

The Philosophical Hermeneutics Contribution to Form a Highly Qualified Judiciary in Brazil

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Abstract—The philosophical hermeneutics is able to change the Brazilian Judiciary because of the understanding of the characteristics of the human being. It is impossible for humans, to be invested in the function of being a judge, making absolutely neutral decisions, but the philosophical hermeneutics can assist the judge making impartial decisions, based on the federal constitution. The normative legal positivism imagined a neutral judge, a judge able to try without any preconceived ideas, without allowing his/her background to influence him/her. When a judge arbitrates based on legal rules, the problem is smaller, but when there are no clear legal rules, and the judge must try based on principles, the risk of the decision is based on what they believe in. Solipsistically, this issue gains a huge dimension. Today, the Brazilian judiciary is independent, but there must be a greater knowledge of philosophy and the philosophy of law, partially because the bigger problem is the unpredictability of decisions made by the judiciary. Actually, when a lawsuit is filed, the result of this judgment is absolutely unpredictable. It is almost a gamble. There must be the slightest legal certainty and predictability of judicial decisions, so that people, with similar cases, may not receive opposite sentences. The relativism, since classical antiquity, believes in the possibility of multiple answers. Since the Greeks in in the sixth century before Christ, through the Germans in the eighteenth century, and even today, it has been established the constitution as the great law, the Groundnorm, and thus, the relativism of life can be greatly reduced when a hermeneut uses the Constitution as North interpretational, where all interpretation must act as the hermeneutic constitutional filter. For a current philosophy of law, that inside a legal system with a Federal Constitution, there is a single correct answer to a specific case. The challenge is how to find this right answer. The only answer to this question will be that we should use the constitutional principles. But in many cases, a collision between principles will take place, and to resolve this issue, the judge or the hermeneut will choose a solipsism way, using what they personally believe to be the right one. For obvious reasons, that conduct is not safe. Thus, a theory of decision is necessary to seek justice, and the hermeneutic philosophy and the linguistic turn will be necessary for one to find the right answer. In order to help this difficult mission, it will be necessary to use philosophical hermeneutics in order to find the right answer, which is the constitutionally most appropriate response. The constitutionally appropriate response will not always be the answer that individuals agree to, but we must put aside our preferences and defend the answer that the Constitution gives us. Therefore, the hermeneutics applied to Law, in search constitutionally appropriate response, should be the safest way to avoid judicial individual decisions. The aim of this paper is to present the science of law starting from the linguistic turn, the philosophical hermeneutics, moving away from legal positivism. The methodology used in this paper is qualitative, academic and theoretical, philosophical hermeneutics with the mission to conduct research proposing a new way of thinking about the science of law. The research sought to demonstrate the difficulty of the Brazilian courts to depart from the secular influence of legal positivism. Moreover,

the research sought to demonstrate the need to think science of law within a contemporary perspective, where the linguistic turn, philosophical hermeneutics, will be the surest way to conduct the science of law in the present century.

Keywords—Hermeneutic, right answer, solipsism, Brazilian Judiciary.

I. INTRODUCTION

BRAZIL reaches 21st Century virtually using the same decision-making that used in the period amongst end of 19th Century and beginning of 20th Century. The Brazilian's law is still tied to a positivist model, and trying to disentangle the shackles that ingrain it to last century in order to enter a new hermeneutics era, according Rodrigues-Pereira [1]. To reach that, it is necessary not concerning only about processual celerity, which is, for sure, extremely important, but also concerning with the lack of foreseeability of court decisions [1]. It is not admissible that two different judges decide totally different facing identical cases. One of them certainly failed while deciding [1]!

Although there might exist several answers for daily issues, as properly demonstrated by Heraclitus, being followed by Nietzsche, Foucault, Deleuze and many others, when a legal system chooses a federal constitution [2]. Once made that choice, it is obvious that a correct answer shall be sought in an issue submitted for appreciation to Judicial Branch within this constitutional text [1]. If a specific rule is not available to provide this correct answer, such answer shall be searched among the constitutional principles, while thinking the issue into such constitutional system, always trying to harmonize and never breaking up the constitutional text [1]. Thus, the present study has the purpose to, first of all, demonstrate that the discussion about the existence or not of one or many correct answers exists since the dawn of philosophy, in the discussion amongst Heraclitus and Parmenides [2].

Later, we try demonstrating the influence of Hans Kelsen in Brazil's Law, and when a search for the correct answer has begun, and, at last, the important of philosophical hermeneutics applied to Law to transform the Brazilian's Law [3].

In the last, the current attempts shall be analyzed regarding the answer that is most constitutionally appropriate and how the New Code of Civil Procedure already outlines a concern about national legislators pursuant this new field to Law, changing old positivist canons for others more connected to a real Science of Law [4].

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II. THE EXISTENCE OF A CORRECT ANSWER

A correct answer, in addition, in a universal truth began, according to Nietzsche, with Socrates^{1,2}, when diverging about relativism of majority of pre-Socratic philosophers³, transforms philosophy into an endless search for absolutely true answers, whose answers would have a universalist feature, also based in a universal reason [2].

The existence of universal and absolute truths, greatly influenced in Parmenides' thoughts, that diverged from Heraclitus and his understanding that everything is flowing, hence, the truths would always be relative. Probably with Heraclitus arises the idea that an absolute truth is impossible, due to "become", the eternal movement that any and all knowledge will be overcome and surpassed by a new one that emerges, accordingly, creating a real insecurity to human thought, such insecurity so abject to lawyer, but so real. Heraclitus would not lecture the impossibility of a knowledge, but the impossibility of an absolute knowledge, because, due to the eternal movement, such knowledge would also be in permanent construction and reconstruction [2].

The first great opponent of Heraclitus' ideas and the mobilists was a doctrine about the existence of only one reality. Many consider it as the precursor of idea that there is a distinction among reality and appearance, considering the movement itself only as apparent [2]. To perceive such appearance, we should go beyond our sense experience, and, through our thoughts, discover the unique, eternal, immovable, immutable truth reality, with no beginning nor end. This opponent will be Parmenides, who believed that reality is not in a continuing flow just like Heraclitus used to think [2]. Therewith, Parmenides [2], while dealing with the matter of to be and not to be will assure that the path will always be the to be one, because the not to be one will be a "path wholly

¹ Many consider actually Parmenides as the forerunner of the idea of distinction between reality and appearance, considering the movement itself just as apparent. To realize this appearance, we should go beyond our sense experience and through our thoughts, discover the unique, eternal, immovable, immutable, truth reality without beginning or end. The importance of Parmenides in Greek philosophy is very large, especially influencing Socrates and Plato and the idea of distinction between real world and the world of ideas, where the truth would only exist in a world of ideas, reachable by man only through philosophy. For Plato, very influenced by Parmenides, the world of ideas was the world of eternal truths, epistheme, while the world of the senses, physical world, would be bound to only have the doxa, opinion, without certainty, truth.

² The same Socrates worshiped by Plato, taken as an example, is seen by Nietzsche as a great deceiver, calling him to the "man of one vision", because he believed in the existence of an only truth that could solely be found through rationality making use of philosophy. There began, according to Nietzsche, the great mistake of philosophy. The domain of the reason! Where instincts are imprisoned for some centuries, being only set free again with Baruch de Spinoza and more evident by Nietzsche.

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inscrutable or you could not know what is not - for it is not to be accomplished - nor could you point it out". Thus, a thought could never be thought from a negative existential.

Parmenides idea of immutability of what is, along with the idea that an opinion is always false, because it is the "wrong ordering of the words" will encourage Plato later, to elaborate his Theory of Ideas, in which certainty would reside in the world of ideas, the episteme, and in sensible world would reside the uncertainty, the opinion, doxa, thus, "should to learn all things, both the unshaken heart of well-rounded truth and also what seems to mortals, in which is no true conviction" [2].

Virtually all traditional philosophy since Socrates is searching for the idea of an absolute truth. Each subsequent philosopher tries to indicate the errors of their predecessors and points out a new methodology to achieve that truth.

Immanuel Kant's thought is within the idea that finding absolute truths is possible, attained from the correct use of rationality. It will very much influence the legal thought, which is then pursuant the traditional philosophy about the existence of a metaphysical correct answer [5]. Thus, Kant's model would have the purpose to submit the positive law to a court of reason and, therefore, "canons allowing to understand the sense of all legal system [5]. Such work initiated by Kant is a survey with the aim to find a rational concept of law as a theory, which shall be useful as a "critical reference for positive law" [5]. Thereby, when Kant develops his thought about law, reveals itself united with his entire critical philosophy, where Law is "a group of conditions under which one's discretion can be gathered with other's discretion according to a universal law of freedom" [6]. Therefore, such freedom law imagined by Kant will point out that "rational legal relationships do not result of empirical conditions ('laws of nature') rather - regardless those, under herein relevant aspect - of pure practical reason" [6].

III. Kelsen AND THE SEARCH FOR A CORRECT ANSWER IN LAW

If Kant wished a safe way to metaphysics, it can be said that Kelsen aimed the same for the Law also by means of science. In his main work, Pure Theory of Law, Kelsen tried to assign a scientific tone to Law, and for that, used two ideas formulated by him, which had defended, and developed the bases of his theory of purity about science of law, which would be a strict definition of Law's object, i.e., its epistemological axis and also his ideas for neutrality of Law, i.e., its axiological axis. All this idea of validity and legitimacy of the legal system will culminate with Grundnorm's idea, and Kelsen will inherit it from Kant [3].

Regarding the definition of his object, since the first lines of his Pure Theory of Law, Kelsen tries to do it. Thus, according to Kelsen, [3] "Pure Theory of Law is a theory of positive Law, of positive Law in general, not a specific legal system. It's a general theory of Law, not an interpretation of particular legal rules, either national or international."

According to Kelsen [3], therefore, theory of Law, specifically to him, the idea about purity of Law, would have

the sole purpose of knowing its own object, not concerning on how the Law should be or how it should be carried on, but simply concerning to know what is the Law. For those other two questions on how should be the Law or how it should be carried on, these would be questions to be answered by political science [3].

The largest problem of law's interpretation by legal positivism is not within Kelsen's Pure Theory of Law, but refers to mistaken application that interpreters made from his theory when applied it, frequently in a not reflected manner, an idealized theory only to create science and not effectively as a creative function of the Law. That is the problem! When the real interpreter is in charge of his creative function he is able to solve the case, only subsuming to the rule – or whether analyzing a law, in thesis, as in repressive constitutional control, especially in a direct suit for unconstitutionality –, the Pure Theory of Law works properly, nevertheless the problems mentioned by the fact that Kelsen has excluded further scientific areas of Law, thinking it as “free” of such influences. However, Kelsen has conceived the idea of applying the law as a framework when the answer to the real case is not simply a matter of subsuming to the rule [3]. Thus, there are several possible interpretations for the Pure Theory of Law to solve the same real case, allowing the interpreter to, in those real cases, choose the most proper “framework” to solve the case, i.e., this task is conferred to magistrate, in addition, regarding his subjectivism to decide the issue. It will then be the judge, from his office, that may choose the “best path” from many possible ones [1].

The other criticism to Kelsenian positivism refers to the factual impossibility of laws to preview all and any possibility happening in the real world, i.e., the possibility of all an any social fact (which interest to Law) to be provided by the Legal System [1].

There is no such possibility, since social facts will always be much more dynamic than legal facts, as taught us by Miguel Reale [7].

What ultimately occurs in real cases is that, in the absence of an express rule to support the authentic interpreter (judge) to decide a dispute, other means to solve the problem shall be used. Pursuant our legal system analogy, general principles, customs, etc. can be used.

Such decision-making possibilities mean in fact that the judge will have a “blank check” to fill according to his own discretion, including all his wishes, political longings, desires, etc., while deciding [1].

Considering many judges doing the same thing while deciding issues where there are no explicit rules, which are not numerically few cases, we face the highest point of legal uncertainty [10]!

IV. NECESSARY HERMENEUTICS TO IMPROVE LEGAL SCIENCE IN BRAZIL

Contemporary hermeneutics will be guided by Schleiermacher and Dilthey and later by Heidegger [8] and Gadamer. Schleiermacher [9] will assure, on the importance of hermeneutics that

“The dialectics ‘Kunst zu philosophieren’, while dealing with the possibility of thought in its formal ideality and while a ‘science of unity of knowledge’ never escapes the temporality of language in which is expressed, because it depends on the opportunities offered by such language. Hence the need of a complement by hermeneutics, which focus on capturing the thought included in a particular speech. In turn, hermeneutics depends on the dialectics while this last aims exposing the thought into a speech. It is possible to say that hermeneutics shows the limits of dialectics; however, dialectics shows the possibility of hermeneutics. Just because the universal thought is always thought within the possibilities of certain language, hermeneutics is essential to present the thought, even that thought that accomplish the ideal-formal level. The pure thought, despite being characterized by immutability and universality, never realizes on its own, but always through a historical language, which places hermeneutics and dialectics in an interdependent relationship also regarding grammar, inasmuch as in base there is the work of linguistic understanding and communication” [9].

The so-called crisis of the judiciary for many years was identified almost as a synonym for lack of celerity in law suits. A magistrate frequently remained months, years, and in some cases decades without pronouncing a final sentence. This used to happen often in the court of first instance. However, the current major problem in the Brazilian Judicial Branch is the lack of foreseeability of adjudication [10].

Some authors like Ronald Dworkin indicate that, due to alleged failures of Executive and Legislative Branches to provide concreteness to constitutional promises, it is now the moment for judiciary to lead such transformations process, not only temporally, in pursuit of celerity, but also, and mainly in hermeneutics area, in pursuit of the answer most constitutionally correct [11]. It shall be mentioned that Judiciary conceived by Dworkin's is not the same imagined by Kelsen. While the Kelsenian judge thinks “free of” morality and finds the disputes' answers submitted to him within his “conscience”, using analogy, general principles, customs, etc., which in fact is consolidated as a “blank check” in judge's hands to pronounce at his own discretion, which is the summit of solipsistic judge, herein understood in Lenio Streck lessons, as the judge who decides concerning his own comprehension about the issue being analyzed, under the fallacious reasoning of free conviction [10]. This concern with a theory on the judicial decisions of Lenio Streck is reverberated in Tomás-Ramón Fernández who shall say that “the judge does not have any discretionary power, not even when selecting the applicable rules, nor when setting the real scope thereof, and shall similarly not have any discretion to choose between the version of the facts as presented by the claimant. [4]” Along these same lines, Sartre shall develop his idea about solipsism, which fits in very well with the discussion about the “solipsist judge” mentioned by Lenio Streck, as thus, as also according to Streck, the judge must resort to hermeneutics in order to

find the correct answer and thus move away from the kelsenian normative and positivist model, and thus from the philosophy of conscience; Sartre [11] shall also state that “the only way to avoid solipsism would be, also here, to prove that my transcendental conscience, in its own self, is indeed affected by the extramundane existence of other consciences of this same type”. This solipsist judge, who is also a solipsist subject or, to use the expression as used by Streck, *Selbstsüchtiger*, is a person who is imprisoned in a situation of ontological solitude, and this would be “a pure metaphysical hypothesis, perfectly unjustified and free of consideration, as this means that nothing exists outside my own self” [10].

Naturally, this solipsist judge (subject) shall not be able to correctly offer jurisdictional services, because has no commitment to seek the answer that is constitutionally the most appropriate, as Streck teaches us, rather seeking an answer that he or she, egotistically, feels is best. On the subject of such egotism, Schopenhauer [10] says that the solipsist would be “a crazy person, locked up in an inviolable fortress. A confession of impotence. Indeed, due to the position of existence of the other, we suddenly bring out the frameworks of idealism, and fall back upon a metaphysical realism”. It shall therefore be against this solipsism shown by the judge that philosophical hermeneutics, as applied to Law, shall arise, in an attempt to achieve the long-sought judicial security once and for all, or at least a minimum of foreseeability of judicial decisions [10].

The philosophic hermeneutics as applied to Law shall not believe in the possibility of finding an answer that is universally correct, metaphysically correct, but rather the answer that is most constitutionally appropriate [10].

Based on the criticism from several different authors, notably Lenio Streck, the national legislators become more aware of this issue, already including in the New Code of Civil Procedure (NCP) [4], some provisions that cover what we may consider to be the start of philosophical hermeneutics as applied to Law in our national legislation⁴ [4]. This is the dawn of a healthy shift in paradigm within Brazilian judicial thought. Surely, it shall take some decades before the concern with the foreseeability of judicial decisions may enjoy the same status as the concern with celerity, but the fact is that a long path always starts by taking the first step [1]. Thus, the search for the correct answer within the field of Law, which is consubstantiated upon the search for the answer which is constitutionally most appropriate, is now starting to be the main hermeneutical guide when making decisions, and also, slowly, starts to have an influence on judges and other personnel who have to interpret judicial situations [1].

V. CONCLUSION

The main aim of the present study is just that of making the Brazilian judicial academia continue to think and also ponder

⁴ It is worth highlighting that Lenio Streck for a long time states that the right to have the constitutionally answer most appropriate with Brazilian Federal Constitution from 1988 has become a real subject right to citizen, a fundamental right, there cannot be space to a judiciary deciding discretionarily in detriment to constitutional text [10].

over the need to seek a decision theory, and on the impossibility of us continuing along this path which is seen as a “judicial lottery” [1].

Even though the science of Law is not an exact science, the fact is that there cannot be space, within a system like the legal system, for “correct” decisions, as in many cases these decisions are diametrically opposite to each other [1]. It therefore becomes necessary for us to think that, even though Law is an applied social science, there is no obstacle that stops us from thinking of a theory which allows the interpreter to find, within a certain system, the answer which this system sees as the only correct one [10].

We are not defending a return to the philosophy of absolute respect for positive law, as the change in Kant’s vision has shown the mistakes within such theories which defended exclusively a positive Law [1]. However, we must not forget that we are no longer facing dictatorships and other totalitarian States, but rather a Social Democratic Rule of Law which, even facing several problems and social frayings, serious political problems, we are facing a constitution that is still respected and which guides, or at the very least should guide, our judicial interpretations [10]. Therefore, whenever we are seeking this correct answer, we should always seek it within the constitutional text, as there we shall always find such answer, whether by applying a rule or, if such rule is absent, applying one or more of the principles which can equip hermeneutics and help them to find the answer which is constitutionally most appropriate [1]. This does not mean to say that this most appropriate answer will be the best! Surely not, since society is dynamic, social facts are much more quickly than judicial facts [10]! Thus, whenever the constitutional text, or the meaning which we are assigning to it, is not in line with the social reality, then first of all hermeneutics must check if there is the possibility of assigning a different meaning to any expression which appears in the constitutional text and which better fits current reality. If there is no such possibility, then the response shall be simply that of calling upon the Derived Constituent [10].

Power to make changes to the constitutional text, which is no longer in agreement with the desires and wishes of society.

What cannot be accepted is that a judge, whether monocratic or part of a collegiate body, whatever the instance, even in the Higher Courts, may wish to give his personal interpretation to the constitutional text or wish to enforce his own will and his own conscience upon society [10]. For this reason, it is necessary to perform a deep study, right from the university chairs, about decision theory, so that the hermeneutist can understand just how this correct answer should be sought, in order to understand his limits and also the impossibility of enforcing his own personal understanding upon others [1].

There is no more space for a Kelsenian normativist positive view in Brazilian Law [10]!

The legislator seems to be getting more aware of this need, as can be seen in the advent of the NCP [4].

Without a shadow of doubt, the legislator has still been quite cautious, but indeed, was a promising and health start,

something that we hope shall spread rather than cool off [1]. For this spread to occur, we need more and more research studies in this area, in a search for contemporary readings from authors who are also reading and seeking decision theories appropriate for their respective realities, in their own countries. An exchange of ideas with lawyers and thinkers about this issue in other countries is also essential [1].

We could say that Brazil is still in its infancy in this area, but what is important is that the first steps are being taken, both in judicial and academic circles, where philosophical hermeneutics has been gaining ground, making it possible for Brazil to enter, once and for all, into a judicial discussion that is more in line with the 21st Century, and thus allowing that national Law area may finally break free from the shackles that are still holding such activities back in the end of the 19th Century [1].

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