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João Maurício Adeodato

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Edited by:
Goethe University Frankfurt am Main
Department of Law
Grüneburgplatz 1
60629 Frankfurt am Main
Tel.: [+49] (0)69 - 798 34341
Fax: [+49] (0)69 - 798 34523

João Maurício Adeodato, Recife / Brazil*

Answers of Legal Dogmatics to two important Problems of the Philosophy of Law

Abstract: Introduction: aims and points of departure. 1. The problem of the knowledge of law: whether previous general rules may support a casuistic decision. 2. The problem of legal ethics: whether there are autonomous rights, which do not depend on positive law. 3. The ways of modern dogmatics to deal with these problems. 4. The question remains the same.

Introduction: aims and points of departure

Philosophy of law has had many questions to handle. Concerning universalistic all-encompassing theories, the first one would be what law "is". To rhetoricians this "ontological question" does not make much sense. But one may try to figure out which problems come to light when the word is used, which new facets have been added by modern complex societies and whether they have gained specific characteristics in the periphery of this society, supposedly globalized around capital, technology and ideology[1].

The thesis here is that, if the ontological approach is left aside, there remain two traditional questions: one concerns knowledge (epistemology) and the other addresses ethics (axiology). Both shall be discussed below.

First question: what would be the limits, if there are any, for the decision of a concrete case, that is, if the general law expressed by the Constitution and other legal texts can play this limiting role, be it by means of Kelsen's frame theory, the rational postulates from Alexy or the Judge Hercules suggested by Dworkin, a debate that until today divides legislativists and judicialists, at least in Brazil. In other words: is all law really created by legislatures or are their texts only random input data for the effective creation of law in the casuistic decision-making process?

* Professor in the Federal University of Pernambuco (jmadeodato@globo.com).

[1] To a description of the different strategies of a peripheral law system, what is not intended here, see João Maurício Adeodato. Brasilien. Vorstudien zu einer emanzipatorischen Legitimationstheorie für unterentwickelte Länder. Rechtstheorie, 22. Band, Heft 1. Berlin: Duncker und Humblot, 1991, 108-128; Practical regularities in underdeveloped countries, *in* Ralf Dreier - Robert Alexy (eds.): Legal system and practical reason - Special Issue ARSP, Beiheft Nr.51, Band 1, Stuttgart: Franz Steiner, 1993, 62-67; Unbeständigkeitsstrategien in Rechtssystemen der Peripherie: eine Form alternativen Rechts. Verfassung und Recht in Übersee, 32. Jahrgang, 3. Quartal 1999. Baden-Baden: Nomos, 1999, 335-346.

Second question: if there are any and which are the limits for the choices of the original constitutional power, that is, if there are subjective rights that are valid in themselves, above positive law, which has to recognize them. Moreover, when social groups do not agree about these rights, what would be the available criteria to decide between incompatible ethical positions that also have to hover above positive law. Even if we could speak of a universal ethical consensus, which would already be problematic – like the rejection of genocide – there are many more controvertible themes, even inside the same culture, like the death penalty, fidelity in marriage or the existence of professional politicians. The question always is to decide which decision would be "the correct one".

I. The problem of the knowledge of law: whether previous general rules may support a casuistic decision

Every try to build an empirical science has to deal with three different elements, which cannot be reduced to each other, because there is a reciprocal incompatibility between a) real events, b) ideas (or concepts) of the human reason (or intellect) and c) linguistic (or symbolic) expressions. Following the tradition of the debate between Parmenides and Heraclitus, Western philosophy has always dealt with the two first elements, while the third has appeared later, by the linguistic turn of the 20th century, despite of some predecessors along history.

Here the real event – **the first element** – is seen as the unique and unrepeatable occurrence which is supposedly perceived independently from the subjects, along an unending flow that is called time. This perception also seems to be unique and unrepeatable, always peculiar and particular at that moment, which is already gone. Every individual object appears irrational to human beings, it does not fit in their knowing apparatus, which functions only with generalizations (ideas, concepts, predicators). Individualities are irrational because of their unavoidable casualty. One could say: it is an ontological incompatibility[2].

In spite of this irrationality, there is a paradox in the fact that the experience of something shows a kind of re-cognition; to recognize something means to associate it with remembrances of what "is already known" (ideas from previous experiences) and this is obtained in detriment of exactness. This complex operation has to adequate an undefined and unlimited number of

[2] Nicolai Hartmann. Grundzüge einer Metaphysik der Erkenntnis. Berlin: Walter de Gruyter, 1946, 302-306; João Maurício Adeodato. Filosofia do direito. Uma crítica à verdade na ética e na ciência (em contraposição à ontologia de Nicolai Hartmann), São Paulo: Saraiva, 2009 (4th ed.), 122.

individualities to a defined and limited number of concepts[3]. So unique objects become scalpels, scissors and needles, are then transformed in "chirurgic instruments" and share the concept of "instruments" with violins, pianos and guitars.

Philosophers like Heraclitus and the empiricists have accentuated this ever changing aspect of the act of knowledge, and it is no casualty that they are inclined to skepticism.

Western Philosophy has presented and described **the second element** of knowledge under different names, as for instance *quiditas*, essence, *Sosein*, *eidos*, universals. Following a translation of Plato, the word "idea" was chosen here. Human beings have developed this "unit of reason" in the following manner: they experiment different actions and objects and build some kind of "image" that does not and cannot correspond exactly to the "real" action or object, but this image turns it possible to deal with this real world by means of re-cognizing "similar" events, organizing them in classes, putting them in contexts. The use of analogies, neuronal nets and other mental proceedings yet to be explained render it possible for the subject in the act of knowing to collect his or her experience in a unifying idea, and this idea provides the parameters to recognize new events and to communicate, to talk about them.

Philosophers from the Parmenidean tradition have emphasized this element in knowledge and constituted the so called rationalism, in opposition to the empiricists.

In this synthetic mental process it is very complicated to determinate what makes that chair "to be" a chair, for its form, matter, finality or efficiency do not seem to give reliable criteria to the abstraction of the individual characteristics of that object and its transformation into "a" chair. The process may become a lot more imprecise if one has to deal with more complex concepts, like justice or misconduct in public office.

So the idea consists in the result of a process of depriving events of the real individualities, which constitute their existence, and to turn them into classes, their essence. Some philosophers have seen these results and their relation to the events as ontological – that is, existing from themselves, independent from perception – as in the case of the Platonic ideas[4], or simply as words, *flatus vocis* – like in the nominalistic Scholastic[5].

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[3] Many times "idea" and "concept" are indistinctly used. Here "concept" (significant) is understood as a linguistic expression of "idea" (signified).

[4] Plato. Parmenides, in: The Dialogues of Plato, translated by Benjamin Jowett, Great Books of the Western World, Bd. 6. Chicago: Encyclopaedia Britannica, 1990, 486-511. To Plato the universals exist before the things, while to Aristotle the universals lie in the things themselves (these thesis were later referred to as *universalia ante rem* and *universalia in re*, respectively).

[5] Bertrand Russell. History of Western Philosophy – and its Connection with Political and Social Circumstances from the Earliest Times to the Present Day, London: Routledge, 1993, at 175 f. and 430.

Besides not matching with the real world of events, another factor for misunderstandings and difficulties in human relations is that these ideas cannot be precisely communicated as well, because the process of constructing and transmitting concepts has to go through the filter of the language, which involves the circumstances of the environment, chiefly the own parameters of the ones who receive the message. Out of this observation modern semiotics suggest **the third element** in knowledge, that is, the symbolic expression through language. Although generic like the ideas, linguistic predicators can neither exactly correspond to the ideas they long to express nor to the events which they refer to.

This is the abyss of knowledge, for which philosophy and epistemology – and so also the philosophy of law – have to construct bridges. So the problem is how the general text can by any means express a signification to legitimate ("support", "rationalize" etc.) a unique decision before a specific case.

An additional problem is that language is a necessary condition for communication itself, so it seems impossible to study one without the other, what brings the question of recoursivity and no way out of the circle, because one has to use language to study language.

Although medieval nominalists paid some attention to this third element when discussing the universals, it was only in the 20th century that the linguistic turn made semiotics one of the most important trends of Western philosophy. The symbolic expression (significant) transmits ideas and constitutes events through communication, when the three elements are united and the problem of knowledge is controlled in that moment.

All philosophers agree that events, linguistic symbols and ideas do not exactly match, but there seems to be certain compatibility between them; an indicium of this is that a (real) bridge will fall down if the (ideal) calculations made by the engineer are incorrect. One of the problems that interested Kant was how it is possible that there is a correspondence between ideal phenomena, like calculations about time and space, and the real world.[6]

For a jurist the problem is to adequate a statute or any other general significant of the legal discourse system (sources of law) to a unique case, constructing a legitimate meaning (idea) to support the decision.

[6] Immanuel Kant. Kritik der Reinen Vernunft. Werkausgabe - in zwölf Bänden, Bd. III, W. Weischedel (Hrsg.). Frankfurt a.M.: Suhrkamp, 1977, 76 (A 28, B 44) and 82 (A 35, 36; B 52).

Umberto Eco resumes this problem saying that the appeal to universals is not a strength of human thinking, but a failure of the discourse itself. The real problem lies in the fact that the person always speaks in general, while the things themselves are invariably specific (singular).[7]

Friedrich Nietzsche had this abyss very clear:

Let us think specially in the building of concepts: each word becomes immediately a concept, not because it should serve as something like a remembrance of the solitary and totally individualized initial experience which originated it, but because it must at the same time comprehend innumerous, more or less similar cases, that is, strictly speaking, never equal, clearly unequal cases. Each concept is born through the equal treating of non-equals. As well as never a leaf is equal to another one, so certain is the concept of leaf built through arbitrary disregard of these individual differences, through an oblivion of the differentiating characters. This provokes the impression as if there were in nature something beyond the leaves, that were "leaf", something like an original form, according to which all leaves would be webbed, drawn, circled, colored, frizzled, painted, but by unskilled hands, so that no exemplar would turn out to be a correct and trustworthy copy of the original form[8].

As an empirical science – or simply a theory – the knowledge of law has to handle with the mutual influence between real events (the legally relevant cases), symbolic expressions (the traditionally called sources of law) and legal ideas (legal concepts, juridical norms).

In case of law and other humanities, there comes a fourth complicating element, which does not appear in descriptive empirical sciences, that is preferences and evaluation, the different and eventually irreconcilable emotional ways through which human beings observe and live in the world.

This is called the axiological question, also an abyss for ethics in law.

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[7] ECO, Umberto. Kant e l'ornitorinco. Milano: Giuffrè, 1997, 28.

[8] Friedrich Nietzsche. Über Wahrheit und Lüge im außermoralischen Sinne, *in* Friedrich Nietzsche: Nachgelassene Schriften 1870-1873. G. Colli — M. Montinari (Hrsg.). Kritische Studienausgabe — in fünfzehn Bände, vol. I. Berlin: Walter de Gruyter, 1988, 879-880: „Denken wir besonders noch an die Bildung der Begriffe: jedes Wort wird sofort dadurch Begriff, dass es eben nicht für das einmalige ganz und gar individualisierte Urerlebnis, dem es sein Entstehen verdankt, etwa als Erinnerung dienen soll, sondern zugleich für zahllose, mehr oder weniger ähnliche, d. h. streng genommen niemals gleiche, also auf lauter ungleiche Fälle passen muss. Jeder Begriff entsteht durch Gleichsetzen des Nicht-Gleichen. So gewiss nie ein Blatt einem anderen ganz gleich ist, so gewiss ist der Begriff Blatt durch beliebiges Fallenlassen dieser individuellen Verschiedenheiten, durch ein Vergessen des Unterscheidenden gebildet und erweckt nun die Vorstellung, als ob es in der Natur auβer den Blättern etwas gäbe, das "Blatt" wäre, etwa eine Urform, nach der alle Blätter gewebt, gezeichnet, abgezirkelt, gefärbt, gekräuselt, bemalt wären, aber von ungeschickten Händen, so dass kein Exemplar correkt und zuverlässig als treues Abbild der Urform ausgefallen wäre".

II. The problem of legal ethics: whether there are autonomous rights, which do not depend on positive law

One of the most common uses of the word "right" appears to be the faculty of doing or omitting something and also to demand from others that they do or omit something. Legal dogmatics has named this faculty a subjective right, literally the right of the subject, of the person, the "faculty to act" inherited from the *facultas agendi* of antique Roman law. This does not comprise any possible capacity of action or omission, but only those that are protected and guaranteed by objective law, by the "norm to act", *norma agendi* in Rome. The English language has kept the difference with the words "right" and "law", whereas other Western languages need the adjectives "subjective" and "objective" to contemplate both concepts, once the substantive is the same: "direito", "derecho", "diritto", "droit", "Recht".

The concept of (subjective) right has become one of the most important in modern theory of law: since the 19th century, subjective rights have come out of the exclusive private sphere to public law, being increasingly incorporated by national constitutions and international treaties and statutes[9].

According to an old tradition, that traces back at least to classical Greece, the strength of natural law is due to the fact that there are certain rights which do not depend on any form of recognition from any instance of secular political power. This is why the metaphor "natural" rights is applied, for the forces of nature – like storms, thunders and floods – remain beyond the will of human beings.

When the first positivists appear, in late modernity, the Western philosophy of law may be seen like divided in two main streams: for the traditional natural law conceptions, a person has certain specific rights only for being human and the positive legal order has to recognize, respect and protect them; the new positivist approach defends that a person only has the rights conceded by objective law – that is, by the commands of the effective political power.

Two opposed contractualist philosophers could well show this point of departure.

To Jean-Jacques Rousseau, the social contract occurs between the citizen and the State, which brings about mutual rights and duties for both parts. Each person carries natural rights from the state of nature and those limit the power of the State:

[9] Klaus F. Röhl. Allgemeine Rechtslehre – ein Lehrbuch. Köln / Berlin / Bonn / München: Carl Heymanns Verlag, 2., neu bearbeitete Auflage, 2001, 328.

One sees by that formula that the act of association reassures a reciprocal engagement of the public with the individuals and that each individual, contracting, so to say, with his own self, is engaged by a double relation, that is, as member of the sovereign before the individuals and as member of the State before the sovereign.[10]

The "pouvoir constituant" of the social contract is thus bilateral.

Thomas Hobbes teaches that the parts of the social contract are the citizens themselves and that the State does not participate in it, but is born of it, constitutes its result. So the State has no debt at all concerning the citizens. The people have given away all their natural rights to fight for space and living in exchange for safety, every member of society has done so. So the State determines in social life which are the subjective rights of the citizens, for these have kept no other natural right besides the existence, the own life, and everything else is a concession from the Leviathan[11].

This way Rousseau preaches the superiority of subjective rights: they are independent from objective law. Hobbes goes in the other direction: objective law rules which are the subjective rights.

The dilemma for the next generations of jurists was that, on the one hand, rights would depend on a very uncertain, transcendent basis, whose empirical verification and control showed to be very difficult, perhaps impossible, like the will of God, the human reason, the *volonté génerale* or the *objektiver Geist*, supposedly the original sources of subjective rights according to legal philosophers; on the other hand, the person would be under the arbitrariness and omnipotence of the State, that is, of the actual governments, according to positivists.

From an ethical perspective, the victorious legal positivism had to be able to distinguish law from arbitrariness in order to defend itself from the accusation of legitimating any rule, regardless of any ethical content. This was an exigency of the also triumphant emerging democratic ideas: new theories were necessary to explain and support the contemporary Leviathan.

The solution: the subjective rights had to find a fundament that, without grasping at transcendent, non-empirical basis, would not be reduced to force and to the simple will of the

[10] Jean-Jacques Rousseau. Du contract social ou principes du droit politique. Amsterdam: chez Marc Michel Rey, 1762, Ch. VII, "Du Souverain" : "On voit par cette formule que l'acte d'association renferme un engagement réciproque du public avec les particuliers, et que chaque individu, contractant, pour ainsi dire, avec lui-même, se trouve engagé sous un double rapport; savoir, comme membre du souverain envers les particuliers, et comme membre de l'Etat envers le souverain."

[11] Thomas Hobbes. Leviathan or Matter, form and power of a state ecclesiastical and civil, Great Books of the Western World. Chicago: Encyclopaedia Britannica, 1990, vol. 21, p. 39-283, 101.

State and eventual governments. One can think that these new theories did not get anywhere and that their basis were as metaphysical as the theories of natural law, but they were surely original. They were original because they stated, like the schools of natural law, that the foundations of the legitimacy of law were above the arbitrariness of governments, but also sustained, like the positivists, that those sources were empirical and scientifically investigable.

That was the path opened by the "theories of the will", according to which the subjective rights are "ein Gebiet, worin der Wille herrscht"[12], and this is the will of the individual person, not the will of the government. The validity of rights like self determination, property or the pursuit of happiness does not come out of a concession from the State, but are justified because all individual citizens want them. This will is seen as a concrete and observable phenomenon and not as something abstract outside human experience.

Critics have argued that rights cannot base on the will, for many people have rights that they do not even understand – as for instance small children, people with mental malfunctions or simply people who ignore their rights – and no one can wish something unperceived. There are also persons who have rights they expressly do not want to have, as it may be the case with suicides and their right to live.

One of those critics of the theories of the will, Rudolf von Jhering brings the concept of interest to explain subjective rights. Interest is a kind of unpersonalized will, a will that every ideal individual would have if rationally (abstractly) observed. The goal (*Zweck*) is responsible for the subjective rights, for law constitutes a mean to an end, in consonance with a utilitarian Ethics guided by advantage, profit and use. This is why the heir has the right to his heritage even if he does not know about it. While interest is the content, the protection provided by objective law is the form of subjective rights, expressing the already mentioned *facultas agendi* of old Roman law, the protection to sue before the courts[13].

Subsequently the *Interessentheorien* were also criticized: as there are some interests that are not sources of rights, like in case of sellers and buyers of illegal material, the subjective rights seem to be much more supported by the protection of objective law than to come solely from substantial interests; as State and government are responsible for this protection, there is a return to Hobbes and to the superiority of objective law.

[12] Friedrich Carl von Savigny. System des heutigen Römischen Rechts. Berlin: Veit, 1840, Bd. 1, §§ 4 f., 7 f.
[13] Rudolf von Jhering. Geist des romischen Rechts auf den verschiedenen Stüfen seiner Entwickelung. Leipzig: Breitkopf & Härtel, Bd. III, 3. Auflage, 338.

The eclectic theories try to conciliate the theories of the will and of the interest and turn out to be defended in the *Traktat der Pandekten*, organized by Regelsberger, by Georg Jellinek („Wille und Interesse oder Gut gehören daher im Begriffe des Rechtes notwendig zusammen“[14]) and by Bernhard Windscheid (the subjective right is „eine Macht des Willens, von der rechtlichen Ordnung geschützt“[15]).

The monist theory from Hans Kelsen tries to get out of this debate about which shall prevail, as long as he states that this dichotomy between law and rights is a false one, because they only make sense together, they are faces of the same coin: on one side, a faculty to do something can only be called a right if it is guaranteed by the objective law; on the other, a general rule cannot be defined as law unless it supports certain specific possibilities of action, subjective rights[16].

In this monist way, the separations between natural and positive law and between objective law and subjective rights disappear in the praxis, as long as modern constitutions – the most important part of objective law – started to contain declarations of subjective rights – fundamental, constitutional or simply human – that then become positive law.

Obviously the ethical choice that this law dogmatizes will correspond to the values, ideologies (or whatever these ethical preferences may be called) of a certain social group. The dogmatization of law and the victory of positivism have brought new strategies to deal with both problems in law practice.

III. The ways of modern dogmatics to deal with these problems

The dogmatically organized law exhibits several different characteristics, of which only five will be highlighted here – under the point of view of the analytical rhetoric and with didactical aims, for these conditions and constraints are never isolated[17].

First, the production (positivization) of normative texts (acts, decrees, statutes, judicial precedents), to which all involved parts and issues must refer and which result from previous procedural rules; second, the hermeneutics, the construction of meaning for the legal concepts from the chosen normative texts, what shall enable the decision of the conflict; third, the actual argumentation that must appeal to the chosen texts in order to persuade the other parts that the

[14] Georg Jellinek. System der subjektiven öffentlichen Rechte. Tübingen: Mohr (Paul Siebeck), 1905 (zweite durchgesehene und vermehrte Auflage), 44.
[15] Bernhard Windscheid. Lehrbuch des Pandektenrechts. Frankfurt a. M.: Rutten & Loening, 1891, § 37, 87 f.
[16] Hans Kelsen. Allgemeine Staatslehre. Wien: Österreichische Staatsdruckerei, 1993, 55.
[17] Ottmar Ballweg. Analytische Rhetorik als juristische Grundlagenforschung, *in* Robert Alexy; Ralf Dreier; und Ulfrid Neumann (Hrsg.). Archiv für Rechts- und Sozialphilosophie, Beiheft 44. Stuttgart: Steiner, 1991, 45-54.

meanings attributed in phase two are these and not those, that the correct construction is that particular one; fourth, the decision that must come out of the three previous steps and of the prohibition of *non liquet*, the decision that determines the final meaning of the general law concerning the concrete case; fifth, the justification of why those specific positivization, interpretation, argumentation and decision are correct and not the other ones, mainly before the parts who are dissatisfied with the actual decision.

Comparing the dogmatic way of treating conflicts with the problem of knowledge in general, one sees that the first postulate of dogmatics – the constraint to refer to the valid sources of law – corresponds to the symbolic expression of the norm. The second constraint is the attribution of meaning to those chosen sources through interpretation. The third consists in the legal argumentation, whose goal is to confront interpretations and determine the predominant one. Both correspond to the idea that the linguistic expression intends to deliver. The fourth constraint, the decision, concerns the third element of knowledge, that is, the event, the concrete conflict that has to be "solved", when dogmatic law interferes and helps to build facts and constitute reality. The fifth constraint responds to the axiological problem of law and its connection with subjective rights.

In Western democratic systems, conformed by the theory of the division of powers, the duty of producing general rules should belong to the competences of the Legislative; in the contemporary world, however, and even more in underdeveloped countries, it comes more and more into the tasks of the Executive and Judiciary powers.

This happens not only because the Executive promulgates general texts of law exactly like the Legislative does – as for example, the "provisory measures" in Brazil – but also because it has the function of producing texts with less degree of generality in order to reduce the meaning of those other more general texts of the Constitution or the law – like regulations and resolutions that will consequently serve as new obligatory points of departure – which become increasingly more important to daily life – like the normative instructions of the Central Bank (or the Fed) or the acts of the regulatory agencies.

The Judiciary has also taken some of the power originally separated for the Legislative, once the normative general text produced by legislators (the linguistic significant) must have a hermeneutical meaning (the idea), which is precisely the function of judges to provide, because the comprehension can only be provided before the real case (the event). This is the act of knowledge of law. So judicial dogmatics can literally never decide against the written law,

because it is exactly this jurisdiction that determines the meaning of legal texts. Of course there may be a couple of sentences that are later invalidated, declared against the law and the Constitution by higher courts, but not a precedent from the higher courts themselves, that would be a *contradictio in terminis*. The situation does not change if the precedent is modified, because this will be a new real, concrete, empirical meaning, a temporary solution to the problem of knowledge.

The first constraint is then to **choose valid texts** among the so called sources of law, whose meanings will provide the basis for the whole procedure. This is the origin of the expression legal "dogmatics", for those texts constitute the dogmas, in the sense that they cannot be ignored and that valid texts can only be confronted with valid texts. The sources of law are the symbolic expressions of the legal norms, significants of meanings before the case. Of course these valid sources can also be oral and gestural, but in modern law they are mainly textual.

Secondly there is the constraint to **interpret the texts** brought to the debate in step one, that is, give them meaning concerning the conflict, the concrete case that started the whole thing, for the text is not the "carrier" of a correct interpretation of the norm, but only a means to get to different and concurrent interpretations and interests[18]. The law system, including jurisprudence, has to produce the winning meaning for the alleged sources of law before the case. This meaning is the spoken law, in the end the definitive decision, against which no more appeals are acceptable.

This is done through a reduction of the ambiguity and vagueness of the chosen texts concerning the concrete case, before which each competing orator has to suggest what the terms of the rules concretely mean in order to get to the aimed decision.

In the third place there is the constraint to **bind all introduced arguments** to the previously chosen valid texts and to persuade the other participants of the deciding process that the meaning attributed by the previous interpretation is the correct one. So the dogmatic validity of an argument is not conditioned by external factors like moral justice, scientific truth, reasonability or even considered established facts. Here lie the roots of the independence of the "legal truth" (the decision) concerning "reality", what is well expressed by the lawyer's old saying "what is not in the legal files is not in the world". This third step constitutes the core of legal argumentation, strictly speaking, the moment of persuasion.

[18] Friedrich Müller, Ralph Christensen und Michael Sokolowski. Rechtstext und Textarbeit. Berlin: Duncker & Humblot, 1997, 19 f.

In the fourth place comes the constraint to **decide** about each and every conflict that the legal order rules as relevant, what corresponds to the prohibition of *non liquet*. The modern judge or any instance that has to decide inside dogmatic procedures cannot abstain from deciding, cannot behave like Solomon or Pilate. Each legally qualified question hast to be answered (*dokein*) by the system.

The fifth constraint of the dogmatic way of treating those two major problems of the philosophy of law is the **justification of the decision**, which includes the problem of legitimacy. Taking the pyramidal, dogmatically hierarchical organization of law as an example, obedience to the lower sources of law is justified by means of a higher source in which the lower is based, and so on, until the top of the pyramid, where the Constitution is responsible for the legitimacy of the whole system.

For the solution of this problem it is enough to observe the concept of justice of contemporary tribunals, which are responsible – in a very literal and also philosophical sense – for the "realization" of law and legal norms. "Just" and "correct" is the decision allegedly based on the rules that were established by the dogmatic system. So the concept of just and unjust remains inside positive law and depends on each legal system.

IV. The question remains the same

This brings a problem to the universalization of (subjective) rights in a context of an international law that is not dogmatically organized. Concerning the extreme inequalities in life standards throughout the world, one more remark will conclude this paper.

One should not expect that a population living in misery, whose minimal basic needs are far from being satisfied, people who are starving, without education and in permanent fear of organized criminality would be concerned to support an international criminal court, the protection of the rain forests or the prohibition of torture and cruel punishments.

The universalization of a supposed rational law may lead to a kind of ethical arrogance, no matter what content it presents. It sure is possible that young terrorists or hungry workers be not persuaded by "rational" rules of argumentation, not to mention other situations when people simply do not want to be convinced by these standards.

Diverging from the theories that claim universal rationality, for example, one can assert that every positive law has a certain moral content; but this content is not in itself valid, it is constituted by temporary victorious meanings inside communication. Naturally, if the

Constitution states that all human beings are equal, all legislators, judges and other public officials shall accept and follow the content of this moral choice. Every positivist would agree with this, no question about it. The problem lies in the fact that the constituent power (the "pouvoir constituent") may choose any other moral contents as well and these will propitiate other parameters to the elaboration of laws and decision of cases. If there exists a positive and effective legal sanction that commands lashing or lapidation of infidel married women, this happens not only because these moral option is seen as just and adequate by some social group in that society, but also because that group has managed to win the struggle for law or to transform their ethical convictions into positive, that is, obligatory law – even for the ones who do not agree with them, as always.

After the determination of those basic ethical contents by the positive legal order, that result from the political oppositions between different moral conceptions, the problems of legitimacy and subjective rights become a question of legal validity and efficacy: a fair and just law is the one that comes from a competent authority and follows the regular rites and proceedings. This formalization is the dogmatic solution to the ever changing character of the ethical content of law in a complex society.

Even if a consensus about this ethical content were possible inside the national State, the difficulties for its universalization are more clearly perceived observing international law. In spite of his enlightened ideal of an international community, Kant warns that the least and indispensable condition for it would be the existence of a sovereign international tribunal, for „Das Recht ist mit der Befugnis zu zwingen verbunden"[19].

Concerning the thesis that human rights have to be universalized because they form an ethical minimum – within the frame of the jusnaturalistic ideal of rights ontologically valid in themselves, independent from and above any constitutional power –, rights that would supposedly be on their way to universalization, mainly after the fall of the Berliner wall and of the Soviet Union, as part of a „post-nationalen Konstellation"[20], one should notice that there still seems to be a long and winding road before that, if any at all. Empirical observations show that

[19] Immanuel Kant. Zum ewigen Frieden. Ein philosophischer Entwurf. *In* KANT, Immanuel. Schriften zur Anthopologie, Geschichtsphilosophie, Politik und Pädagogik 1. WEISCHEDEL, Wilhelm (*Hrsg.*). Werkausgabe — in zwölf Bände. Frankfurt a.M.: Suhrkamp, 1977, Bd. XI, p. 191-251. And KANT, Immanuel. Die Metaphysik der Sitten. Werkausgabe – in zwölf Bände. Bd. VIII, Weischedel, Wilhelm (Hrsg.). Frankfurt a. M.: Suhrkamp, 1977, 338-339 (A-B 35-36).

[20] HABERMAS, Jürgen. Die postnationale Konstellation. Politische Essays. Frankfurt am Main: Suhrkamp, 1998, 96-105.

international enforcement of criminal law, for example, succeeds only when the strong States agree to punish the weak ones, what seems to be far away from Kant's International Court.

Contemporary non-positivist jurists appeal to the necessity of rules with certain moral content, like the formula of Gustav Radbruch against the "unbearable non-law" („das unerträgliche Unrecht"), that would have no procedural character, or at least to rules that, although procedural, would propitiate moral developments, like "everyone has the right to participate in the discussion (because all shall be equal before the law)"[21].

It rather seems that this search for moral standards valid in themselves simply reflects the actual axiological state of the art in today's dominant nations of the Western world. Unfortunately, the historical development of the international relations reveals that on every occasion in which the interests of the powerful are at stake, the human rights of the fragile find no place in the post-national constellation.

Address:
João Maurício Adeodato
Federal University of Pernambuco
Praça Fleming, 117, ap. 2001, CEP 52050-180, Recife, PE, Brasil.

[21] Robert Alexy. Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung. Frankfurt a.M.: Suhrkamp, 1983, 361 f. (*Anhang*).