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Normativity of Law and Interpretive Approaches (A Discussion on the Relation between Law and Reason)[1]

Abstract: The debates about the interrelations between reason and law have undergone a change after the eighteenth century. References to the recta ratio of jusnaturalistic tradition have not disappeared, but other comprehensions of legal reason have developed. The European debate over legal positivist science has contributed to this in a manifestation of the rationality of law. This transformation may be considered the basis for the development of true "legal technologies" throughout the twentieth century. On the other hand, in the context of theories of positive law which have taken the relation between ethics and legal reason as a problem, the formation of discourses on coercion (Austin and Holmes), on validity (Kelsen and Hart) and on justification (Alexy and Dworkin) has also contributed to the emergence of new models of legal rationality. In this paper, it is highlighted that the construction of these models is linked to the "points of view" which theories have proposed as legitimate for the interpretation of legal phenomenon. And it is suggested that the discussion over points of view (defined as "focuses", term which is close to the notion of "attitude", "stance" or "place of speech") may aid in the debate on the normativity of law.
Keywords: legal rationality; rightness of natural reason; point of view; coercion; validity; justification; legal theories; normativity of law.

The theme of this working group is "The Normativity of Law". As we all know, the term "normative" can be discussed in different ways. However, in the history of European legal culture, it is possible to identify the existence of a traditional type of discourse on normativity, within the tradition of jusnaturalistic thought. Within this tradition, the discussion over normativity converged to the debate over relations between law and reason. The normativity of law was based on the affirmation of rightness of natural reason and its discussion was carried out through the association between *lex naturalis* and *recta ratio*. In the legal tradition, to understand the legal normativity was equal to understand the legal rationality.

In the transition from medieval to modern culture, the relation between law and reason have undergone some modifications. One major change was the emergence of a new comprehension of reason, closer and closer to the notion of consciousness. This appears in the

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writings of some followers of St. Thomas Aquinas, who began to turn consciousness into a property of mind, not only related to the acts, but also to mind itself (as self-awareness). It also appears in the work of Abelard, who emphasized that to sin was to act against conscience, and not against dictates which are of an external nature to men. In the context of the Protestant Reformation, these ideas eventually influence the development of individual consciousness as a "moral sense".

Within this new understanding, the discussion of the normativity of law has gained a different direction. It was redirected into the anthropological realm of the subject of law. The normativity was then linked to the nature of man (to be understood as a naturally bearer of rights). Beside the traditional discourse of natural law, the discourse of natural rights emerges. This appears in the work of Grotius even before the formulation of the metaphysics of Descartes. This innovation, however, does not change the tradition of discussing the normativity of law by means of the discussion of the relationship between law and reason.

The traditional discussion over normativity only changed when modernity begins to break with the very idea of right reason inherited from the classical culture. The first sign of this rupture is usually identified at the thought of Hobbes. In his work the idea that law corresponds to what is not contrary to the right reason is still present. The English philosopher, however, criticizes the understanding of the right reason as the infallible basis for normalizing. To Hobbes, in the context of human nature, the claims for reason as an ultimate judge for all controversies are simply claims for things to be determined by the consciousness of each individual. Natural reason is nothing but a private assessment, through which every man realizes the appropriate means for their own preservation. The rationality of law, therefore, should be associated with the utility of law. Hobbes recognizes that this is a problem and, to face it, he proposes that the natural reason need to be overcome by the social authority of the holders of sovereign power. In order to form a civil society, it is necessary to build unity through authority. Thus, the question of the normativity of law changes profoundly. It begins to be discussed as the issue of "positivity"[2].

This emphasis on the new issue of "positivity" is accompanied by two other transformations of rationality, which also end up passing under the law. On the one hand, in the final period of the Italian Renaissance, Giovanni Botero and Federico Bonaventura theoretically develop a new conception of political prudence that was known by the name of "reason of state". The idea of "reason of state" allows governments to put themselves above

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[2] Not for another reason the theme "Normativity" appears as well in the title of this workgroup linked to the notion of "Positivism".

the law to serve the purpose of conserving the state. So it begins to gain strength that the rationality of law belongs to the field of politics. On the other hand, the establishment of natural laws, the new physics of Galileo Galilei and Francis Bacon's *New Organon* no longer promote the classic separation between *episteme* and *techne*, that is, between science and mechanical arts. Both converge to a change of attitude towards techniques, with the proposition of a new scientific rationality, mathematical and operative, which owns the truth and falsehood with a view to practical consequences. This modern know-how is not just a utilitarian reason, it is also an alliance between science and technique, which begin to merge toward the formation of what came to be called techno-science or technology.

For the rationality of law, these modern set of changes clarify the separation between legal knowledge and ethical wisdom. It indicates the emergence of a new attitude towards law. This new position advocates two new ideas: on the one hand, the thesis of historical and social sources of legal phenomenon, on the other hand, the thesis of the conceptual separation between law and morality. This new approach has received the label “legal positivism”.

The appearance of positivity as a new way to understand normativity also modifies the very context in which the legal debate is carried out. This context is now set to be a clash between supporters of the approach called “legal positivism” and the supporters of the contrary position, which can be summarized under the name of "non-positivism", although this stance could receive different denominations (“natural law”, “legal realism”, “humanism”, “hermeneutics” etc.). More recently, especially after the postscript written by Hart, the context has also been characterized by another dispute: the debate between “inclusive positivism” and “exclusive positivism” (or between hard and soft positivism). In the Brazilian legal theory, the contemporary debate has also been characterized by the confrontation between “positivism” and “post-positivism” (which, for the most part of it, gravitates towards a “neoconstitutionalism”, whose main reference is the work of Robert Alexy on fundamental rights).

This association, however, should not bring the idea that the debate over relations between law and reason has disappeared after the characterization of normativity from positivity. Nor is it appropriate to develop the idea that the debate between law and reason continues only by means of the persistence of jusnaturalistic tradition. There are many examples showing the debates on positive law do not fully untied jusnaturalistic rationality after the eighteenth century. Both the projects of codification developed in the nineteenth century and the reconstruction of human rights discourse in the twentieth century are inspired by the *recta ratio* which comes from natural law discourse (classical or modern). However,

alongside the persistent discourse of natural law, it is also possible to recognize the formation of new understandings of legal rationality in the context of theories of positive law that assume the relation between ethics and legal reason as a problem. These new understandings are expressed in a peculiar way, by means of the images, the metaphors and the points of views which these theories have been proposing as legitimate to interpret the legal phenomenon. The organization of the main points of view (understood as "interpretive approaches", close to the notions of "attitude", "stance" or "place of speech") allows to discuss, in general, in the form of three major models, the place left vacant by right reason on the field of law.

In chronological terms, the first new model of legal rationality to occupy this place began to be built in the nineteenth century with the development of theories of positive law that rejected jusnaturalistic metaphysics on behalf of an "ethics of utility" or an "enlightened skepticism". Among these theories, we can highlight the imperativist theory of law (especially the command theory of law established by the English jurist John Austin in the early nineteenth century) as well as various forms of legal realism (in particular, the theory about the predictions of what the courts will do in fact, introduced by the American judge Oliver Wendell Holmes Jr. in 1897). These views maintain the image of the positive law as a set of coercive commands of a sovereign, already present in modern jusnaturalism, from Hobbes to Kant. However, in an unprecedented way, these studies deepen the relation among law and politics, economics, psychology etc. The field of debate on the foundations of positivity was definitely shifted from nature to society, with the formulation of new approaches (the "social point of view" suggested by Austin and the "point of view of a bad man" proposed by Holmes) which emphasized the importance of coercion in the manifestation of law, bringing the legal phenomenon and the traditional image of power closer as domination and empire. Since then, these theories eventually presented legal reason in the form of common rationality between law and politics, reaffirming and consolidating one of many lines of thought already present in the Hobbesian theory.

A second peculiar model of legal rationality can be identified in the constitution of other legal theories about the internal elements of positive law itself, understood as a system. It appears (during the first half of the twentieth century) both in the proposed purification of legal theories developed by the distinction between "being" and "ought to be" drawn by the Austrian jurist Hans Kelsen (with his theory of the "basic norm") and the internal view of the ordinary legal language highlighted by research on social rules conducted by the English jurist Herbert L. A. Hart (with his theory of the "rule of recognition"). These theories replace

the focus on facticity of the legal phenomenon, built on the theories of Austin and Holmes, by the focus on normativity (strict sense), which is found by Kelsen in the "point of view of a disinterested third" (that appears in an ambiguous way, from the perspective of the norm as "scheme of interpretation" and the view of legal science that describes "norm" as "legal propositions"), while Hart builds his theory by means of the complementation of the external observer's point of view (from which not even Kelsen escapes) by considering the "internal point of view of the legal system", that is, from the point of view of those who use the rules as reasons and justification for criticism of the behavior of themselves and others, not just limited to describe and predict what the law is.

Under this new approach, the consideration of the positivity by means of laws and judgments was replaced by the analysis of "norms" or "social rules". These new designation of positive law are brought together in the form of a "legal system". In the context of this process of abstraction, imperativistic and realistic elaborations – by means of which coercion appeared as the core element of the definition of law – have to live with new images of the legal phenomenon, quite distinct from each other. The image (geometrically) constructed by Kelsen emphasizes the form of a hierarchy of valid norms. Hart, on the other hand, has (functionally) presented the legal phenomenon as a complex social practice similar to a game. In any way, despite the differences between these images, the legal theories of both authors point out to the notion of validity. Positive law is to be characterized as a system of legal valid norms. The place of the legal reason is then occupied by a conception of a proper rationality of law.

In addition to the approaches of facticity and normativity, with their respective investigations of coercion and validity, a third peculiar model of legal rationality is noticeable, whose construction has drawn the attention of many jurists, at least since the second half of the twentieth century . His field of development lies in the theories which are critical to the idea that positive law could be understood merely by means of the category of validity. In this context, it is argued that the notion of validity is not capable of dealing with the identification of rights, especially with regard to the complex situation of recognition of fundamental rights within the cases. To deal with these situations, in the context of legal theories, it is necessary to redirect the study of social practices, of which law is part, discussing the search for parameters in the process of applying the positive law.

In a certain way, the Hartian conception of a social rule as practical reason went in that direction. However, the rule of recognition theory proposed focus for understanding the social practices has not developed the issue of legal argumentation, nor offers elements for a

renewed discussion of aspects of political morality which are involved in law enforcement. On the one hand, Hart presented a quite traditional view of these themes, in terms of a theory of the "virtues" attributed to the laws and judicial decisions considered fair. On the other hand, Hart's theoretical project oscillated between a "descriptive sociology" and "hermeneutics". In a supposedly external, neutral and uncompromised level, Hart has submitted for conceptual analysis substantive and engaged issues, related to freedom, equality, rule of law and other political ideals. In this regard, what has been lately proposed as a model of legal rationality aims mainly at overcoming these limits by means of the construction of new approaches for understanding the recognition of fundamental rights as a part of the justification of legal arguments.

Among these new approaches, the balancing theory proposed by the German jurist Robert Alexy has great diffusion (particularly in Brazil). This approach differs from Hart's "internal point of view", in it understands legal argumentation from the point of view of a specific participant who demands for "correctness" in a legal decision. In these terms, a new image of the legal phenomenon became possible, not only as a normative system, but rather as a system of procedures (including the balancing oriented by the maxim of proportionality). However, Alexy's theory still intertwines the ideal and critical dimensions of correctness with the dimensions of validity. His thesis that the most essential characteristic of law is its dual nature, composed by coercion and correctness, offers abounding material to confirm this mixture, which brings so many ambiguities to his theory.

Therefore, the delineation of a new model of legal rationality seems more explicit and clear with "the judge's point of view" constructed by the integrity theory of Law by U.S. jurist Ronald Dworkin. Under this approach, it is possible to understand how judges who have the obligation of deciding hard cases do not see themselves as retroactive legislators, but as authors of the discovery of moral rights which the parties in the process have in each case. This discovery occurs through the practice of constructive interpretation, which emphasizes the image of the positive law as a chain connection novel and presents the legal phenomenon not only by means of politics, but also, and most importantly, as a phenomenon linked to political morality. Thus, the legal arguments developed in the grounds of judicial decisions allow us to understand the importance of proper justification for theoretical characterization of the rationality of law. Positive law is manifested as an attitude, interpretive and self-reflexive, directed to the politics in a broad sense, to make every citizen responsible for imagining what are the public commitments of their society to principles. Accordingly, for its emphasis on the aspect of justification, the model of legal reason that results from the points

of view constructed by Alexy and Dworkin can be denominated as shared rationality between law and political morality.

Based on these three great models of legal rationality developed since the crisis the notion of right reason in modernity, it is possible to see that the opposition centered on the notion of “positivism” is not adequate to characterize the development of theories of law that arise from nineteenth century. This development is linked to a debate marked by diversity. To understand this diversity, the debate needs to be related to different views and different images brought by lawyers for the formulation of new models of legal rationality, which now point to the external relations between law and force, sometimes only for the internal relations of the legal system, sometimes for the relationships and ethical implications of law and democracy. Thus, the debate on normativity seems best characterized by its division into three great debates: the debate on the basis of coercion (started in the nineteenth century), the discussion of the validity function (developed in the twentieth century) and the debate on the basis of justification (which marks the last 30 years).

In this sense, to rethink normativity in the contemporary law, I believe it´s appropriate to have in mind ideas already suggested by Joseph Raz: “Perhaps it is not time to refute legal positivism, but to forget the label and consider the views of various writers within that tradition on their own terms”[3]. Unlike Raz, however, I lay emphasis on the consideration of different points of view instead of the investigation of pure social facts. I believe it´s important to study the confrontation between the different “interpretive approaches” built by the legal theories. The study of images and points of view allows us to resume the investigation of rationality into the discussion of normativity. That's what I put for discussion in this workgroup.

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