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Post Legal Positivism: New Paradigm of Legal Science (Jurisprudence) and Practice in Brazil

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Post Legal Positivism: New Paradigm of Legal Science (Jurisprudence) and Practice in Brazil

Abstract: The relation between law, moral, society and science is shifting in Brazil as it is changing in democratic contemporary societies. This paper proposes to reflect about this change in the Brazilian legal and social context. Jurisprudence and legal practice have been transformed intensively after the Brazilian redemocratization that began in 1985 and Federal Constitution of 1988. In the field of Jurisprudence (Legal Theory), a new legal theory called post-positivism progressively has been overcoming legal critical studies and legal positivism. In recent years, ideas as any moral values can be improved by law (positivism) or law is one of many oppressive institutions in capitalist society (legal critical studies – Marxism) have been losing place in legal theory. Nowadays, when Brazilian Constitution implements just society and legal system, different from the authoritarian military regime (1964 – 1985), it is difficult to work with a complete relativistic idea of law (positivism) or difficult to accept that law is necessarily oppressive in capitalistic societies. Otherwise the idea of science in law at post-positivistic point of view try to overcome in a dialectic way a pure science methodology (normativistic positivism) and the complete political and economic studies of law (critical legal studies – Marxism). After that, the text will show that Brazilian legal practice have changed intensively after post positivistic methodology of law and will reflect about same dilemmas of post-positivism in Brazil in the legal theory and practice.
Keywords: Brazil, Legal Positivism, Critical Legal Studies and Legal Post-Positivism

I. Positivistic Model of Social Science and of Law

The idea of a social positivistic science has some axioms, such as: i) it is possible and it is necessary a precise method as in nature sciences (science method), ii) scientists should be neutral axiologicaly, in others words, theirs values should not *contaminate* the objective knowledge of social reality, iii) it is not possible to change social laws of society that are necessary as laws of nature (gravity law) – an example of social law is the natural concentration of rent in the industrials (Augusto Comte).[3]

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[3] These ideas are presented in M. Löwy, Ideologias e ciência social, 2008, p. 37-74.

Positivistic ideals were first revolutionary and after conservative. Condorcet defended the creation of a social mathematic that would be precise and could comprehend the society without any short of prejudice and negative discrimination. His ideals were important in the context of France Revolution and supported the revolutionary values (M. Löwy, Ideologias e ciência social, 2008, p. 39-41).

Saint-Simon, on the other hand, an utopian socialist, explains that in society there are social parasite classes that take the wealth produced for other social classes. For a scientific vision of society, it is needed a social biology. Simon's thoughts are an important scientific argument for the workers fighters (M. Löwy, Ideologias e ciência social, 2008, p. 41-42).

After these revolutionary social science positivistic, it appeared the conservative positivism with the concepts and analyses of Augusto Comte and Emile Durkheim. This author defended that the organization of society is something independent of human willing. So the idea of social revolution is impossible (M. Löwy, Ideologias e ciência social, 2008, p. 41-42).

These positivistic social ideas were very influent in Brazilian legal thinkers as Tobias Barreto, Sílvio Barreto, Clóvis Benvilácqua, Pedro Lessa, Djair Menezes e Pontes de Miranda (Clèmerson Merlin Clève, O direito e os direitos, 1988, p. 37).

The positivistic legal philosophy was also important in Brazil. The influence of exegetic positivism, because of the importance of France for Brazilian professors and intelligentsia. However, pure theory of law had a huge impact.

Hans Kelsen (Teoria pura, 2006, p. XI-XV) tried to implement in jurisprudence a pure scientific method. Pure legal science prescribes that i) legal scientist should not impose his values in the study of a specific legal system and ii) jurisprudence has a specific science object: law.

At Kelsen's theory of law (Teoria pura, 2006), any value could be incorporated by legal texts. In that way, justice could be defended or not by the legal system. Pure legal theory promoted important themes and reflections about legal system as i) coherence and unity of legal system that is promoted by a "grundnorm", ii) explanation of hierarchy of laws, iii) resolution of conflicts of laws, iv) limits of interpretation of legal system, v) structure of legal norm, vi) relation of national legal system and international system and other subjects.

The works of Norberto Bobbio (Positivismo jurídico, 2006), a sophisticated positivistic legal philosopher, were intensively studied in Brazil. Herbert L. A. Hart (O Conceito de direito, 2007) and its sociologically legal theory of law and its contributions of open context of language, however, were only deeply studied in Brazil at the end of the XX century.

II. Critical Legal Studies

From 1964 until 1985, Brazil was governed by military autocratic regime. The violations of human rights were intense (murders of political dissents, arbitrary prisons, torture, censorship, cassations of politics that were against the regime and others). At that social context, in 70's and 80's, critical legal studies in Brazil took place.

It is very difficult to define the movement of critical legal studies in Brazil.[4] Many were the influences in the field of social science and philosophy. Without any doubts, Marxism vision influenced intensively part of the movement.

In Marxism critical legal studies, Roberto Lyra Filho (O que é o direito?, 2007) produced an important study "O que é o Direito?" (What is Law?). Lyra Filho defended the idea that positivism and jusnaturalism were ideologies.

Ideologies, in his definition, are wrongs beliefs produced by social institutions with the function of sustain the injust society. Family, State, Religion and Companies (Social Institutions) created wrong beliefs that maintained an unjust economic model (Roberto Lyra Filho, O que é o direito?, 2007, p.13-24).

For example, V and IV b.C, at Athens, slavery was an established social relation that was the principal way of produce. This absurd oppression was developed when Aristotle created his Theory of Justice. Natural law that represent the cosmological ideas of equilibrium and order was valid only for citizens (male, rich and free man).

Any kind of legal positivism is also an ideology (Roberto Lyra Filho, O que é o direito?, 2007, p. 30-34). Exegetic movement defended that law should be strictly observed by judges and legal thinkers when teach law, but universal suffrage was not a reality in XIX and in many states at the beginning of the XX century.

Marxism critical legal studies do not believe in state or legal reforms, because they give some benefits and rights, but the changes maintain, in general, social oppression (Roberto Lyra Filho, O que é o direito?, 2007, p. 70-72). So people should change the social structure for legal system become just and fair.

This vision has positive and negative consequences. At a positive point of view, Marxism legal studies showed that interdisciplinary approach of law is fundamental to comprehend law and its relation between politic, economy and social relations. On the other hand, this legal think promoted some problems.

Lyra Filho showed as political, economic and social relations are important for legal studies, but his theory reflect little about essential internal themes as relations between legal

[4] Antonio Carlos Wolkmer (Introdução ao pensamento jurídico critico, 2008, p. 86-159) showed the trajectory of critical legal studies in Brazil.

norms, coherence and unity of legal system, interpretation of legal system, relation between state powers and others.

Besides Marxism legal theory, there were important members of Brazilian critical legal studies that reflected about specific themes of legal theory. For example, Luis Alberto Warat (Introdução geral ao direito, 1994), argentinean philosopher that had lived in Brazil for many years, developed relevant studies about legal interpretation.

Plauto Faraco de Azevedo in his works explored the relation between legal system and social justice and a theory of legal interpretation.[5] Faraco showed as military regime of law was a regime against law.

At the beginning of the 90's, the consequences of redemocratization of Brazil and promulgation of 1988 Brazilian Constitution changed many social, legal and politic relations and, of course, help to change the legal paradigm thought.

III. 1988's Democratic Federal Constitution

First of all, it is necessary to present some important characteristics of 1988's Brazilian Constitution. The fundamental law is pluralistic and this can be showed by its first article which prescribes sovereignty, citizenship, human dignity, social value of work, free enterprise and political pluralism as fundaments of the Brazilian Republic (art. 1º, Federal Brazilian Constitution – CF).

Brazilian State has separation of powers (functions), which are independent and harmonic: Executive, Legislative and Judiciary (art. 2º, CF). Brazilian Republic's goals are to achieve social justice as building a free, just and solidarity society, affording national development, eradicating poverty, reducing regional inequality and promoting the good for all without prejudice of any kind (art. 3º, CF).

Brazilian Constitution prescribes the competence of powers and presents the fundamental rights at article 5º until 16. For example, article 5º has 78 items and recognizes important rights, such as freedom of religion, freedom of press, privacy, freedom of work, freedom of association, protection of private propriety if it respects its social function, right of petition, legality principle, constitutional guarantees, impossibility of death penalty (which it is possible only at war times) and many others rights. Also, social fundamental rights are

[5] Plauto Faraco de Azevedo (Aplicação do direito e context social, 1996) presented important reflections as i) ideology and jurisprudence, ii) jurisprudence and social context, iii) law interpretation and iv) creative power of judges. There is no doubt that Azevedo is a member of critical legal studies, but many of his ideas were the germ for post-positivism jurisprudence in Brazil.

prescribed as rights of education, wealth, work, housing, social security and others (art. 6º, CF).

There is an important part of Constitution devoted to Financial and Economic Order that establishes principles as social function of private propriety, consumer defense, full employment, environment defense, free enterprise and others (art. 170, CF). Brazilian Constitution is an analytic constitution so it has detailed regulation of many social relations as urban politic, family, culture, education, social security, science and technology, social communication and many others themes.

Finally, the last words of Brazilian Constitution are about the judicial review. Since 1891 Brazilian Constitution allows judiciary control of the constitutionality of laws in concrete cases. Since 1965 it is possible the concentrate or abstract control of constitutionally (16th ammendment at 1946 Federal Brazilian Constitution). By that time, Republic's General Persecutor, who was chief of the Brazilian Parquet and, also, the main attorney of Federal Executive Power, could present Representation against unconstitutionality at Supreme Tribunal of Brazil (STF). STF, without analyzing any specific concrete case, could declare the unconstitutionality of any federal or member state law.

In 1988, Brazilian Constitution's concrete control of constitutionality was maintained and abstract control was enlarged. For instance, after some constitutional amendments, there are many active legitimates to propose Direct Action against Unconstitutionality, Direct Action against Unconstitutionality by Omission, Declaration Action of Constitutionality and Complain of Breach of Fundamental Precepts as President of Republic, Directive Board of Federal Senate, Directive Board of Chamber of Federal Deputies, Governor of State-member, Federal Counsel of Bar Association, General Persecutor of Republic and others.[6]

IV. Post-Positivism – Part I

The principal critique of Marxism critical legal studies is that law present, as a rule, an oppressive action of elite against major part of population. This idea cannot be supported when a country has a constitution as the Brazilian.

As showed, Brazilian Constitution is committed with the construction of a social just society. Many rights that were demanded for social rights as housing and social function of private propriety are prescribed in Brazilian fundamental law. In this social and legal context, it is hard to say that legal system, in general, is oppressive and unjust.

[6] See for Direct Action against Unconstitutionality of federal or state law or normative regulation and Declaration Action of Constitutionality of federal law or normative regulation, art. 103, CF. About Judicial Review in Brazil, see H. Meirelles; A. Wald; G. Mendes, Mandado de segurança e ações constitucionais, 2010.

So, like Brazilian's legal system, gradually jurisprudence has been changing also. Luís Roberto Barroso (Interpretação e aplicação da constituição,1996) and Paulo Ricardo Schier (Filtragem constitucional,1999) at the 90's presented important reflections about legal paradigm of science.

Schier showed that critical legal studies, special at the Marxism version, is inadequate for Brazil after 1988's Constitution. The main argument is that when legal system has a progressive political orientation it is absolute wrong to say that legal system presents interests of elite social class.

Also, in a democratic and social constitution it is important that all jurists are engaged in concretization and effectiveness of Constitution. In a time like this, the legal technique should be intensively studied to develop juridical solution to concretize of constitution's values and norms.

Barroso (Interpretação e aplicação da constituição, 1996, p.245-261) presented in an important book "Interpretação e Aplicação da Constituição" (Interpretation and Application of Constitution) an analyses about legal positivism and critical legal studies. Both theories have positive and negative aspects.[7]

Positivism has two major problems. One is the axiologic relativism. It is not possible to say that any value can be supported by law. It is true that the discussion about values is difficult and many values (just and unjust) were incorporated by law in a historic view. On the other hand, the legislation and laws should be related with the idea of justice.

Other problem is the concept of science of legal positivism, in special Kelsen's perspective of jurisprudence. It is wrong that values should not interfere in the analyses of legal system. The progressive values should guide the jurisprudence.

Also it is wrong the idea that legal scientist only must study legal system and do not make reflections about sociology, general philosophy, economy, political science and others sciences and knowledges. An interdisciplinary view of society and law is essential for an adequate construction of legal science.

Besides, positive consequences of critical legal studies are i) the demonstration that law should be analyzed in an interdisciplinary perspective, ii) that legal norms can be used to oppress the majority of population and iii) some values and progressive social relations should guide the construction of jurisprudence and legal system.

Marxism critical legal studies and others perspectives of critical legal studies with important reflections in others fields of knowledge made fundamental contributions and some

[7] This vision about positive and negative consequences is composed by arguments of Schier (Filtragem constitucional, 1999), Barroso (Interpretação e aplicação da constituição,1996) and from the author of this paper.

themes of jurisprudence. Specially in Brazil, where there were many times when law was used to oppress. Finally, the idea of social justice is another important contribution of Marxism.

The main negative points are the relation between law and oppression and little studies about specific themes of jurisprudence.[8] About this problem, fundamental reflections as conflicts of legal norms, relations with state powers, specific studies of juridical disciplines did not have the attention they deserve.

Post-positivism vision of law, as Barroso defended in that first moment of post-positivism, is a dialectic synthesis because it studies specific themes of jurisprudence, influenced by legal positivism, and it has an juridical method that recognizes the importance of interdisciplinary and relevance of developing social justice and a democratic society, influenced by its critical legal studies.

By that time, Dorwkin's[9] and Alexy's[10] ideas became more relevant at legal studies in Brazil, especially, the Theory of Principles and the Theory of Fundamental Rights. Brazilian Constitution shows a lot of principles and should be developing an adequate methodology of concretization of these principles. As Brazilian Constitution has also many fundamental rights and most part of them are principles, the Theory of Justice is even more important.

In the first moment of post-positivism in Brazil,[11] the work of legal thinkers and members of judicial power were intensively valorized. The legal thinkers were responsible to create legal methods to concretize the Constitution. Also jurisprudence should do a constitutional filtering, which means the necessity to reread all juridical disciplines (civil law, criminal law, administrative law, procedural law and et etcetera) inside the context of Constitutional's values, rules and principles.

On the other hand, judiciary was the most relevant social actor to implement the constitutional changes. At the beginning of the 90's, legislative power had little social legitimacy.

[8] It is relevant to observe that generally Brazilian's critical legal studies did not studied specific themes of jurisprudence. A. B. de Carvalho (Magistratura e direito alternativo,1997), otherwise, developed in Brazil an alternative law movement, a specific vision of critical legal studies, and reflected about important jurisprudence themes as legal interpretation and functions of legislative and judiciary.

[9] At that time, the principal work studied were Ronald Dworkin, Taking rights seriously, 1977 e Dworkin,Law's empire,1986.

[10] At that time, the principal work of Robert Alexy (Teoria da argumentação juridical, 2008) studied was "Theorie der Grundrechte". By then,the principle idea adopted was weighting of rights.

[11] The idea of post-positivism is related with the concept of neoconstitucionalism. In synthesis, neoconstitucionalism defends that democratic and constitutional contemporary values should guide legal practice and theory. About the relation between neoconstitucionalism and post-positivism jurisprudence, see Antonio C. Diniz; Antonio C. Maia, Pós-positivismo, 2006.

Also legal thinkers evaluated that legislative would not make the changes in ordinary laws, which were essential for effectiveness of 1988's Constitution. As judicial review is possible at concrete cases and at abstract reclamations, post-positivism required an activism action of judiciary.

V. Post-Positivism – Part II

This initial point of view of post-legal positivism had important and positive points. First of all, this paradigm of jurisprudence helped to establish the supremacy of Brazilian's Constitution. This supremacy gradually was incorporate in the studies of many technical disciplines of law.

For instance, Gustavo Tepedino and Luiz Edson Fachin, legal thinkers of civil law (contracts, propriety, family law), created a field of studies called civil-constitutional law or civil contemporary law.[12] These legal thinkers want to change the way that contract, propriety and family law were developed by universities and applied by courts.

Tepedino and Fachin wrote, at the 90's, that civil law where thought by jurists and applied by courts with values of economic liberalism and an oppressive moralism of XIX century. This ideas and practice are incompatible with the values of 1988's Constitution and contemporary democratic values as pluralism, human dignity, liberty and equally.

So, in the context of 1988's Constitution judicial point of view and legal think analysis should reread under the Constitutional law to implement constitutional values. The principal idea were: it is important that legislative power change laws to be coherent with constitution values, rules and principal, but, if legislative does not change laws, courts and judges should change the interpretation of laws or do not apply laws that are against Constitution.

This principal idea is possible, because of the model of Brazilian's judicial review and because legal thinkers are developing legal and constitutional analysis that can guide judges. At that time, the 90's, Tepedino and Fachin thought legislative and executive powers' action were important, but not necessary to implement constitutional rights and values.

That first view of positivism created legal arguments to defend, also, an intense intervention of judiciary in public policies. For example, there were and are many individual's actions of citizens against federal State or member state about medicines.

Several times, many medicines included by governmental health system are tested and can treat well many diseases. However, doctors prescribe medicines for patients with particular medical conditions, who demand this medicines which are not in general's

[12] Fundamental works of civil-constitutional law are Luiz Edson Fachin (Estatuto jurídico do patromônio mínimo, 2006) and GustavoTepedino (Temas de direito civil, 2001).

government's lists, and are much more expensive. Also, many times there are not enough scientific research to prove that this medicines are better than the ones that exists in state's health list or program. Judiciary, in some judicial orders, forces the executive to provide remedies that are not in wealth state programs, but have others remedies those programs that can be used to treat the diseases.

At the begging of the new century in Brazil, judicial power played a much more important role in social dynamics than legislative and executive powers, both elected by citizens. In addition, judiciary have laws declared unconstitutional without, sometimes, reasonable arguments and without a precise method to reconsider legislative and executive creation of laws, normative regulation and public politics.

This change in the roles played in public powers and institution made the post-positivism paradigm change a little. There is no doubt that Constitutional values, rules and principles must be implemented by ordinary laws, normative regulation and public politics, but it is important to recognize that this implementation should be done principally by democratic powers (legislative and executive) and just subsidiary by judges. Also it is necessary to implement a public sphere that can influence the social institutions.

So studies about deliberative democracy[13], procedural democracy[14], limits of judicial activism[15] and rebuild of institutions and state powers to become more democratic and less non-majoritarian are in theme of legal reflections in Brazil.

VI. Some Words as Final Considerations

There is no doubt that principal ideas of post-positivism are adequate for Brazilian context. When we are building a democratic and pluralistic society compromised with social justice, a Constitution that defends this values is an important tool to help in that construction.

So it is essential create a juridical dogmatic (legal technical) committed with the concretization of constitution. Also is important that judicial power in sentences and orders obligate that constitutional values, norms and principles are implemented.

Of course, judiciary has to defend the fundamental rights essential to democracy and that minority cannot be oppressed by majority. Our legal thinkers cannot describe the system as it is, but have to point out the problems and suggest changes in concepts, laws and judicial decisions.

[13] See Carlos S. Nino, La constitución de la democracia deliberativa, 1997 and Claudio Pereira da Souza Neto, Teoria constitucional e democracia deliberativo, 2006.
[14] J. Habermas (Direito e democracia, 2003a; 2003b) became an important author in post-positivism discussions in Brazil.
[15] Marco Aurélio Marrafon, O caráter complex da decisão em matéria constitucional, 2010.

This is all true and necessary. Besides, it is important to recognize that democratic society is build only when citizens, with a strong public sphere, and elected powers act as major players.

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