



25th IVR World Congress
LAW SCIENCE AND TECHNOLOGY
Frankfurt am Main
15–20 August 2011

Paper Series

No. 086 / 2012

Series D

History of Philosophy; Hart, Kelsen, Radbruch, Habermas, Rawls; Luhmann; General
Theory of Norms, Positivism

Antônio Cota Marçal / Paula Maria Nasser Cury

Ethics and Science in Brazilian Legal Discourse

URN: urn:nbn:de:hebis:30:3-249449

This paper series has been produced using texts submitted by authors until April 2012.
No responsibility is assumed for the content of abstracts.

Conference Organizers:

Professor Dr. Dr. h.c. Ulfrid Neumann,
Goethe University, Frankfurt/Main
Professor Dr. Klaus Günther, Goethe
University, Frankfurt/Main; Speaker of
the Cluster of Excellence “The Formation
of Normative Orders”
Professor Dr. Lorenz Schulz M.A., Goethe
University, Frankfurt/Main

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

Antônio Cota Marçal, Belo Horizonte / Brazil

Paula Maria Nasser Cury*, Heidelberg / Germany

Ethics and Science in Brazilian Legal Discourse

Abstract: The Brazilian Constitution of 1988 declares Brazil as a Democratic State of Law. This formally democratic legal status has been facing difficulties when it comes to its material implementation. Brazilian legal procedures are still greatly influenced by the catholic heritage from Portugal in the times of colonization, translated in the present times into a strong moral set of dogmas that still reflects upon the legal production and interpretation in the country. Recently in Brazil, a debate brought to the Supremo Tribunal Federal, the Brazilian Federal Supreme Court, has evidenced the struggle between Ethics and Morality in the country's legal scenario. The focus of the discussion was the possibility of abortion of anencephalic fetuses (in Brazil, abortion is considered a crime against life). In order to properly ground its decision, the Court invited scientists, doctors, members of feminist movements and representatives of certain religions to a public dialogue, in which both scientific-technical and purely moral-religious arguments were presented. Although these procedures encouraged and promoted a democratic and pluralistic legal debate, it seems like the crucial point of the discussion were not taken into account: the scientific character of Law. This is the object of the present manuscript: in order to ensure an intersubjective construction and application of Law, this must be perceived as an Applied Social Science and judges, lawyers, legislators and all other legal actors must proceed in a scientific way. To illustrate the theme, the specific case of abortion of anencephalic fetuses will be mentioned through the text.

Keywords: Brazilian Legal System, Intersubjectivity, Scientificity, Law as an Applied Social Science.

I. Introduction

Although Brazil constitutionally declares itself a Democratic State of Law, committed to democracy and to the enforcement of human rights, in many aspects its material independence from religion and other spheres of subjective morality has not been reached yet. As a result, the recursion to anti-democratic and therefore authoritarian legal concepts is still commonplace in the current legal practices and debates. This has severe implications for the scientific status of the Brazilian legal system. For, if Law is to be considered a science and, as such, is to be rationally justified on the basis of non-dogmatic concepts which are open to review and actualization, then it must be possible to *proceed in a scientific way* in regard to the legal norm and the interpretation of its content.

* Scholarship holder – Cooperation PDAAD/CAPES (Deutscher Akademischer Austauschdienst/ Coordenação de Aperfeiçoamento de Pessoal de Nível Superior).

This impasse between Ethics and Morality, between intersubjective construction/interpretation and dogmatic content of Law; ultimately, between Law as Science and Law as some sort of heteronomous discourse, can be greatly exemplified by the so-called *ADPF 54-8*. The *ADPF* (Arguição de Descumprimento de Preceito Fundamental) is a constitutionally established means to report the violation of constitutional prescriptions. In the *ADPF 54-8*, the alleged offense to the constitutional order consists in the legal prohibition of abortion in the specific situation in which the fetus is proven to be anencephalic¹.

According to the penal legislation currently in force in Brazil, abortion is considered to be a crime against life, punishable with imprisonment for up to ten years. The practice of abortion would be technically not punishable only if the mother's life were at risk and could not be saved by other means, or if the pregnancy resulted from rape. To sustain this prohibition, Brazilian Law relies on a concept of "life" that is mostly grounded on religious and moral beliefs, a concept that is not based or even influenced by the actual scientific evidences regarding to the matter of life and its beginning. Even though the Brazilian Constitution states that Brazil is a secular State, legislation and legal decisions keep employing moral contents in the legal discourse, describing bad practices as "sinning behaviours", life as a "gift of god" and human person as "a complete and unchangeable entity". Ethics and catholic Morality are still considered synonymous by many. In the above-mentioned *ADPF 54-8*, the influence of such factors in the judicial argumentation itself is explicit. This can be demonstrated in the following parts of the debates, among others:

I am not convinced by the argument that the anencephalic fetus is condemned to death. All of us are, all of us were born to die. What cannot be subject to the power of disposal of the other people is the duration of life. This is the crucial juridical reason why not only infra-constitutional norms, but also the Constitution protects *life*. Because, from the moment in which, independently from the nosological classification of the anencephalic fetus, we transform it in object of others' power of disposal, this *life* would become a thing (res), [...]. (Min. Cezar Peluso, Questão de Ordem na *ADPF 54-8*, p. 93).

* * *

¹ The above-mentioned *ADPF 54-8* objectifies that the abortion of anencephalic fetuses be legally permitted in Brazil, under the argument of impossibility of survival outside the mother's uterus. This would lead, according to the claimer, to a situation that would not be technically considered 'abortion', but anticipation of birth. Besides, obliging a woman to hold a pregnancy under these conditions would be a violation of her dignity, of legality, freedom, autonomy and of her right to health. Science is, according to the claimers, able to demonstrate that there is no possibility of development of an autonomous life in such cases, and this scientific statement, achieved through medical exams and reports, should be a ground for the permission of a pregnancy's interruption. At first had the judge in charge of the *ADPF 54-8*, Marco Aurélio de Mello, asserted in an injunction decision that the mother has a constitutional right to interrupt the pregnancy when the fetus is anencephalic. Later, the other Ministers of the Brazilian Federal Supreme Court decided to revoke this injunction decision. The grounds given to support this position and the debates among the Ministers show that religious and therefore subjective moral aspects concerning the concept of life and the legal possibility of abortion were used as reasons to deny the injunction. After the revocation of the injunction that allowed the abortion of anencephalic fetuses, the course of the *ADPF 54-8* went on. A final decision about the matter is still to be reached by the Court.

We still have, in Court, a crucifix, but the separation between State/Church has happened a long time ago. I believe there must be, in case, technical parameters, constitutional parameters, and not moral, religious and even fundamentalist views about the theme. (Marco Aurélio, Questão de Ordem na *ADPF 54-8*, p. 83).

The present article intends to critically analyze, from the example of the *ADPF 54-8*, the scientific character of Law, which is ultimately at stake when it comes to questions as abortion and the concept of life.

II. Law and Scientificity

The scientific construction of reality by western modernity is, from the documental and analytical point of view, and considering its theoretical and practical results, one of the most successful ways of exercise of rationality. Confronted with myth, with opinion and with the Platonic-Aristotelian *episteme*, contemporaneous scientificity presents itself as *an egalitarian and intersubjective construction of objectivity*.

1. Science and scientificity as rational construction of objectivity

Initially circumscribed to the western European universe, the creation of *modern experimental science*, with mathematical expression and constructed on the basis of reciprocal and uninterrupted exchange between theory and practice was not an isolated fact². In this respect, many historical, political, climatic and intercultural phenomena must be considered. It is important to notice that the consolidation of modern Law as theoretical system and as social practice was contemporary to other scientific processes; it has assumed and kept, however, an epistemologically pre-modern or even anti-modern posture. The fact that Law has taken this position radically contrasts with the objectified effectiveness of the regulatory function performed by the legal system in relation to the other systems and subsystems of the politically organized society. Indeed, from the perspective of normative regulation, there is no means to be effective without assimilating the dynamic that institutes these subsystems and ignoring the practical-theoretical reference patterns adopted by the subsystems on which it is intended to act.

In the western European universe, the first step towards a self-structuring rationality was taken in Greece in the 5th and 4th centuries B.C., with the theoretical constitution of the *episteme* in contraposition to the *doxa*³. The *episteme*, translated to Latin as science and knowledge, had a highly differentiated and rationally grounded content as element or object

² Hans Blumenberg. *Die Legitimität der Neuzeit*. Frankfurt a. M.: Suhrkamp Verlag, 1966.

³ Bruno Snell. *Die Entdeckung des Geistes: Studien zur Entstehung des Denkens bei den Griechen*. Göttingen: Vandenhoeck&Ruprecht, 1975.

of knowledge. Aristotle⁴ identified this differentiation through the explicitation of *episteme* as the knowledge of the cause or causes of the thing in question. Such knowledge, differently from opinion or *doxa*, objectified to produce a precise and accurate knowledge of the object of knowledge, capable of explaining this object's real reasons or effective causes. Differently from the *episteme*, opinion doesn't have the stability of grounded knowledge and is not always true. For Plato and Aristotle, grounded knowledge was due to analysis and demonstration. This demonstratively grounded knowledge could lead to principles and causes, previous to the object of knowledge in time and space, as well as to hypotheses, axioms and definitions that would work as explicative elements. Aristotle used, among other resources and methods, perception, memory, induction and deduction to establish and ground such connections that are constitutive of knowledge. Knowledge that was so produced was considered epistemologically adequate knowledge. In the theoretical sphere, the Euclidian geometry, the Aristotelian logic, philosophy and physics were considered products of this rationality, as well as ethics, politics and rhetoric in the sphere of practical reason. In both cases, the *episteme*, as a work of the *logos* that aims at the universal and at the necessary, is a *rationally demonstrated, constructed objectivity*. Because of its axiomatic construction, on the one hand, and of its recourse to not completely demonstrable universal principles or primary causes, on the other hand, the resulting objective knowledge was extremely complex and its mastering demanded a good methodological initiation.

The generalized prevalence of monotheistic religions from the 4th century B.C. onwards (Judaism, Catholicism and, later, Islamism), its disqualifications of the mundane and the instrumentalist affirmations of the human finitude have discouraged and progressively precluded the development of the autonomous rationality started in Greece. The answers to present and possible problems would lie in the sacred texts. Institutionalized, religious belief excluded the exercise of rational and critical intersubjectivity. Indeed, its exercise became dismissed or banned because of the revealed truth, assumed or imposed as something finished and definitive. For Catholicism, the predominant religion for many centuries, man should worry about his soul, in consonance with the Plotinian Neoplatonism that has served as basis for the doctrinal formulations of the Patristic. The millenarianism grounded on the belief in the return of Christ has overcome the asceticism and the almost simultaneous monarchism, consolidated by Bento de Nursia. As a consequence, it was no longer justifiable to spend time and effort with an "impotent" rationality.

⁴ Aristoteles. *Lehre vom Beweis oder Zweite Analytik*. Hamburg: Felix Meiner Verlag, 1976; *La Métaphysique*. Paris: Librairie Philosophique J. Vrin, 1974.

From the 11th century onwards, however, various events and factors contributed to the gradual resumption of an autonomous exercise of rationality, without any form of control but the one that derived from the *ethos* of the free rational action. In this process, *logos* and *ethos* would be explicitly associated. Personal engagement, the risks assumed in face of the teleological and political orders, the rupture with patterns and beliefs that were generally accepted due to tradition or imposition, demonstrate the presence of an ethical component of authenticity and veracity in the performance of actors as Guillaume de Conches, Petrus Abaelardus, Gioacchino da Fiore, Sygerius de Brabantia, Petrus Johannes Olivi, Marguerite Porete, Nicolaus von Kues, Jakob Böhme, Raimundus Lullus, Nikolaus Copernicus, Galileo Galilei, Giordano Bruno, considered at the time visionaries, bandits, heretics, ignorant or crazy⁵.

The events that started this process were the Crusades. Motivated by religious reasons or by political strategies, the Crusades led the Christian Europeans to know themselves through their *other* and initiated the process of their rational majority. A Law that was different from the canonic and a Christianity that was diverse from the roman in Constantinople and its domains. A different religion spread all over the Middle East and the north of Africa. The participants of the Crusades noticed that it was possible to be happy and personally free under a belief that was different from the one they had learned and had conceived as the only truth. They noticed their delay in terms of knowledge and techniques such as mathematics, medicine, astronomy and philosophy. They heard about the existence, in Cairo, of an advanced teaching institution (Al-Azahr) that would be later implemented in Europe and named university.

Short after the first Crusade, the Holy Roman Empire of the West began a long period (11th-18th centuries) of persecutions (torture, exclusions and executions) to internal dissidents (heretics and witches) and of bloody wars against populations that had non-Christian beliefs⁶. Nonetheless, the intensification of intercultural exchange and the Pope's progressive lost of credibility made the *personal individuality* revive and reason ended up prevailing in western Europe. A new *scientificity* was born. The progressive consolidation of the modern European national States and their respective collective individualities, the reception and dissemination of the *Codex Juris Civilis* in contraposition to Canonic Law, the rediscovery and dissemination of Aristotle's writings and its following influence in the Christian theology, the

⁵ B. Gräfrath. *Ketzer, Dilettanten und Genies: Grenzgänger der Philosophie*. Hamburg: 1993; Markus Knapp und Theo Kobusch. *Querdenker: Visionäre und Aussenseiter in Philosophie und Theologie*. Darmstadt: Wissenschaftliche Buchgesellschaft, 2005.

⁶ Georg Baudler. *Gewalt in den Weltreligionen*. Darmstadt: Wissenschaftliche Buchgesellschaft, 2005.

successive and always repressed attempts at reform inside the Church, the formation and uncontrollable outbreak of personal individuality and the construction of its autonomy in the Lutheran Reform and in the experimental Science constitute different stages of this process of demystification of transcendentalized life.

Modern Science emerged from a long course of persecutions, camouflages, confrontations and self-affirmation. As the philosophical schools were closed and the non-canonic texts were forbidden, only an externally imposed truth could prevail. Although this apparent unanimity regarding beliefs and practices has persisted for centuries, it was artificial and irrational. The contact with other religions, practices and cultures opened the perception of many. Those who investigated by themselves had to risk their own lives to do it. Climatic cycles and the consequent poor harvest and hunger, as well as the plagues, propitiated the formulation of questions that Theology and its reference to sin as the ground of all those events could no longer answer. First the alchemists, then the members of secret societies and finally the scientists knew that the grounds for such phenomena had to be searched in reasons and causes that belonged to the same dimension of reality as the one of the events they wanted to fight against.

In this context, modern experimental Science (with its method of observation of data, construction of hypotheses, identification and verification of consequences and variables, elaboration of universal theoretical statements, construction of models, application of produced knowledge in technologies) revealed itself as the *most egalitarian way of exercise of rationality*. Indeed, all of the mentioned stages and methodological processes of construction of new scientific knowledge are open and, in this process, the exercise of individual subjectivity prevails. The one who observes and experiments, who evaluates and identifies mistakes, who proposes alternatives for correction, who generalizes and formulates laws and theories or, finally, the one who produces science is each and every member of the community. What now distinguishes this process is the fact that, being all the participants rational agents, *the control of the practice of rationality is intersubjective and no longer extrinsic to reason*. Thus, modern experimental science constitutes itself as *a social practice of intersubjective construction of every possible rational objectivity*. As such, modern scientificity conceives itself as *a continued intersubjective construction that can always be subject to review*.

2. Contemporary Scientificity and Law as an Applied Social Science

Modern Science has consolidated itself because of its methodology based on a wide exercise of critical intersubjectivity and of the technological, almost immediate results that it has started to provide. Though, modern scientificity became more consistent when it accomplished its self-critical process and integrated to *logos* and *ethos* the dimension of *pathos*. Explicated since the 17th and 18th centuries, the *pathos* is the dimension of emotions and feelings, interests and values, desires and expectations. It deals with a constitutive element of human finitude and historicity and, as such, it is the starter and propellant of the human rational agent's performances in society.

In the sphere of scientific and social practices, *authority, tradition, subjective beliefs and religious convictions* shared by many haven't been considered scientific arguments since the beginning of Modernity. The Enlightenment reflected and reinforced this way of understanding physical, social and cultural reality. Observing, measuring, weighting, registering, comparing, formulating and verifying hypotheses, permanently criticizing results and inferences in the light of systematically built statements and theories gradually became standardized procedures. Repeating experiences and experimentations and expressing their results in mathematical univocal formulations give the new physical, chemical and biological sciences a high degree of certainty and validity, to the extent that they be considered epistemological and methodological reference to the other areas of knowledge. Newton led this process to its peak when he united investigations about universal gravity and about the axioms of Mechanics in one unique general theory of Physics.

Critical, both internal and external to science, progressively forged the producer of scientific knowledge as the new inventor of human social, cultural and environmental reality. Empiricism and Rationalism, Materialism and Idealism were expressions of the discussions and confrontations concerning the grounding of knowledge in general and of scientific knowledge in particular. This exercise of intersubjectivity turned religious belief into a private, subjective matter, while science assumed the management of intersubjectively objective knowledge in the public and private spheres. Conditioned by technical and methodological instruments and resources provided by the rational human agent and the perspectives opened by the *pathos, truth became a relational and intersubjective construction in cultural time and space.*

Locke and Hume, Leibniz and Kant, Rousseau, as well as Julien de La Mettrie, Paul Henry d'Holbach, Hegel and his criticism to idealism and metaphysic were different steps in this process of self-constitution and self-comprehension of scientificity. From this long and

fruitful interaction among multiple specialists resulted the understanding that reality is a process that cannot be reduced to things and artifacts given to perception. Elements of different dimensions integrate this process, such as conceptual contents, beliefs and convictions, data and facts, hypotheses, theories, systems, institutions, interests, values and virtual entities. Reality became what man makes of himself and of the state of things in which he acts and interacts.

While the above-mentioned process was developed through the conception and practice of scientificity, Law assumed the function previously performed by the ecclesiastical institution (church) regarding *right and wrong* in the social and political domains. The regulation of public and private behaviour was, then, no longer a matter of religious belief. Correctness and its regulatory content became also *an intersubjective construction* shared by the members of politically organized groups.

However, Law kept seeing itself as a subordinated system to support and preserve the established power and order. It kept using the same dead language (Latin) that the population of the modern States did not know, it kept making use of pomp and rituals from the past and, above all, it did not change its authoritarian and conservative posture in performing its functions. In brief words, Law did not constitute itself as science and kept speaking for itself, which, by the way, is consistent with the self-alienation that Law has always kept in relation to a reality in a permanent state of construction. The use of previously constituted rituals and formulas that avoid surprises demands less rational effort and provides more stability. Although legislators, judges, theorists and other agents of Law were confronted with Historicism, with the idealistic movement of systematization of practices and knowledge, with Positivism and the new social and political dynamic towards a higher democratization, they ignored the epistemological change that surrounded them. To stick firmly to logic in the grounding of Law and the generalized employment of subsumption as the method of application of norms are perhaps the most significant characteristics of Law in this period of time. In clear opposition to what was happening in science in general, Law (particularly the Legislature and the Judiciary) kept excluding citizens and specialists in different areas of knowledge from the tasks of critical elaboration, construction and development of Law and its practices. Law turned itself into a world apart from the real social and political world.

The claim that Law, as an applied social science, could not have adopted the scientific methodology in development in those times cannot be theoretically justified and has no historic grounds. Each area of scientific knowledge has specificities and, even so, they keep using scientific procedures and methodologies. What happens is that Law has not critically

followed the methodological movement that took place after Kant's critics to the metaphysical grounding of Science.

Indeed, in the second half of the 19th century and under the influence of Romanticism, especially that from Schleiermacher, Wilhelm Dilthey (1831-1911) sustained the existence of a dichotomy between understanding and explaining – these would be, respectively, the methods of human sciences (*Geisteswissenschaften*) and natural sciences (*Naturwissenschaften*). While the natural scientist would explain the phenomena of the physical world based on the construction of hypotheses and its correlation to collected data and observed facts, the scientist of the spirit would understand historical and social reality based on his own life experiences and actions. Institutions, rules, works and monuments produced by humans would be the primordial objects of understanding because they contained the meanings conferred to the world by the human agent⁷. This comprehension of science opposes understanding and explaining and, besides, wrongly names 'methods' complex rational activities, mostly logical and epistemological, present in all sorts of scientific knowledge.

Law's alienation in regard to the methodological changes was shared also by philosophers, psychologists, sociologists and other specialists considered members of the 'human or cultural sciences'. Fact is that, contemporary to Dilthey's initiative and independent from it, some scientists and philosophers promoted, in the Mathematics and in Logics, a movement destined to rethinking the grounds of these sciences. This initiative, *in a route opposite to the one followed by Dilthey*, would end up methodologically approximating all sciences.

Frege (1848-1925), physicist, chemist, mathematician and logician, and Peirce (1839-1914), physicist, chemist, astronomer and philosopher, were well-known representatives of this movement, in which Hilbert, Dedekind, Cantor, Peano and, by extension, Carnap, Bertrand Russell and Edmund Husserl also took part. Central objects of the works of these researchers were language, meta-language, the construction of a technical language for science, the creation of new methods to develop and ground scientific conceptual contents. The results of these studies decisively influenced the Philosophy of the 20th century, from Analytical Philosophy to the present Neopragmatism, especially the Philosophies of Science and Language. This movement, developed through dialogues, live discussions and exchange of letters, was an explicit exercise of interactive production in the community of scientists.

⁷ W. Dilthey. *Der Aufbau der geschichtlichen Welt in den Geisteswissenschaften*. Frankfurt a. M.: Suhrkamp Verlag, 1974.

As to the methodology of Law, an applied social science, it is important to note that the self-criticism initiated in the formal sciences was extended to the other natural sciences and ended up introducing, in the 20th century, the ideas of *finitude*, *historicity* and *the qualitative element* in the methodology and self-comprehension of the so-called *hard* sciences. Before and independently from any competent questioning about scientific positivism, from Werner Heisenberg (1901-1976) to Thomas Kuhn (1922-1996), through Kurt Gödel (1906-1978) and Gaston Bachelard (1884-1962), the natural sciences themselves demonstrated that the ‘exact’ sciences are also submitted to internal and external limits. And it couldn’t be different, since such sciences are produced in finite and contingent time and space, through the employment of the available methods and techniques and in concurrence with interests and values of the societies in which the scientists live and act.

Finitude and contingency start to integrate the self-comprehension of natural sciences in the first decades of the 20th century, as a result of critical work. The principle of indetermination, formulated by Heisenberg in 1927, according to which, when it comes to physical magnitudes, quantum mechanics cannot precisely and simultaneously determine variables such as place, impulse, time and energy, showed that the sciences are not effectively exact and necessary, but operate with probabilities and contingencies⁸. Another element, this time concerning the concept of finitude, was identified in researches about the specification of a comprehensive system of axioms, able to simultaneously ground mathematics and to prevent the derivation of contradictions. Gödel, in 1931, formulated the principle of incompleteness of formal systems. Incompleteness consists in the fact that every system, even a formal one, is not able to justify and explain itself without using additional external elements⁹.

The process of intersubjective construction of natural sciences kept on and integrated, with Bachelard and Thomas Kuhn, *historicity* and social *practices* in the construction of science. Researcher of the epistemology of natural sciences, Gastón Bachelard forged the concept of epistemological obstacles. These consist of convictions and previous knowledge, normally assumed without questioning and criticizing. Observation and the history of science would have led Bachelard to sustain that scientific progress is mostly due to the correction of previously groundless knowledge, turned into obstacles to science. In this context, Bachelard affirms that science is an approximated, precarious knowledge for it bases itself on

⁸ Ulrich Nortmann. *Unschärfe Welt? Was Philosophen über Quantenmechanik wissen möchten*. 2. Auflage. Darmstadt: Wissenschaftliche Buchgesellschaft, 2009.

⁹ Rebecca Goldstein. *Incompleteness – The Proof and Paradox of Kurt Gödel*. New York: W. W. Norton & Company, 2005.

experiences and verifications that can be contested and overcome at any time and place¹⁰. In his turn, Thomas Kuhn provided another element to the assimilation of the qualitative factor by the natural sciences when he showed that science does not progress linearly, but due to self-corrections that can represent deep changes. Neither in its results nor in its self-constitution is science absolute. Science is a complex process of theoretical and practical correlations, a network of relationships, in which history, values, beliefs, theories and practices interpenetrate each other and reciprocally interact¹¹.

Today, quantitative and qualitative methods are currently used in human and natural sciences. It is also considered commonplace that observation interferes with what is being observed. It is a fact, however, that the natural sciences advanced more in the critic to scientificism, when compared to the human sciences. In this sense, it is symptomatic that, still in the 1960s, philosophers and sociologists were debating the scientificist positivism, while not even one natural or formal scientist took part in this discussion anymore¹². An even clearer symptom is that the Philosophy and Theory of Law are still discussing Positivism and Post-Positivism in present times¹³.

It is due to the above-mentioned processes and arguments that it can be sustained that science is an intersubjective construction of the rationally possible objectivity, in which authority, tradition and appeal to the transmundane are not scientific reasons. In case there weren't epistemological and practical grounds for the constitution of Law as a science, the plurality and the complexity of the contemporary society and the rational normativity of the Democratic State of Law would suffice to make the legislator and other agents behave scientifically.

3. Modern rationality and Brazilian Law

In the Brazilian legal production, the participation of scientists and specialists from various technical areas is insignificant, not encouraged or demanded. Due to the passivity that results from the authoritarianism and centralism dominating in the Brazilian legal and cultural tradition, the universities and faculties of Law do not implement opportunities of participation, through, for example, the elaboration and presentation of projects of law, or the intervention in the public discussion of projects under analysis. The Brazilian legislator, with

¹⁰ G. Bachelard. *Essai sur la Connaissance approchée*. Troisième édition. Paris: Librairie Philosophique J. Vrin, 1969.

¹¹ Thomas Kuhn. *Die Struktur wissenschaftlicher Revolutionen*. Frankfurt a. M.: Suhrkamp Verlag, 1973.

¹² Th. Adorno et alii. *Der Positivismusstreit in der deutschen Soziologie*. Darmstadt und Neuwied: Hermann Leuchterhand Verlag, 1972.

¹³ ALEXY, Robert. *The Argument from Injustice. A reply to Legal Positivism*. Oxford: Oxford University Press, 2002.

few exceptions, does not have technical qualification in logistics and, generally, does not have basic knowledge of Law, indispensable to an appropriated legislative performance. It is also known that the technical staff, that should compensate the inexistence of specialized education and information among the legislators, is not composed of specialists, but mostly of legislators' relatives and party fellows.

In a Democratic State of Law, secular and plural, the grounds for legal practices cannot lie in the judge's or in the legislator's particular religious beliefs and subjective convictions. Ethical transsubjective duties and public reasons, as well as evidence and results of scientific researches and technological improvements, must constitute his argumentative basis. In order to implement this, it is necessary that there be criticism inside and outside the Legislative and the Judiciary, and above all in the judiciary apparatus, including its staff.

Most of the times, judges still behave as if they were above the law and out of its reach. Many act as if they were owners of the claims to be judged, of the Courts they integrate, and place themselves as superiors to lawyers and parties, as if there were a hierarchy among them. In Brazil, there is no effective control of the Judiciary and its acts by the holders of the State of Law – the citizens. The Brazilian Judiciary is not sufficiently democratic, secular, pluralistic and scientific.

The other agents of Law, especially lawyers and prosecutors, most of the times do not have a scientific legal education or a perspective of Law as an intersubjective, permanent construction. The citizen and the civil society do not participate as would be required in a Democratic State of Law. Exceptions are due to individual efforts, opening to other legal systems and international experiences. The faculties of Law are, in great part, endogenic in selecting their professors and rarely take part in interdisciplinary activities in and outside the university. The method of teaching is dogmatic and monologic, the use of manuals is generalized. The language – as happens in the Judiciary as a whole – is archaic and unintelligible to the common citizen, and an uncritical legalism dominates. Also under this aspect are the academic practices mostly retrograde, not scientific.

4. Finitude and self-determination versus pre-modernity

The legal conservatism has an insidious face, whose consequences are aggravated when implemented in a country with authoritarian tradition like Brazil, where the civil society did not conquer, by its own initiative, rights and guarantees. Theoretically, Brazilian Law would be formulated by the State's apparatus to protect the interests of each and every one of its citizens. When it comes to practice, however, a kind of paternalism prevails. It consists in not

opening space for society to decide which interests are to be protected. Ignoring ethnical and cultural plurality, the legislative process bases itself on Christianity. Expressions like ‘the gift of life’, ‘interfering in the course of nature is an usurpation of the Creator’s role’, ‘the grace of forgiveness’, ‘under the protection of God’, both in legal decisions and in other public acts, proliferate in the legal scenario. Besides, religious symbols and even rituals are present in the places where judgments and public practices take place. Associated to the lack of scientificity in the reflection about Law and its construction, these beliefs exacerbate the idea of finitude and restrict the self-determination. Consequently, risk and unpredictability are no longer seen as contingencies that are constitutive of life itself, including human life. People fear risk and for this reason delegate the function of dealing with unpredictability to the State. But fear is neither scientifically nor rationally an adequate means to face risk and unpredictability. Rational means to do it are still the identification of risk factors and possible unwanted effects of acts or new technologies and the consequent action to avoid or restrict the possibility that they occur. Under these aspects, the enlightened assumption of one’s own life, of one’s choices and decisions and the vindication of the space to exercise private autonomy and therefore to promote personal and collective self-realization are unavoidable.

Another pre-modern element to be overcome in the context of new Technologies and scientific knowledge is teleology. Although science, after intensive discussion since the Renaissance, has abandoned an old Aristotelian finalist conception, Law insists on keeping its old conceptual content. Teleology has to do with purposes, objectives and functions, in the context of explanations and justifications for behaviours and states of affairs. According to Aristotle, inanimate things searched for places and states that were natural to their respective species, the same way rational beings were driven by natural development and growth to a stage of maturity. Things were so because there was a final cause at stake. Modern experimental science has not subscribed this attribution of proposals to inanimate objects, except to those artifacts that are produced to reach certain objectives through the manipulation of controllably induced physical-chemical reactions. On the other side, animals and rational agents are governed by purposes and goals. Thus, the problem is not denying the teleology of intentional action, but considering teleology as a pre-ordination of reality, an extrinsic direction that involves things and rational agents as unavoidable causes. This is, for example, the power attributed to ‘nature’ in situations such as the generation of life and the event of death. Lottery and fate would perhaps be the most appropriate denominations for these two situations. Because of his religious and cultural tradition, man behaves as if he were impotent and as if it were forbidden to act proactively in support of Law. Euthanasia and abortion of

anencephalic fetuses exemplify such situation. Being submissive to these restrictions can mean giving up on rationality and ceasing to be the author of one's own self-realization.

III. Conclusion

It can be noticed that not only Legislative and Judiciary as formal instances of production and development of Law act in a pre-modern, not democratic way. Civil society seems to be inert in face of this situation. Under the Portuguese colonial regime, that did not experience the Enlightenment and was initially connected to Canonic Law via Patronage, and even after the proclamation of the Brazilian republic, Brazil has never been able to educate the subjects of Law and holders of the State to the exercise of citizenship. Although an archaic Penal Code is still in force, a Code that contradicts the Constitution of 1988, although the individuals are governed by a civil process in which the citizen has little or even no voice and the judge has absolute control over the procedures, only now, twenty-four years after the re-democratization of the country, the first attempts to criticize and change positive Law start to arise. Not only agents and thinkers of Law, but also universities and faculties of Law avoid taking part in the legislative process, in the development of Law, in the public exercise of the right to criticize and disagree. As a result, the State is formally, but not effectively democratic – not effectively democratic because, among other reasons, the Legislative has not yet regulated important aspects of the Constitution, because the Judiciary still decides on the basis of private, moral beliefs, because the lawyers themselves frequently have a shy, bad performance.

The *ADPF 54-8* illustrates well this situation. Not only its content itself but also the posture assumed by some of the ones involved in it, the arguments presented, the language and even the formalist development of the debates evidence the current pre-modern status of Law and the legal practices in Brazil.

Address:

Antônio Cota Marçal
Programa de Pós-Graduação em Direito
PUC Minas
Av. Dom José Gaspar 500
CEP 30535-901
Belo Horizonte / Brazil

Paula Maria Nasser Cury
Friedrich-Ebert-Anlage 56
69117 Heidelberg DE