, which, for Holmes, must be analyzed from the perspective of the bad man, in order to conclude this manuscript, one cannot leave aside the approach of the great economic transformation of this century, the crisis of Parliament and judicial activism.

5. The Great Political and Economic Transformation, the Parliament Crisis and Judicial Activism

Karl Polanyi, in his book The Great Transformation, points out the rise and fall of the market economy as one of the main factors for the political and economic transformation of these times, because, although he states that "17th-century society unconsciously resisted all attempts to transform it into a simple appendage of the market" (Polanyi, 2021: p. 221), he argues that the modern State, by monopolizing power and imposing fiscal discipline, modified the social organization that, with the advent of market forces and the emergence of the national State, caused the community world to collapse.

Causing a serious social problem, it is arguing that the State itself, dependent on national production, joined the dominant economic classes in helping to effectively discard those who are not interested in a society focused on productivity, with the implementation of the agendas that were demanded in the social revolutions, mainly after the Second World War, an immense demand was installed from the most vulnerable layers of society around the State which, after the Wei-

mar Republic, began to be constituted as a Welfare State.

Charged with acting actively in the protection of the life, health, and social well-being of its citizens, according to Georg Jellinek, if the constant and profound social transformations have demonstrated the "inability of Parliaments to fulfill their tasks," this is because "parliamentary legislation is bad: partisan and deficient, incoherent, it deteriorates the good legislative ideas due to bags of formulations and notes inadequate" (Jellinek, 1991: p. 76), with the establishment of the crisis in Parliament and the inherent difficulties of the Executive Branch in resolving issues relating to the extensive catalogue of social rights, with no power vacuum, judicial activism is seen to increase.

Originated from the term coined by Arthur Schlesinger Jr. (1947) in an article entitled The Supreme Court: 1947, published in Fortune Magazine, vol. XXXV, no. 1, in January 1947, judicial activism, converging with the idea that permeates legal realism, concerns the limits of the Judiciary's actions and, consequently, of justice.

Marbury v. Madison can be cited as its historical antecedent. Although in the United States of America, judicial activism is marked by a political-ideological dispute between Republicans and liberals for control of the Supreme Court, for the purposes of this article, in Brazil, activism is beginning to take shape and form in the field of the judicialization of public policies, since, given the extensive list of fundamental rights of a second dimension provided for by the Constitution of the Federative Republic of Brazil of October 5, 1988, with the malfunctioning of the Public Power which, failing to comply with the powers granted to it by the constituent within the institutional arrangement, drives the Judiciary to absorb and attempt to satisfy the social demands held by the dominated class, known as the "minority".

As a result of the lack of interest of the dominant political class in implementing the social program inaugurated by the 1988 Constitution, judicial activism, as a face of realism, sparks discussion about the limits and possibilities of justice, especially when representing a more intense participation of the Judiciary in the implementation of constitutional values, to the point of investing the judge as a researcher of constitutional sentiment, it increases the interference of judges in the actions of the other constituted powers of the State.

The critical point is that in activism, the judge replaces the legislator and the administrator in the public debate, thus increasing the burden of discretion. If, in the early days of the political theory of the tripartite division of powers, the Judiciary would have been practically null, it is necessary to investigate whether judicial activism is justified in light of the philosophical analysis of the law as it stands and what are, in current terms, the limits and possibilities of justice.

6. The General Theory of Law, the Secular Vocation for Legislation and Pachukanis' Criticism of Kelsen: The Limit and Possibility of Justice

Savigny (2008) dictated, in *De la Vocación de Nuestro Siglo para la Legislación y*

para la Ciencia del Derecho, this century's vocation for legislation.

Having demarcated his positivist bias, especially since he was one of the exponents of the historical school, it is clear that the criterion for resolving the research problem that drives this manuscript, consisting of the limit and possibility of justice, will depend on the school of thought that the jurist will adhere to, since, if he affirms the thesis of legal realism, he will consider it possible for the judge to advance in competences that until then would be reserved to the legislator, precisely to implement the programs introduced by the Constitution of the Republic or to obtain distributive justice or the realization of material equality, since the Law would be constituted by the jurisdictional pronouncement. If one follows the positivist current and claims to be the bastion of legal rationalism, the conclusion will be diametrically opposite because adhering to the ideas of Bentham (2018), Austin (1998), Hart (2009), and Kelsen (2021), giving prominence to the thought of the latter, it will affirm that the norms emanating from the Judiciary will always be secondary, as they depend on the legal force granted by the State. Likewise, refusing, as in Kelsen (2021), that the legal norm receives interference from other areas of knowledge, such as morality, considering it unfeasible to correct the justice of the norm through interpretation, which does not constitute a criterion for the validity of Law, it will position itself contrary to judicial activism, concluding that the limit and the possibility of justice is what is expressed in the law.

Having thus summarized the issue, if the legal-philosophical analysis cannot be limited exclusively to the criterion of adherence, or not, to one or another school of thought, it is necessary to justify whether, in light of the reinterpretation of the current legal system, driven by the advent of the 2015 Code of Civil Procedure, there would be a philosophical basis to admit the possibility of the judge, who is not the only actor who must implement justice—a primacy that also falls to the administrator and the legislator—to correct the legislated law to make it more fair, egalitarian, accessible and fraternal and to what extent this construction would be permitted.

Although it cannot be denied that Kelsen (2021) placed the person applying the standard in a hierarchically inferior field to the supreme authority that draws up the standard, as Pachukanis warns:

> A general theory of law that does not claim to make anything explicit, that, from the outset, rejects factual reality, that is social life, and deals with norms, not being interested in their origin (a meta-legal question!) nor in the connection they establish with certain materials of interest, can evidently only claim the title of theory in the same sense used, for example, to refer to the theory of the game of chess (Pachukanis, 2023: p. 71).

Referring, Pachukanis (2023), to the caricatured appeal represented by Stuttgart, a staunch opponent of Kelsen, and criticizing the pure view defended by him, despite the fact that Brazilian law is based on a Roman-Germanic basis, thus being situated in the civil law family, despite continuing to restrict the judge's ability to

decide based on equity, which would be typical of realism and the English-based system of common law, with the advent of Law No. 13,105, of March 16, 2015—Code of Civil Procedure, it is considered that the judge is authorized, by legislative delegation and, therefore, enabled to improve the legal norm, correcting any injustices that arise from its empirical application, since, as stated in art. 8th of the aforementioned legal diploma, "when applying the legal system, the judge will meet the social purposes and the demands of the common good, protecting and promoting the dignity of the human person and observing proportionality, reasonableness, legality, publicity and efficiency".

Granting the judge a more accentuated activity than that contained in art. 5 of Decree-Law No. 4657 of September 4, 1942—Law of Introduction to the Rules of Brazilian Law—which is affiliated with the historical-evolutionary school of Raymond, located at the epicenter of the Brazilian legal system, the 2015 Code of Civil Procedure allows the judge, when applying the rule, to have a greater margin of discretion and ductility, and the limit of their action will be, based on the jurisprudence of interests, all the interests that the legislator has considered worthy of protection and hierarchy to be protected. By stating that in the application of the legal system, the judge will meet the social purposes, the demands of the common good, the protection, and promotion of human dignity, proportionality, reasonableness, publicity and efficiency, and art. 8th of the Code of Civil Procedure goes beyond granting the judge the role of updating the law, imposing that it be applied, based on the law of evolution, since by granting ductility to the Law, in the constitutional State inaugurated in 1988, as emphasized by Zagrebelsky (1997), it places the judge in the position of guardian of the structural complexity of the Law, ensuring that there is harmonious coexistence between the law, the law and justice.

With this, that is, with the ductility that can be extracted from art. 8 of the Code of Civil Procedure, the basis in legal positivism is maintained, which is the essence of the Brazilian legal system, which was built on the primacy of the law, but, adapting the system to reality, allows, through the interpretative route, its correction notably through the route of principles, given that such authorization was granted by the legislator himself in legitimate legislative delegation.

Even though judgment based exclusively on equity continues to be prohibited and the principle of non liquet subsists, according to which the judge is not exempt from judging by alleging a gap or obscurity in the legal system, thus enhancing the subsumptive activity of the judge, with the emergence of social pluralism and heterogeneity, the judge can no longer be considered a blind, incautious and deaf-mute servant, an automaton in the application of the law, because, as Zagrebelsky points out, based on the case, that is, based on the process in which the individual legal norm endowed with equal effectiveness to the law between the parties in relation to whom it is given will be expressed, the judge must establish the topoi appropriate to the resolution of the dispute.

The legislator recognizes its importance in regulating all social demands and complementing the provision contained in art. 140 of the Code of Civil Proceduregrants

the judge the ability to decide based on social purposes and the demands of the common good, promoting and protecting one of the fundamental principles of the Federative Republic of Brazil, namely, the postulate of human dignity.

The wording of Article 8 of the Code of Civil Procedure gives flexibility to the Law, transferring to it the plurality, complexity, and heterogeneity that permeate the social fabric.

In line with the constitutional state experienced by Brazil, the scope of art. 8 of the Code of Civil Procedure may not bury, but rather enhance the limits and mechanisms of control of voluntarism and judicial subjectivism. However, without the intention of burying the debate, for the purposes of this article, it is understood that despite proclaiming ductility, art. 8 of the Code of Civil Procedure itself stated that the judge must observe, among others, the principle of legality. In other words, although in applying the legal system, the judge must attend to the common good and the social function, he is not completely free from legal constraints and may adapt, but never replace, the interests and values imprinted by the legislator in the legal text.

Conciliatory solution, art. 8 of the CPC delimits the possibilities and limits of justice, introducing concepts originating from the theory of ductile law, by Zagrebelsky (1997) and from the jurisprudence of interests, serving as a legislative delegation so that the judge can act as if he were a legislator, always respecting the limits imposed by this delegation.

7. Conclusion

In view of the explanations above, it is assertively concluded that the possibility of justice is all that is necessary to meet social purposes and the demands of the common good, safeguarding and promoting the dignity of the human person and observing proportionality, reasonableness, legality, publicity and efficiency, and that the limit of justice is the interest considered worthy of being protected by the legislator, an interest that must be understood and respected by the judge. In other words, with the changes experienced by the Brazilian legal experience, with the law having become ductile, the judge can act not only as an updater of the law, but also as the guardian responsible for maintaining the structural complexity of the law, which is constituted not only of rules and principles, but is also externalized in the fact-norm-value triad.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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