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**MACHADO DE ASSIS AND THE MODERN LEGAL IMAGINARY
IN BRAZIL: CONTRIBUTIONS TO THE SCIENTIFIC
DEVELOPMENT OF LEGAL POSITIVISM**

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ABSTRACT: The text analyzes the legal-political imaginary of legal positivism in Brazil in interface with the literature by Machado de Assis. It recovers the main hermeneutical traditions and traces an evaluation of positivism in times of crisis.

KEYWORDS: hermeneutic schools; Legal positivism; Brazilian literature.

INTRODUCTION

Legal institutions and norms do not exist separately from narratives that demarcate and give meaning to them. Law is inscribed in the context of discourses that produce meanings and thus cannot be understood merely as a prescription to be obeyed, but it constitutes the *habitus*, the ground of life on which men are inserted. Thus, History, Literature and Law are intertwined in a normative dimension shaped on the material reality and by the imaginary, both allowing the extension of juridical reflection.

In reality, the legal system does not only concern a normative *corpus*, but it expresses a language and also a mythology that would be responsible for models of behavior. In them, the legacies of the past can be found in the history of law in the day-to-day experience, either in the frustration of

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Custódio, the character exposed by Machado de Assis, or in the arbitrary differentiation between individuals, as well as in criticism toward state power.

In this way, the text proposes to examine the political-juridical imaginary of positivism in Brazil, from the interlocution with the literature of Machado de Assis. It also proposes an evaluation of positivism and the impasses and fractures of the theory of law in contemporary Brazil.

Based on these assumptions, the article was organized into four topics. They are: Introduction; Literature as mission: the case of Machado de Assis; The positivists and the legal-political imaginary in Brazil, which includes: a) the Comtean conception; b) the exegetical; c) the pandecentist; d) jurisprudential; e) normativist; f) of hermeneutic carnavalization (Luis Alberto Warat) and an inquiry into the status of positivism today; the final considerations and references.

The critical-bibliographic method was used in the writing of the paper. The text intends to present the different imaginaries and to show how they contribute to the production of the hermeneutic “meaning” of the law, indicating their problems and insufficiencies, in order to contribute, even if precariously, to the better understanding of the area.

LITERATURE AS A POSSIBILITY OF EXPRESSION OF THE LAW: THE CASE OF MACHADO DE ASSIS

First of all, there is no way to define literature only as an aesthetic discourse and law as an instrumental discourse. Both are narrative and insinuate interpretations, rhetoric, meanings and representations.

The *case method*, discussed below, promotes the encounter between different positivism meanings that require reflection. It is a text that acts as a basis both for law and for literature, since it produces a link between fiction and normativity, in which the pedagogical use of literature serves to understand law (Godoy, 2008, p. 75).

To understand the scope of this method, it is necessary, firstly, to present the writer Machado de Assis (1839-1908), who is considered one of the most important Brazilian authors. A chronicler of Brazilian society's customs of the nineteenth century, his texts constantly deal with the complex reality that gives conditions to the existence of law (Godoy, 2008, p. 80). He narrates existence as a theater stage in which the author is a

kind of counter-reporter or playwright who does everything to not interfere in the fate of his characters, because he perceived, as few have, the human stinginess and the precarious lot of the individual (Bosi, 2008, p. 176), making them the food of their daily reflection. One of these passages is in the work *Esaú e Jacó*, in chapter LXIII, entitled “Tabuleta nova” (“New table”), which records an emblematic passage, described in the sequence.

At the time of the transition from the Brazilian Empire to the Republic, Custódio, character of the narrative, had a Confectionery that was called “Confectionery of the Empire”. With the ascension of the Republic, Custódio asks Aires for advice, whether or not to replace the sign for “Confectionery of the Republic”. Aires hesitates, does not know what to say. Perhaps it would be better to write “Confectionery of Custódio’s” (Assis, 1994, p. 78).

Of the episode, it is necessary to register that the proclamation of the Republic, for Custódio, was only a change in the tablet, since the confectionery would continue the same. Here law appears as a force that authorizes transformations and reforms within the normative discourse (Cover, 2016, p. 194), which, by the author’s writing, competes with other types of *nomos*. In one sentence, the law qualifies and encloses the discourse of power in an official, bureaucratic world (Godoy, 2008, p. 105), far from sweets.

The example of the Machado character is an archetype of the absence of citizenship in Rio de Janeiro at the time and is in line with the expression of Aristides Lobo, a journalist who wrote, in the days following the proclamation of the Republic, that the people had witnessed in a bestialized awe² the barracks in Campo de Santana, in the then capital of the country.

With the change in the form of government to Republic, there was the expectation of greater political participation of the people. Paradoxically, in the first election of the republican period, there was a reduction in the number of voters able to vote in relation to the last elections of the monarchy (Carvalho, 2003b, p. 395).

² The expression is of the journalist Aristides Lôbo, who presently saw the proclamation of the Republic, in 1889.

In addition, the social and political readjustment of the new regime was marked by a continuous series of political crises: 1889, 1891, 1893, 1904 and 1907. All of them were characterized by waves of “depositions”, “goring”, “exiles”, and “deportations” (Sevcenko, 2003, p. 36). The Republic became more of the same. There was a gap between the majority of the people and the government, if not distrust or open antagonism (Carvalho, 2003b, p. 83). Hopes failed as a result of the uprising and the search for advantage on the part of the men of the new regime.

It may seem strange to reflect on the republican period with Machado de Assis, since the work of the “wizard of Cosme Velho” is associated with the Second Reign. However, Machado’s literature is full of surprises. He was a civil servant of the Empire in the Ministry of Agriculture, Commerce and Public Works and, in the Republic, of the Ministry of Industry, Transport and Public Works, he worked in the public service for some thirty-five years without adhering to any of the parties or tendencies of Parliament or of Congress and without expressing any preferences for political systems (Sevcenko 200, p. 303).

If law is conceived as the land of security, stability, and certainty that is produced by the modern dogmas of the legislature’s completeness of norm and omniscience, literature is the space of the unexpected. If law works with the notion of person, of an abstract character, literature is the terrain of the character, of the individual, who exposes the concrete to the pretensions of the universal rationality of law.

Machado clearly identifies that the landowning patronage and rising scientific and technical elites have made it impossible for the country to create alternatives of democratic social promotion projects, which constrained the country to the election of the pen and the policy of governors. More specifically, this was done by introducing the discourse of order and progress into a spurious union between the “old men” (yesterday’s monarchists) and the “new” (today’s republicans). The new ideas would have been condemned to decay, suffocated by “order”, an indispensable condition of “progress” (Sevcenko 2003, p. 309).

Given this context, political actions were of little importance and, usually, responses to what was considered to be the will of the authorities.

It was, so to speak, a negative citizenship, in which the people had no place in the political system. Brazil was, for citizens, an abstract reality and, in the face of great national events, the people watched perhaps distant, perhaps fearful, perhaps amused (Carvalho, 2003a, p. 83).

The case of Machado de Assis is exemplary to mark the configuration in this key period of transition of Brazilian society, of narrative formulas that denounced the official commitment to fix images of a new beginning, be it a new identity, a new literature, a new political system or a New law that would be endowed with their own promising projects, against which any other languages was obsolete or inept, so that they could only be commented upon and criticized in the very terms in which they were proposed (Sevcenko, 2003, p. 311, adapted).

The current situation does not seem to be very different. Political compositions, slogans and political associations are altered so that everything can remain in the same place. Machado de Assis' account of the sign change at the Confectionery shows that it is the appearances that govern and that politics is often conceived as a confectionery that has the purpose of refracting itself with the masters of power, and not of changing.

THE POSITIVISTS AND THE POLITICAL-JURIDICAL IMAGINARY IN BRAZIL

In Brazil, the state preceded the nation and even the people. This assertion presents the complexity of the *civitas status* in the ruts of the Old Regime in the Colony.

With the arrival of the Bragantine royal family in Rio de Janeiro in 1808, the Colony became the seat of a European monarchy. The governing functions of the Portuguese Empire were then exercised in Rio de Janeiro, which transformed customs, urban landscape, law, institutions, history and memory of the city.

The problem of citizenship in the Colony occurred differently from Europe. The term citizenship comes from *cives*, city, and, at the beginning of the 19th century, there are not really *cities* in Portuguese America. The rights of freedom and civil rights are incipient. The rupture with Portugal is not a well-designed project, but an inevitable one. The logic of the new

National State preserves the Portuguese institutions. There is, in fact, no rupture, which does not mean the presence of consensus.

For Ricardo Marcelo Fonseca (2008, p. 74),

Brazilian “modernity”, whose constitution has been so long sought since independence, ends up being inserted “in the middle”, or rather, from a very strong filter of the pre-revolutionary and pre-liberal conceptions that, in the nineteenth century France (to take an example), had already been largely placed under the rubble along with the old regime.

The option for eclecticism (liberalism in politics, privatism in family, slavery in economics), described by João Cruz Costa (1956), which is the basis of patrimonialism, and the absence of philosophy, supplied by literature and history as models of thinking, inform the precariousness of the situation in the nascent national state. The problem of difficulty/absence of reflection is not of “talent”, but of education. In fact, obsession with origin has been a characteristic of the intellectual work: political formation in Brazil, economic formation in Brazil, formation of Brazilian literature, among others. In spite of this, inconclusiveness is the rule, which would separate us from the European tradition, which associates the life of the spirit with the whole of social life. Thus, the reflective activity was carried out by writers, Jose Alencar, with the myth of the foundation of America, an anagram of Iracema, Machado de Assis, and in the twentieth century, by the so-called “interpreters of Brazil”.

In the history of Latin America, and not only in Brazil, the novels went hand in hand with the republican ideology and were often linked through authors who prepared national projects through fiction prose and implemented fictions of foundation through campaigns of legislative or military characteristics (Sommer, 2004, p. 22). In fact, if the Revolution was political work, the legal work was the Code, and the novel was the literary legacy of the rise of the individual.

If the concept of nation was shaped by Romanticism, especially by the pen of Alencar, the conception of people would have to wait for the twentieth century, although it is evoked in an organic and abstract way in the texts of the nineteenth century. Moreover, the role of the people in the process of independence, if not of simple spectators, was not a decisive role

either. Its presence was greater in the coastal cities and, in the countryside, was diminutive.

Gradually, the term citizen was opposed to servant and vassal. New political and social role was defined and replaced the designation *troops and people*, characteristics of the Old Regime. In being born of modernity, the citizen of the world was reporting to the relations between individual and society, and individual and king. Participation became more intense and more rights were demanded, which led to the internalization of the need to fulfill obligations before the State, and, *pari passu*, it took the same fulfillment of functions as protection and defense of order. The individual learned that the values of public power should be preserved, and that for that, the people had an important role to play.

It was in this broth of culture that flourished the Comtean imaginary. Before following the step it is necessary to demarcate, more specifically, the notion of imaginary (Warat, 1990, p. 67). The institution of a society needs a set of imaginary meanings, organizers and constituents. They are a response to chaos, their symbolic negation, and they aim at imparting meaning to the being, the world, to society. They conceal and mask the abyss of existence (chaos), in a simulacrum that avoids man's confrontation with himself, by means of imaginary compensations. In this context, unveiling the places of speech and their problems is what will be done next.

The Comtean imaginary

It had not yet been a month since the proclamation of the Republic when the French charge d'affaires in Rio de Janeiro, Camille Blondel, wrote down about the attempt of the November 15 winners to build a version of the facts intended for history (Carvalho, 1990, p. 35).

The fixation of the republican pantheon was a narrative dispute over the definition of the new regime. The examination of the dispute of the founding myth can contribute to clarify the symbolism of the proclamation of the Republic and the role that Comtean positivism played in this process.

Republican positivism, in its various aspects, argued that the theological-military phase, embodied by the Monarchy, should be replaced by the positive phase of the Republic, which would be the rule of reason. In addition, it defended the separation of State and Church, appealed to a

strong Executive (the idea of a republican dictatorship had a breath for a significant portion of the Brazilian positivists), with a conception of enlightened despotism that was very dear to the military and, lastly, to the proposal of incorporation of the proletariat to the modern society (Carvalho, 1990, p. 27).

These conceptions are developed between the middle of the nineteenth century and the beginning of the twentieth century, in which a scientific view of the world assumes a central role. Ideas such as: a) the notion of matter is the ultimate reality; b) living organisms can be disenchanting, scanned and explained by mechanical means, perceptions that spread across all areas of knowledge and are felt, also, in law, politics and literature (Pino, 2015, p. 169).

As is well known, the Republic was proclaimed in an extremely unequal and hierarchical society and at a time of intense financial speculation caused by the money emanations made by the Union to meet the needs of the abolition of slaves. The intellectuals, especially the Republicans, were worried about the difficulties of implementing the new form of government. The central issue of the debate revolved around the relationship between the public and the private, the individual and the community (Carvalho, 1990, p. 29-30).

It is from this time the view that Iberian culture had an emphasis on community character and integration, while the Anglo-Saxons would bet on the prevalence of the individual.

To reject this argument, Jessé Souza, in his recent book *A tolice da inteligência brasileira (The Foolishness of Brazilian Intelligence)*, claims that the social science texts in Brazil have been invoked as a mantra to justify historical situations of exclusion, as if the thesis of the supposed Brazilian singularity intended to articulate absolutely the existence of a people with singular, unique attributes that would function as a “second skin” for Brazilians (Souza, 2015, p. 101).

Perhaps, the permanent search for identity is indicative of its absence. As far as Comtean positivism was concerned, he failed to create a collective identity for the country, a task that would be fulfilled by the intellectuals of the Old Republic, especially by the modernists of 1922.

The exegetical imaginary

The Comtean matrix is densely coupled with the political philosophy and the advent of the Social Sciences. Differently, exegetical positivism is a kind of legal positivism, French-based, constructed from the validity of codification.

Under the rubble of the Old Regime, modern society bets on individual initiative, on choice, and thus the contract becomes an instrument of the bourgeois in their triumphal march in Modernity. They have the legislative piano in hand and establish the metrics of the score. In one sentence: the symbology of the contract lays the foundations for the legitimation of a new model of political society.

In fact, the idea of a contract assumes a political and ideological character. In the first case, theories about the nature, order and functioning of society were erected in the flow of the seventeenth and eighteenth centuries, commonly called under the rubric of “contractualism”. Political philosophers of various shades, such as Hobbes, Locke, and Rousseau, share the idea that society comes from a contract, from a fictional, hypothetical and imaginary pact, which rationally justifies the origin of the state (Roppo, 2009, p. 28).

In the second case, the aspirations of security and order, dear to the moderns, could only be achieved by the authority of a sovereign with repressive force. In the name of the preservation of the original freedom, the emergence of the contract, in spite of the important paradigmatic rotation, starts to play the role of masking power relations, since freedom, which really matters at the dawn of market society, is the Contractual freedom.

Thus, the freedom of each one can be translated, in the legal arena, in the freedom to establish the place, the means and with whom one wants to contract. In this context, the contract exsurges as a technique for conducting economic activities, as a vehicle for access to property, and contractual law, as a set of rules, seemingly insipid, haurid of reason, which exert a prominent function in an environment of predominance in the negotiation.

As we can see, the freedom to contract was conceived not only as a presupposition of the realization of the “general will”, to employ an expression of Jean Jacques Rousseau, but also of particular interests.

In the eighteenth century, Robert-Joseph Pothier confers ownership of the concept of the basic legal category of the private law system, in a construct of abstraction and generalization that was constituted in a program, in a legal “hallelujah”: the Napoleonic Civil Code (1804), The archetype of the “age of codifications”.

The Civil Code is a cultural artifact of the Enlightenment and the product of the French Revolution, which, in conceiving of negative freedom and formal equality, inaugurates bourgeois protagonism, which occurs not only in the political sphere, but in all fields of human life. In this scenario, *status* has been replaced by contract, not only from the point of view of political law. Also the private law operated the change of the axis of the faith for the one of the credit.

Following the passage, the Code becomes a “monument of civilization”, written reason, and the exegetes argue that the law, because it is rational, does not have to be interpreted, only applied. It is the judge-mouth-law stage. There is fetishization of the law³, and it is understood that the political power par excellence in the State is the Legislative, which acts as a kind of normative Midas, when transforming into law everything that touches.

Paradoxically, this ideology has a strong presence in contemporary Brazil. The reminiscences of the methods of grammatical and literal interpretation, the legal discourse that affirms the absence of need of interpretation when the law is “clairvoyant” are, among others, examples of this permanence.

The pandectic imaginary

The starting point for the understanding of pandectics is the work of Friedrich von Savigny. Privileging the historical conception and considering the original source of law the “spirit of the people”, and not the law, the German jurist develops the notion of legal institute based on the relations of life, especially, private, such as marriage, property, purchase and sale, which would be organized as a legally binding order and would establish the basis of the origin and evolution of law (Larenz, 2012, p. 13).

³ The expression is by Norberto Bobbio.

With a fulcrum in a Kantian perspective, pandectas were cultists of juridical dogma, above all, of civil law, and elaborated a paradise of concepts (Wieacker 2004, p. 508). In this scenario, one can highlight two jurists, namely: Puchta and Windscheid. The first, founder of classical jurisprudence of nineteenth-century concepts, with his *Pandekten*, designates a method based on the conceptual pyramid and hierarchy of concepts, a logical system, built continuously and without gaps – a “genealogy of concepts”, which would confer legitimacy to the legal norm by systematic correction, logic and rationality, and legal decisions could only be taken with observance of logical rigor (Wieacker, 2004, p. 456-457). The creation of the law had to take place on the premise of the concept, that is, the legal decision should preserve the concept, which would later lead to the criticism of Rudolf von Ihering.

Karl Larenz, in his book *Methodology of Law Science*, explains that Puchta’s idea is that each higher concept allows certain statements, for example, the concept of subjective law refers to power over an object; therefore, if a lower concept subsumes a higher one, all assertions about the higher concept will count for the lower one (2004, p. 25-26).

The genealogy of concepts teaches that the supreme concept from which the others are deduced co-ordinates the others by means of their content. This content emanates from the philosophy of law, more precisely, from the Kantian concept of freedom. For anchoring his system in Kant, for Puchta, the abstraction of the key concept causes the ethical substance to lose strength at the expense of the formal scale of concepts, which has paved the way for the legal formalism that has prevailed for over a hundred years.

Already the *Pandekten* of Bernhard Windscheid (1817-1892), disciple of Savigny, exerted important influence on the law in Germany and abroad. The Teutonic has created a manual directed to the application plan, based on a closed, logical system, to enable predictable results. In the words of Franz Wieacker (2004, p. 510),

Thus, as a result of pandecticism – as before in the great commentaries of the Roman jurist Ulpiano or of the *Glossa Ordinaria* – a sum of private law, whose general fame led to the most distant countries the influence and the validity of pandectics. In Germany itself, the work led

to the call of Windscheid to the first commission for the Civil Code, where he had a determining influence.

In the wake of Immanuel Kant, Windscheid lived in a time marked by the culture of Kant and Goethe. He defended an ethical and rational sense for the law in a not only historical, but also systematic scientific construct.

Both Putcha and Windscheid put the concept of subjective right at the apex of the pyramid of concepts. However, if the former works the subjective right, the power of “the will”, in an ethical category, the latter does so in the psychological perspective, almost completely removing the substance of the concept, which becomes a logical-operational condition and devoid of content. (Larenz, 2012, p. 37-38).

Ihering’s contribution is characterized by two phases: a) in the first, he supports the formal construction of Putcha, his former teacher; b) in the second, he makes a pragmatic turn, approaching the law of sociology.

Finally, the legislative concern in France and the creation of a science of law in Germany in the nineteenth century have as background the ideal of constant planning of the Enlightenment ideology. It is an expectation of that time that formulations of the past, whether of legislators or jurisconsults, can anticipate future decisions (Streck, 2014, p. 108).

In contemporary Brazil, the Byzantine attachment to the academy, the salvific and anticipatory scientific constructions, as well as a certain disdain for juridical practice, denote the presence of this bias.

The jurisprudentialist imaginary

The forerunner of modern legal positivism, Thomas Hobbes, and Jeremy Bentham, the “Newton of law”, had vast influence on all Western political and legal theory, although the presence of the latter, from the point of view of law, was not greatly acknowledged in England and the United States of America.

It is that Jeremy Bentham, the “father” of utilitarianism, advocated codification, having even written to the President of the United States in 1811, suggesting the renewal, and more than that, the replacement of the American legal system the common law, for the *civil law*, due to five central

aspects: a) common law's uncertainty, b) retroactivity of common law, c) absence of the principle of utility, d) lack of specific jurisdiction of the judge to resolve any type of conflict regulated by law, e) its political character (Bobbio, 1995, p. 95-99).

Unlike Bentham, John Austin says that it is "better the judicial law than a bad code" and, in spite of being in favor of the codification project, opposes to the existence of a code accessible to all, since it would have to be submitted to the Public debate and would be permanently subject to reforms (Bobbio, 1995, p. 114).

These new ideas have fueled the history of law in the United States, which takes place in three stages. These are: a) the discovery (1787-1860); b) faith (1860-1914) and c) anxiety (1914 - to this day).

In the age of anxiety, the advent of legal realism, which contrasted with the method of the case, was developed by Christopher Columbus Langdell at Harvard in 1870. The realist authors criticized this method as a method of teaching, or as a theory of law, so that the movement (even if it had great theoretical robustness) constituted a theory of teaching and a theory of law (Ferreira, 2012, p. 7). Its starting point was the publication of an article by Karl Llewellyn in 1930 that advocated the revision of the law study, which should not be based on the "cold letter of the law" but on observable behavior, including probable attitudes and Standards of performance of judges.

As a theory of law, legal realism has faced serious objections in the United States since the 1930s, for, by linking the production of the law to the will of courts and judges, the (unorganized) movement was accused of totalitarianism, considering that law would be, for them, a coercive and amoral force. It should be noted, however, that legal realism is not univocal. If in Llewellyn, law would be what employees do about the disputes they know; In Oliver Wendell Holmes Jr., the first character of the law lies in what the courts decide, among other conceptions.

According to Arnaldo Godoy (2006), Holmes would be the main name of American legal thought, having distanced himself from conceptual and metaphysical problems that were characteristic of European juridical

thinking, imparting new perceptions and pragmatic solutions. In addition, Holmes would have been the first modern judge to acquire status of celebrity, something common today.

Considered a predecessor of the *law and economics*, Holmes called on the judges to study economics and statistics, he argued that the political, social and economic motivations of judicial decisions should be clearly identified. Thus, law would be experience, not grammar or logic. Transcendental and metaphysical aspects, besides science, epistemology, history and logic, were not present in his cogitations. For him, they constituted rhetorical devices for decisions, and judgments should be made according to the average pattern of the society in which one lives.

Nevertheless, despite the difficulties as a theory of law, the legacy of legal realism for a theory of education is remarkable. It lies in interdisciplinarity (mainly in the integration of law with sociology, administration and economics), in the creation of elective disciplines, in empirical research in law, in the adoption of legal practice clinics and in the improvement of teaching techniques in that country.

The presence of jurisprudentialist imagery, in spite of the tradition of Brazilian law, belongs to continental European law, is noticeable, whether in law schools, in the training of judges or in the courts. The problem is that it leads to activism, and this condition, in a country with strong authoritarian colorings like Brazil, is a permanent risk.

The normativist imaginary and beyond

Throughout this exposition, it is noted that legal positivism has different variations, but its apex is the normativism of Hans Kelsen. Before beginning the examination of the author's contributions and considering their importance for the contemporary debate, it is necessary to clarify what he did not say:

- a) Hans Kelsen never said that the judge was the mouth-of-law;
- b) Hans Kelsen never said that normativism was concerned with the practical application of the law to be made by the judge in the particular case;

- c) Hans Kelsen never said that the fundamental hypothetical norm is the Constitution;
- d) Hans Kelsen never said that the science of law concerned the plan of application of the rule of law;
- e) Hans Kelsen never said that the law was pure;
- f) Hans Kelsen and the “Pure Theory of Law” were not responsible for the rise of Nazism in Germany;
- g) Hans Kelsen abandoned the dualism between being and duty in 1965. If, in the past, norms derive only from the will, at the end of life, he admits that nature alone could contain norms if a will had placed those norms. But this presupposes a God creator, whose will was inserted in nature, and discussing this is a vain attempt, noted the jurist⁴.

These preliminary observations remove the existing theoretical common sense of the Austrian jurist, which is defined by Luis Alberto Warat (2002, p. 96) as:

A conglomeration of opinions, beliefs, fictions, fetishes, expressive habits, stereotypes that govern and discipline anonymously the social production of the subjectivity of law-makers and the knowledge of law, compensating them for their needs. Visions, memories, scattered ideas, symbolic neutralizations that establish a meaningful climate for the speeches of law before they become audible or visible.

As can be seen, the theoretical common sense of jurists refers to knowledge accumulated and expressed in institutional juridical practice through a set of moral, theological, metaphysical, aesthetic, political, technological, scientific, epistemological, professional and family representations that jurists in their activities, under the influence of legal dogma, and which are present in the faculties of law, in the courts, in professional associations and in public administration (Streck, 2012a).

Certainly, normativist positivism became, in the twentieth century, the philosophy of jurists. It is a scientific position referring to facts, which

⁴ The change of position of Hans Kelsen can be identified in the text that follows. POPE BENEDICT XVI. Visit to the Federal Parliament of Germany. Sep 22 2011. Available at: https://w2.vatican.va/content/benedict-xvi/en/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin.html. Accessed on: 30 jun. 2016.

correspond to an interpretation of reality that covers only what can be measured, measured, or, in the limit, something that can be defined by means of experiment.

Positivism was engendered in a kind of juridical culture that includes discourses about law as an abstraction only and relegates to the background the world of application, which is colonized by predatory discourses, be they political, moral, historical, among others (Streck, 2012b, p. 31).

Kelsen's theory is descriptive, non-static, and concerned with the science of law, and not with that of judicial deliberation. Gabriel Nogueira Dias (2010, p. 352) reports that:

If we take a look at Kelsen's juspositivist construction elements, we will be methodologically confronted with a rigid science of law, without a shadow of a doubt, always inflexible, which, in the name of the autonomy of the science of law, to the last consequences, distances from a metaphysical or casual approach to law. However, if we set ourselves the task of analyzing despite the general theory of law [...] it is only possible to understand it in relation to its various stages of development. The theory of law [...] of 1911 [...] is not the one of 1920.

There are significant changes in the course of constructing the author's *opus*. Regarding the application of the law, he asserts that this is a question of judicial policy, that is, it is subject to the will of the judge, who must choose one among several valid options, respecting the normative framework. This means discretion and the possibility of judgments of exception. In this context, it loses legal practice, loses the predictability of decisions, and loses the autonomy of law.

Another problem concerns the fact that law is a practical-deliberative science, and lawyers must understand that they do not deal with fictions, but with human lives. In addition, the substitution of the rationalist ideal of justice for the modern/positivist ambition of certainty and legal certainty, to the free-will of the courts and without considerations of ethical character, had its price for the theory of law, for the political theory and for the theory of society: totalitarianism.

The downfall of legal positivism is associated with the defeat of the Germans and Italians in World War II. However, it is not so. After the war, Norberto Bobbio and Herbert Hart tried, in their own way, to rehabilitate

positivism, even though the idea that the application of law was foreign to ethics became strongly questioned. In fact, there was a rapprochement between law and morality. However, this relationship did not necessarily mean a return to Jusnaturalism, but an overcoming of legal positivism, especially normativist.

These inquiries opened the way for new reflections on law, on the theory of sources, norms, and interpretation. Its designation, post-positivism, does not concern a school or a cohesive group of jurists, but rather the redefinitions of the theory of law and the understanding of fundamental rights in the last decades of the twentieth century and at the beginning of this century.

In Brazil, there is a racket about the Kelsenian formulations and their criticism. Universities, preparatory courses and legal professionals, with rare exceptions, have created a vulgar reputation of the author to the science of law, which has hindered the proper understanding of his theoretical conceptions.

Moreover, in this area of Brazilian history, it is necessary to ask: why, after the struggle for democracy and fundamental rights, for the civilizational achievements of the legal-constitutional texts, should we delegate to the judge the appreciation of the right in conflict? This refers to the problem of democracy and the limits of state power. In one sentence: discretionary, arbitrary, legal positivism: everything is interconnected (Streck, 2012b, p. 30).

In the recension of the political-legal imaginary of positivist matrix, the jurisprudence of values was not included, since it is inserted in a post-positivist view of the law.

One small observation: the post-positivist, principiological panorama, decisively influenced the advent of contemporary constitutional hermeneutics. Once a method of unveiling the meaning of the norm, hermeneutics has become a condition of possibility for law, above all, with the legacy of the philosophy of language. From then on, law becomes a system of principles and rules and, with the Dworkinian contribution⁵, the

⁵ The allusion is by the American jurist Ronald Dworkin.

act of judging ceases to be a choice and begins to obey the thesis of integrity, as well as the admission of a single correct answer to a legal case, although it is difficult to find. Theories of argument⁶ have also been developed, which suggest, with different nuances, that judicial decisions must be made on the basis of the best argument. There are several post-positivist cut theories. They will not be analyzed in this text because of the thematic clipping and methodology proposed for the article.

Hermeneutic carnivalization, solipsism, and the save-yourself-as-much-as-you-can

The reading of Luis Alberto Warat, a Bahian-Argentine jurist, can provoke many things, except for indifference. For some, he is a provocateur, for others, an iconoclast. Many are the qualifiers used to refer to him.

In 1985, he published the book entitled *A ciência jurídica e seus dois maridos (Legal Science and her two husbands)*. In the work, the notion of carnivalization is present, which concerns a certain type of imaginary, namely, the surrealist one. The expression, unusual to jurists, indicates the need to construct new meanings for the law. “Legal surrealism” opens the door to counter-dogmatism, considering that the law does not constitute the legal whole, because there supposedly are gaps of meaning not covered by the legal instrumental reason.

In this directive, the Carnival transgression proposed by Warat (1990, p. 72) can be synthesized as the perennial provocation to the human imagination, which would be responsible for the desalienation of it, from the proposal of a *locus* of reading the world and its speeches. This space, in the author's words, is very important because it reveals knowledge and power, which gives rise to a greater presence of subjects who dialogue with meanings, making them protagonists, in view of the unfinished character of meanings, and also rejects the mere condition of listeners of speech.

Thus, in order to confront traditional legal dogma and vigorous exegetical formalism, in an environment of formal/nominal constitution, which, with rare exceptions, contributed to the support of military governments, as was the case in Brazil, Warat suggests the unveiling of knowledge And power through the carnivalization of legal discourse,

⁶ One of the main authors of argument theory is Robert Alexy.

reversing the criticism of law. It was therefore necessary to criticize criticism. By incorporating semiotics and psychoanalysis and by disagreeing with legal realism, he did not want all power to the applicator, but to criticize an institutionalized and standardized view of law, indicating the imagined, socially instituted meanings, or the unsaid by discourse of the legal common sense theory of lawyers.

The relation between law and the meaning of carnivalization is described by Lenio Luiz Streck (2015a, [p.]):

I remember that as soon as Niemeyer had finished the sambodrome, the students asked Warat what he thought. He lit a cigarette that I handed him – he did not swallow, but liked to thread – and said: making a sambodrome is already a problem. But the worst is to make a square of apotheosis. It is the institutionalization of enjoyment. It's like setting a time for sex... and stipulating the exact timing of ejaculation. That's a joke, said the master, throwing himself back with his already considerable belly.

Warat, speaking of carnivalization, rejected the carnival of the type-practiced-in-Pindorama, especially that of the parades of the Sambodrome. That's not what he was talking about. Therefore, I also built the concept applied to some Graduate Programs in Law: Imperatriz Leopoldinense. The Course is no big deal; But the wings alone are up to date. Play according to regulation. But this is not carnival. Institutional discourse is not critical. Warat loathed it. We joked: there are courses in which from 9 to 10 the teacher gets fuzzy talking about legal criticism; enters the criminal law teacher with a summarized manual under the arm and sculpts with everything. But the Course says: “our course is critical; There are even some teachers who actually teach from 9 to 10”. Institutional criticism. Hence the need for criticism of the criticism of law. Only by carnivalizing one could reverse all that.

It should be noted that carnivalization has nothing to do with “epistemic ganda” or theoretical mixes. It is a criticism of the criticism of the law, and considering it the second one would be biased because, it would mean to relate it to a state of exception, which does not have any type of relation with the “late legal Woodstock”, or the simplification of today's legal courses.

An ecology of desire affirms that carnivalized discourses oppose the transparent reason of the Enlightenment, which elects the subject of law as the center of the world, the source of solipsism (I, my world, my references, or each head, a sentence), in the insofar as they expose the fictions of the

prevailing juridical conceptions which would be responsible for the illusion of control of human life in society.

Given this, it is necessary to rethink, also, the legal education. The praxis of jurists will only be changed if they change the matrices that support their symbolic order. For this reason, an emancipatory pedagogy of the law passes, obligatorily, by the reformulation of the existing imaginary.

In legal courses, the act of learning must be related to life, not to conceptual incarceration. Creativity, uncertainties, impurities, fragmentations of knowledge are not obstacles, but conditions of lucidity for a theory that deserves that name. This has nothing to do with the state of hermeneutic⁷ or the save-yourself-as-much-as-you-can point of view that has become the exercise of legal activities in modern Brazil.

In this perspective, reading Warat is awakening from the lethargic sleep of positivism, an unconfessed theoretical model of all those who reject the questioning and who live in the epistemic doxa. Not that positivism itself is good or bad (Streck, 2015b). There are several types of positivism (including post-exegetics). It is necessary to know them, undress them, and thus to change to the common-sense truisms (Streck, 2012a) and overcome the anachronisms of hermeneutics (Leal, 2010, p. 55).

It is urgent to remove the notion of dual rationality, as if everyday rationality could not understand history, but only the scientific one. It is as if there was a cliff between common and scientific sense (Warat, 2002, p. 99). In one sentence: it is as if politics were the place of chaos; and law, that of reason. It's not that simple.

Legal positivism: a burden? An attempt at synthesis

Yes and no. Yes, because the birth of global constitutionalism after World War II brought with it the repositioning and not the rupture with the theory of law, that is, post-positivism. It articulates questions that were not present or were perhaps obscured by legal positivism. With the new State, Law and Constitution matrix, law education, legal institutes and forensic practice need to be rethought. No, to the extent that there is still an attachment to exegetical formalism, and pandemic and jurisprudential

⁷ The expression is by Lenio Luiz Streck.

solutions are prestigious. In this view, a Kelsenian cut, or based on Norberto Bobbio or Herbert Hart, may be a breakthrough, although they are not properly synchronized with the current discussion.

Perhaps one of the keys to understanding the theory of law in legal positivism is the fact that the discussion about the legitimacy of decision making at the various levels of state power (Executive, Legislative, or Judiciary) matters little. In effect, the separation between validity and legitimacy operated, the former having to be resolved through semantic analysis of legal statements, whereas the latter (the problems of legitimacy) would be tied to political theory, which would lead, inevitably, to the idea of decision as a choice and to philosophical relativism.

What many did not realize was that Hans Kelsen, the most important author of normativist positivism, in “giving up” confronting difficult cases, opened up space for discretion, hence the Kelsenian decisionism (Streck, 2012b, p. 62-63).

Not to conclude, the existing state of affairs requires the epistemic clarification of some questions, such as: is applying the letter of the law a positivist attitude?⁸, to distinguish between species of inclusive and exclusive positivism, to demarcate a new theory of the State, considering the theory of the Constitution in a Democratic State, to discuss the problem of discretion, solipsism, positivist and post-positivist theories, the permanence of the subject’s philosophy, among others. In fact, this is an arduous challenge.

FINAL CONSIDERATIONS

Commonly, duality was established as a key to the interpretation of Brazil’s problems – namely, the wilderness and the coast (Euclides da Cunha), the sower and the tiler (Sérgio Buarque de Holanda), the master’s house and the slave pit (Gilberto Freyre), The master and the slave (Caio Prado Júnior), the patrimonialism of the State and the virtue of the market (Raymundo Faoro), development and underdevelopment (Celso Furtado),

⁸ This is the title of an article published by Lenio Luiz Streck.

the house and the street (Roberto Damatta), among others In the genealogy of the discourse of “we” and “them”.

Reinvention or democratic creation in Brazil occurs with the 1988 Constitution. Before being a regime of government or method of decision, democracy is a condition of signification, which governs the processes of autonomy, opening them to the unpredictability of their meanings (Warat 1990, p. 64). In this process, dialogue is an indispensable partner, and some degree of uncertainty must be admitted.

The fractures and impasses of the theory of law and also of democracy reside in the (lack of) permanence of a theological-political imaginary that desires a strong state (Chauí, 2001, p. 98) for national salvation, as if it were possible. Suspicious of the Executive, fearing the Legislative and fearing the Judiciary, this strong state model is represented in the figure of Custódio, Machado de Assis' character, who comes to be a kind of metaphor of the Brazilian, and also, in the celebrity judge, champion of the fight against the corruption and venerated in the streets by the popular, so common today.

The 1988 Constitution, built on a new theoretical matrix, needed new models of analysis: a theory of the sources, a theory of the norm, and a hermeneutic theory encompassing second and third-dimensional rights. As the Constitution continued to be conceived as a political document until the threshold of constitutionalism of effectiveness, a vanguard constitutional doctrine was adopted, which led, as a side effect, to inconsequential activism.

In any case, the exegetical, pandectical or jurisprudentialist discourses are dated, and although they are predominant in the field of legal dogma in Brazil, they represent a setback. This is because, on the one hand, they support objectifying discourses and, on the other, axiological positions that make the law depend on the preferences, values and morals of its interpreters.

If the new model was based on the structure of law (objectivism), it would have adopted a posture of subjectivist profile, which gave rise to decisionism and also instrumentalism in the civil process, as well as the inquisitive pattern in the process (Streck, 2011, p. 81-82). To counter them, hermeneutics would function as a dam to prevent democracy, as a method

and form of political organization, if replaced by the “government of judges”. On the face of it, one of the duties of jurists is to establish or corroborate the construction of an imaginary of respect for the Constitution and laws. It would be a good start.

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