Why Western Law Theories Do Not Settle Religious Issues?

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Abstract

The present study addresses the difficulty regarded on the gap between ideal/real on law and religion phenomena, and seeks to understand the motives and reasons for the inability of the western legal framework to deal with problems arising from religious practices. The paper starts from the assumption that mankind is not defined solely through social objects in which manifests itself in compact and concentrated way. There is a transverse dimension on humankind that works in active or latent way in the entire thickness of social reality, which does not fit in the immanence of Law. The transversality of religion and its reverberations in other spheres of human life is bounden to review the issue of deontological nexus that exists in the law. Thus, in this study concluding remarks, the problem of the gap on "Is-Ought problem" prevailing on Law Theory, may be primarily located in the binomial relation "Religion-praxis/Law-techné".

Keywords

Philosophy of Law; Political Philosophy; Religion; Sociology of Religion; Theory of Law.

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"We are sinful not merely because we have eaten of the tree of knowledge, but also because we have not eaten of the tree of life." – Kafka - Die Zürauer Aphorismen

Introduction

This paper questions arises from the difficulty regarded on the gap between ideal/real concerning Law (practice and theory) and religion (understood as a sociological phenomenon and also metaphysical experience). Under such issue the present study seeks to understand the motives and reasons for the inability of the Western legal framework to deal with problems arising from religious practices.

From these assertions, we may assume (hypothetically) that both Law and Religion have implicitly epistemological senses and forming practices. Whenever it comes to any problem in the world of experience, *i.e.*, a "Social Fact"[70], to be contemplated by law, there is a subject/object relation, in which the later emerges from the empirical, while the first is both the operator and "*telos"* of the law. However, religion is regarded as both, a social fact and a transcendent phenomenon to the subject, which means it is some phenomenical category apart from ordinary and secular affairs.

A socio-historical analysis on Western Modernity, concludes (or may imply) that religion, rather than disappearing from the modern world (as Weber and Freud forecasted), became one of several possibilities of belief in the social imaginary (Taylor, 2007, p. 209). Under such predication, the present study starts from the assumption that man in religion is not defined solely through social objects in which manifests itself in compact and concentrated way, since there would be a transverse dimension of the human phenomenon, which works in active or latent way, in the entire thickness of social reality, according to procedures specific to each society, which does not fit in the immanence of the legal normative text. Such transversality of religion and the reverberations in other spheres of human life is bounden to review the issue of deontological nexus that exists in the law. Thus, the problem of the gap on "Is-Ought problem" (or "*Sein-Sollen*") prevailing on Law Theory, may be primarily located in the binomial relation "*Religion-praxis/ Law-technê*".

In order to question the interaction between Law and Religion, the present study assumes that both of them lie inexorably intertwined with politics, such that certain relations generate social and psychological attitudes that may or may not become formally religious and/or legal. Thus, the underlying religious category is provided by the striking analogy between the behavior of the individual to the deity and behavior towards society. A critically important aspect is the sense of dependency (Simmel, 1997, p. 110). The problem seems to be that metaphysical dimension, the one that transcends the individual, is contained on human religiosity, however, subjective religiosity does not guarantee the existence of a realm beyond metaphysics, such as legal normativity (Simmel, 1997, p. 14). On such quarrel the present study starts its rhetorical contention from the idea that religious phenomena arises as some kind of rationalization of the world[71].

[70] Hereby understood as "*fait social*" or *"Sozialer Tatbestand"* on Durkheim (and sometimes post-weberian) terminology.
[71] The epistemological orientation of the present study is in accordance to the Rational Ttranscendentalism (also present in the phenomenology of Husserl) and the analytic philosophy of Wittgenstein (in its two phases). Thus, the paper confines itself to what can be arguably disputable, delimiting what is thinkable (Wittgenstein, 2010, p.179), so, the "psychologizing" of structures and relations between entities is something unrelated to this discussion.

Religion and its Epistemological Senses

Aiming to get hold of Religion as a Social issue (therefore also political and legal matter), this study returns to the classical mainstream of Sociology of Religion - Max Weber. The German sociologist is often regarded to take an objective and (some say) distant view of the sociological traditions of the institutions of religions, specially its inner human gearing. The work of Weber, before settling its quarrels on rationality and disenchantment, starts from searching some stipulation concerning the guidance of the Human Reason as part of 'Being'[72] (Koch, 1994, p.2). The ontological question in Weber contrasts with other classics, such as Durkheim and Marx, precisely because it structures its (then new) sociology of comprehension. Weber's ontology tries to give account on transcendence and immanence of the social body, and inquires how subjectified facts become objectified facticities, and eventually, how can they be socially shared. Bergman and Luckmann (1991 pp.28,29) locate and describe Weber's ontology in the *Ideengeschichte*[73] of Social Sciences:

> " The central question for sociological theory can then be put as follows: How is it possible that subjective meanings become objective facticities? Or, in terms appropriate to the aforementioned theoretical positions : How is it possible that human activity ('*Handeln*') should produce a world of things (chases)? In other words, an adequate understanding of the 'reality sui generis' of society requires an inquiry into the manner in which this reality is constructed. This inquiry, we maintain, is the task of the sociology of knowledge". (Berger, Luckmann, 1991, p. 29)

To answer this question (the interaction between the subjective and the transcendent which creates objective facticities) Weber starts from the assumption that all human beings seek a subjectively meaningful guidance to the world, which would be the source of both the religion and knowledge (Weber 1978, p. 499). The religious orientations have their origins in inner psychological desire to search or training intellectual shaping of meaning and unity of the world (Koch, 1994, p.4). In this sense, the human mind is led to reflect on ethical and religious issues, and not by material need, but by inner compulsion to understand the world as a significant Cosmos and take a position in relation to itself, i.e., an attempt to tune and suit human uncertain understanding to a portentously ineffable empirical reality (Weber 2004, pp. 282, 416-418).

Therefore, a metaphysical orientation, in theory, can assist in obtaining control over the external world of objects and provides the individual a subjective and functional significance. (Weber, 1958a: 136, 137) The individual has a psychological need for ethical guidance and a practical need for such orientation to the world of objects. The guidance is necessary because a person *has to act*[74] in the world but this action shall not be random, since the individual acts as a vector result of motives or agencies (Koch, 1994, p.4). In other words, even rhetorically, it is necessary just one reason[75] to provide the "meaning" or "intelligible reason" for our actions. As Weber suggested, we can describe the actions of a person who writes a numerical equation on a piece of paper, but to understand the reasons to such behavior it is necessary to infer, or even know, what motivated this particular action. (Weber 1978, p. 8) Weber suggested that material and ideal interests provide

[72] Understood as metaphysical and ontological issue (James, 1916, p.39) – albeit hereby concerning Social Science.

[73] Usually translated as "History of Ideas". However, the original German word is more accurate to describe and circumscribe such subject as epistemological category because of its inter and transdisciplinary method (Bevir, 1999, p. 32)

[74] It is noteworthy that Weber's work is essentially a sociology of human action (Gerth, Mills, 1958, p. 70-75)

[75] Strictly we should say '*Triebfeder*', sometimes translated as 'motivation', on kantian lexicon.

the motivation for action (Weber, 1958b, p.280), and these "ideal interests" are the ethical guidance which humankind owe to the world (Koch 1994, p.4). If every individual has the need to seek a rational orientation to the world, in which ontological conditions such guidance occurs? In other words: what are the conditions of human existence that serve to impound the available knowledge in conducting any action? At this point, the legacy of Kantian epistemology is evident in Weber work (Koch, 1994, p. 5). The human mind confronts the external reality, regardless of whether this proves as strictly physical or social, but always occurs as a strange and separate object of the mind. The dualism inherent in this position has its origins in the epistemology of Kant (1958). The fundamental ideas of modern epistemology, including religion studies, ultimately derived from the Kantian philosophical building, as Weber himself assumes (Weber, 1949, p. 106). The implications of this epistemological position are numerous, since the Kantian system is built on the notion of a distinction between the empirical world and the intelligibility realm (Kant 1958, p. 26), in such a way that man knows the empirical world through the action of the senses and the mind activity. However, the mind is limited in its ability to capture the empirical reality, due to the limited nature of the mechanisms employees towards understanding (Categories). The Categories of experience, our perceptual epistemological body, (which construct religious understanding) never transmit the complexity of the true nature of any object. Therefore, the objective reality lies in the field of metaphysics, so in being achievable only the appearance of reality. (Kant 1958, p. 54).

As a result of such Weberian and Kantian epistemological view, we may assume that each event in the social world also has a complex nature which human mind is unable to understand in its entirety. Hypothetically, even a minimal description of a slice of mere ordinary fact can never be exhausted from the categories of the individual (Weber, 1949, p. 78). This means that the parameters of social knowledge are restricted, which lies a problem defining a universalizing method to any aspect of social intelligible world (as Marx attempts to). The acceptance of the Kantian dualism on Weber understanding of Religion form the core of methodological strategy used in the study of social reality. As a separate object of empirical reality, the rational mind is to deal with a reality that is a foreign object itself, devoid of a priori sense - so science and religion build these directions, which are not predicates to the 'Real World' ineffable to human mind. In the study of society, as in the study of physical objects, their events will never be understood in its entirety, so the social world requires interpretation, sometimes through science, sometimes religion - both are methods of disenchantment[76] and rationalization of World, apparently itself meaningless, and therefore unreadable[77]. But, among such rationalizations, where would be the Law and Normative Order?

Normativity and its Dissentient Schematics on Social Facts

To expatiate on Legal Theory of the twenty century (and early twenty-first) is perforce to discourse on Hans Kelsen contribution on such lore. The Kelsenean perspective is unavoidable, even to its detractors. Even if this study (or any other) tries to appeal and recourse to authors like Hart,

[76] Strictly from the weberian concept of "*Entzauberung der Welt*".

[77] The weberian epistemological construct (in Ontology-way) what is essential is the search for knowledge, not gnosiological founding itself, and that distinguishes Max Weber from other Liberals, according to Merleau-Ponty (2006, pp 1- 2). Yet, it urges to point that there isn't such natural and necessary opposition between Weber and Marx – "Weber does not squarely oppose historical materialism as altogether wrong; he merely takes exception to its claim of stablishing a single and universal causal sequence". (Gerth, Mills, 1958, p. 47).

Dworkin, Rawls or even Ross[78], none of them would have the ability to analytically deconstruct and reedify our very *Episteme*[79] of Law as we know it (understood both as "*Lex aut Iuria*", or "*Gesetz oder Recht*").

Concerning valuational questions, the Kelsen's theory is confluent and tributary to Kant's work, while under "scientific" terms it fits into the context of the Vienna Circle, especially because of the parallels (not always in accordance) with the natural sciences (Posner, 2001: 3). However, it is of utmost importance the Kantian heritage related to a particular reading of the work of David Hume, specially his "Treatise of Human Nature" and the "ought-is" problem (Hume, 2011, p. 335). Hume the eventual possibility to infer a rule of conduct from a description of something that just happens in the world of empiricism, such as religious acts or beliefs. As a logical consequence, it is not feasible to build a moral-normative system from any ontological belief. Wherefore, apparently, is impossible to carry over the "Being" (or "Is") to "It should be," (or "ought to"), *i.e.*, to infer values from facts. Kant (1958, p. 72), distinguishes this disjunction among judgments and valuations between the Pure Reason that is expressed in the indicative about the judgments about reality ("*Sein*"[80]), and Practical Reason, which is expressed by imperatives ("*Sollen*").

From the Kantian interpretation of Hume's work, Kelsen structures his theory of normativity from writs propositions. For Kelsen the object of some science of the Law (which is the law itself) should, to some extent, be explained from explanatory methodologies from natural sciences, which aims to explain the actual and factual behavior of materiality. Such explanation establishes causal relationship to the empirical result, present in the sensible world, which "must necessarily" ("*muβ"*) occur (Kelsen 2003, p.86) and can be expressed in a similar way to natural laws ("*gemuβt*"). Under natural law cause and effect does not admit exceptions therefore "must" occur ("müβen").

The legal norm, as opposed to the natural law, is not able and cannot express the factual occurrence of something, i.e., lying on empirically cadre of the "Being" ("*Sein*"), therefore it isn't a logical and mandatory result of a necessary relation of cause and effect ("*Gemuβt"*). Unlike causality relations (v.g. religious social phenomena), the legal standard provides that, in certain circumstances, something is necessarily due in normative sense ("*Gesollt"*). Therefore, the Law (understood as "*Iuria*" or "*Recht*"), subject to its own science, must consist on groups of normative statements concerning the idea of "Should Be" ("*Sollen*"). Such statements are observed by Jurisprudence from legal propositions, which consist of normative causal links between any factual support ("*Tatbestand*") describing a possible illicit and the State reaction (Kelsen 2003, p. 126).These relations within "Is – Ought be" problem structure the static dimension of legal norm (Kelsen 2003 pp. 121-140), while the staggered hierarchical logic of the legal rules substantiates the so-called juridical dynamics, which has a vertex that holds an hypothetical last legitimacy towards all other judicial standards (Kelsen 2003, pp. 215, 221). The problem arises when one tries to establish similarities and differences up the normative command to a reality whose entirety is ineffable, as social outbreaks of religious nature. In theory, the law, with the aim of dealing with it, seems to make a certain syncretism of analytical categories such as "Interpretation", "Sense" and

[78] Jürgen Habermas, in some accordance with kelsenean theory, shall have some role ahead this paper argumentation,
[79] The present study evokes the '*Episteme*" idea under Foucault, i.e. "(...) conditions of possibility of all knowledge, whether expressed in a theory or silently invested in a practice" (Foucault, 1966, p. 168).
[80] Some specific words shall be consigned on both ways: its original idiom and some translation, in order to maintain the lexical specificity of the expression.

"Significance". (Amselek 2011, p. 42). This structural scheme of the legal norm might seem puzzled or inconsistent in the face of complex social phenomena, as the norm would guide human actions, and that itself (the norm) is a sense, *i.e.*, the significance of an act of volition (Kelsen 2003, p. 392)

To unravel this assertion we must assume that a legal norm is necessarily a valid standard (which means it is made under and to the extent of another superior normative standard) and therefore mandatory, otherwise it would not exist, since one that is not endowed with mandatory will not be truly a legal norm; Also, validity of the legal norm is the specific mode of existence of juristic standards, which always returns (as a rhetorical question) to another standard (on a higher legal degree) which is the basis of its legality and enforceability (Kelsen 2003, p. 246-). Thus, is perceived a retro-feed relation between "Being" ("*Sein*") and "Ought-to" ("*Sollen*") closing the normative world unto itself, shutting himself in any interpretation of legal wording. Somehow, social phenomena (including religious one) must be phagocytosed into this circular analytical relation. The answer seems to be within the logic of both instances – normative and social. But, could any action necessarily be determined by rule? Wittgenstein may add some ado at this point:

> "This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here." (Wittgenstein, 1958, p.161)

From this premise (with which Kelsen would seem to agree) believes that an act of volition can have different meaning in different patterns. Regardless of the subjective meaning given to it by its originator *persona*, he subjectively desires that his commandment is obeyed by those to whom it is addressed: the act has the meaning objectively valid in the eyes of jurisdictional and, in theory, in the eyes of a third and uninterested person (Amselek 2011, p. 43), as an extraneous "*phainesthai*" to the axiological and gnosiological inconsistencies of "everything that is the case" [81](Wittgenstein, 2010, p. 134). This question of a hypothetical separate and flitted Sense to human experience, as an attempt to suit some legal norm to the epistemic multitude of civilization, opposite to the contingency of the world and individuality (understood as the Marxian concept of "*Gattugsmässigkeit*"[82]) appears on Theory of Law as reverberation of formal logic studies in the early twentieth century (Green, 2003, p.367). Regarding, therefore, the logic of a particular legal system, like any language, it is necessary that the interlocutors understand the signs, their structures and can assign meanings to express events and phenomena in the given language (or encoding). To understand a legal system is to allocate legal meanings to external manifestation of human conduct (Kelsen 2003, p. 48) despite its metaphysical and subjective meaning (like on religion). Consequently, the legal meanings assigned to single events, therefore, should be understood in terms of its functional contribution to maintaining the possibility sanction in the long chains of

[81] §1"*Die Welt ist alles, was der Fall ist*" (Wittgenstein, 2010, p. 134).

[82] Especially in Lukács, the concept of "*Gattugsmässigkeit*" constitutes the ultimate ontological foundation of the individuation process, with only real existence as a social being, so that outside society, there is not any possible individuation (Lukács, 2012. p. 196). However, the term developed in extensive way by the Hungarian philosopher naturally refers to Marx himself. The original Marxist work does not presuppose an abstract, isolated human individual, so the essence of being of each individual, "can only be understood as "gender"("*Gattung*") given in your "interiority" ("*Innere Als*") as some silent form ("*Stumme*"), which generally would connect to other individuals (Marx, 1978, p. 6). Why, therefore, the human universality of the Social Ontology is opposed to human ordinariness naturally set.

events in which they occur. (Green, 2003, p. 377).

It may be concluded, regarding the normative system framework, that the content of the law is contingent to social facts. As well as the logical analysis of language does not explain the meaning of words, logical analysis of legal systems does not explain the ratio between single social events and their primeval signification (Green, 2003, p. 380). In this sense, the early legal meanings can be attached by means of rules of imputation to generate basic legal meanings or conditions for sanction (etiological condition of legal standards). To interpret legal systems is to find a relation between these rules of attribution and the sentence structure, which means, to find and understand the sequence of social events that must be interpreted – even if these events seems to have no earthly reasonable explanation. It seems the problem lies in the communicative[83] process.

Immanence and Transcendence

Whenever it comes to concern any issue from the world of experience, i.e., a social fact to be contemplated by law, there is a conceit on a subject/object ratio, in which it the later emerges from the empirical orb, while the first is both operator and "teleological dictum" of the Law. With regard to this relation, what is proposed in this paradigmatic cut is, in short, a "Ptolemaic" perspective methodologically reverse to Kantian method, which arises from a "Copernican revolution" in philosophy. For such theoretical effort, religion is seen both as a social fact and as transcendent to the subject, namely, uranian, apart from ordinary and profane affairs. So, in this epistemic understanding that identifies with an opaque reality[84] (Žižek, 2001, p.82-83), lies a specific teleology that sees Man (beyond any hedonistic concern) inserted *into* Mankind (so, not just the individual subject) as a center for intellectual reflexion, including (and this is the case), the Jurisprudence as *Man's Law*. In this Ptolemaic theorizing scheme (one may say Geocentric, or, on more rigid philosophical lexicon, Anthropocentric thought), the current intellectual lead up proposes the study of some Uranian doctrines and disciplines towards the most immanently human concerns. In short, this section seeks to determine a starting point in the Anthropic Principle[85] in the construction of legal questioning previously stated. The study targets in the humane subject because understands that the religious man is not defined solely through social objects in which manifests itself in compact and concentrated way. There is, therefore, a transverse dimension of

[83] Cf. Quine: "The unit of communication is the sentence and not the word. This point of semantical theory was long obscured by the undeniable primacy, in one respect, of words. Sentences being limitless in number and words limited, we necessarily understand most sentences by construction from antecedently familiar words. Actually there is no conflict here. We can allow the sentences a full monopoly of "meaning" in some sense, without denying that the meaning must be worked out. Then we can say that knowing words is knowing how to work out the meanings of sentences containing them". (Quine, 1981, p. 63).

[84] In this particular ontological understanding, which its last plea lies in Lacan, the present study works on the so-called " Symbolic Real ", where lie both, religion as *praxis* and the law as *techné*, still having the " Imaginary Real " that holds the religious transcendence and its complete otherness well as the Kantian foundations of today's Law Theories. The "Real Real" presents itself as an epistemic monolith being terrifying and unspeakable, while the reality is expressed only on facts and absolute acts such as death, life, sex, etc., which are digested and made knowable in the first two instances of "Real" (Žižek, 2001, 10).

[85] Anthropic Principle generally refers to cosmology and physics, and states that any valid theory of the universe must be consistent with the very existence of human beings, for which the only universe we can see is what has humans. For now we ignore the fact that such a theory, in its most pseudo-scientific and vulgar form, lends itself to the nonsense of Christian fundamentalist groups, whose doited members refute the evolution of species and related theories. Thus the adoption of the concept of the Anthropic Principle in this article aims to diverse effect aimed by religious proselytism.

the human phenomenon, which works in active or latent way, explicit or implicit, in the entire thickness of social, cultural and psychological reality, according to procedures specific to each society (Simmel, 1997, p. 13).

The metanarrative of humankind can be seen as a dramatic and hopelessly painful description of the man's condition divided between two co-dependent and mysterious realities that cannot be fully defined and determined, namely, existence and transcendence (Jaspers, 1994, p. 174). Transcendence becomes important whenever the world known for empiricism and science does not show itself as self-sufficient and cannot be explained by its own categories. In this pathway we start from a problem faced by Descartes, and taken up by Edmund Husserl (Oizerman, 1988, p. 157) – can we ascertain, with absolute certainty, what we *know* from what we just *seem* knowing? In this sense, we can see us (as mankind) as a lonely warm light in the darkness[86], through and by which we try to name and give forms to uncertain and erratic experiences (sometimes oneiric), since the very notion of space/time to the rules of coexistence – and these one ultimately, try to keep that very light on. Furthermore, we can still cross the point explored by Jaspers to the weberian provisions about religions as rationalizations of the basic problems of the human condition, namely, contingency, impotence and scarcity. Given these basic problems, the religious concepts are crucial in human societies as guide the search towards direction and meaning to its existence and not merely an emotional adjustment, since it creates, in fact, cognitive safety when facing problems of suffering and death. Such basic problems persist, hence it becomes natural the existence of metaphysical answers, such religious and mythical ones (Weber, 2004: 279. However (and this is the problem), their social consequences cannot be naturalized under legal and judicial guise, because this social praxis is eminently linguistic, *ergo* uncertain and precarious [87].

Given this transversality of religion and its reverberations in other spheres of human life, it is necessary to review the issue of the deontic of law from holistic understanding of problems arising from the relation between religion and the law. Thus, the problem of the gap between "Is" and should "Ought-to" in-law, concerning the object of this study, it may be primarily located in the binomium Religion-practice/Law-Technique, however, this binomial relation seems to be developed from a *clinamen* perspective of the "Imaginary Real". This means that what really is criticized is the conflict and the chimera resulting from the antagonism between some legal framework and the various religious practices, so, the core of the criticism is an anthropogenic legal deontic confronted to some source of religious transcendence.

Both Law and Religion have implicitly teleological senses that form their practices. It is, therefore, urging to understand the particular difficulties regarded in the gap between ideal/real, and seeking some deep meaning of the religious fact, it supposes the existence of sense and meanings expressed on these experiences. The phenomenological method applied to the analysis of the religious fact, seeks, towards the achievement of it purpose, to promote phenomenological reduction (Husserl, 2008, p. 85), as from this procedure it is possible to catch the universal symbolic structures of religious phenomena. Religious thought is the result of an idea and a power of transcendence that

[86] As on Wittgenstein yale about the 'Red Campnula" (Wittgenstein, 2012, p 68).

[87] Again, the study searches some root on Wittgenstein (now the later one): "*We are talking about the spatial and temporal phenomenon of language, not about some non-spatial, non-temporal phantasm. . . . But we talk about it as we do about the pieces in chess when we are stating the rules of the game, not describing their physical properties. The question "What is a word really?" is analogous to 'What is a piece in chess?'* " (Wittgenstein, 1958, p. 108).

is in the human being. But his is born such feeling of transcendence? In the genesis of the notion of transcendence lies the lack of slow and transgenerational events (Sloterdijk, 2009, pp. 20-24), as well as unknowable facts regarded as violent, brutal (as in "*Real Real*" described by Žižek – 2010, p. 10) also, the the inability to one really reaches the other, and perhaps most importantly, the fact of human consciousness entails the ability to submit an intelligence that exceeds itself. On the other hand there is also depth of the human being, which allegedly lies in its religious dimension, in tune to something that unconditionally touches the individual. This depth of human beings actually lies in the absurdity of his existence (Camus, 2005, pp. 86), and his inability to deal with it gives vent to alleged manifestations of the sacred, exercises on imagination and the consequent creation of so-called myths. The "sacred" is therefore a means of backing and resignation in the face of an existence that has the power to annihilate us, and manifests itself not only in everyday things, but through everyday things (Eliade, 2010, p.17). In some irruption of the sacred (called hierophany) it is experienced some alleged religious breath, all of nature can manifest as cosmic sacredness[88]. But how come such ineffable experience is to be put on words, or mere human signs of 'positive' or 'negative'? It just does not happen.

Concluding Remarks - Transcendence Towards Immanence

The strangeness of the Law concerning Religion are superimposed the functionalists teleologies of both phenomena, antithetically opposed to each other. Namely, religion acts as Social Solvent while the Law can be a Social Dinamogenic.[89] The law attempts to rationalize facts and their logical sequence, including the phenomenal emanations gait of religion. However, the legal system does not share a generalized logic, immanent, through functional premises and conclusions (Perelman, 2004, p.46) so that applies directly to the world of empirical facts. The Law, therefore, does not share a pure logic, connected to the earliest reasons of Philosophy, but comes to organized thinking as a manifestation of knowledge, which seeks "Truth", similar to metaphysics and ontology. Unlike these two matters, however, the logical and legal methodology deal with criteria for some particular goal can be achieved, so it is merely a mean, no ant end. In a first completion of the strangeness of the Law to religious phenomenon, there is the ontological-transcendental idiosyncrasy of the latter that is not consistent to some mere rationalization of the facts, which derives from immanentist reasoning. Jurisprudence and its object, the Law, seeks, at first, enable the achievement of social purposes that couldn't be attain except through this same form of social control. That's how Law fosters particular purpose through promotion of abstract ideas and attitudes of its participants in a legally cohesive society, dynamogenically united. Such promotional function of social dynamogenic is accomplished through mechanisms of encouragement and discouragement, from a functional perspective (Bobbio, 2007, p.19), the latter are used in order to unite the disparate, while discouragement measures are used in order to preserve social cohesion, that is, some maintenance of the *status quo* of society.

Religion in its social functionality, inasmuch on the realm of "*Sein*", collides with the Law, as "*Sollen*", in its dynamogenic functionality, in such a way that works as a social solvent. Such an interpretation is a Weberian sociological tradition against some of Durkheim's ideas, in order to

[88] As in Mystical Experience told by Bergson (1932, p. 127) or Hume's Demea (Hume, 2005, p. 94).

[89] On parallel with chemistry and physiology, it is the idea of scaling some functional activity resulting from action of an exciter and agglomerating agent on a particular set of originally separate units.

position the parallax between traditional cultures to Judeo-Christian civilization. If the French sociologist saw that aboriginal cultures had their individuals united by religion (Durkheim, 2009, p.457), on the medieval-modern monotheistic culture, religion had the capacity to dissolve old belongings and established cultural lines (Pierucci, 2006, p. 120), including (nowadays) the law, as the very notion of Democracy, Secularism and Human Rights, in theory. The proselytizing universalist religion, i.e., with individual salvation proposal, tends to predominate over other socio-cultural phenomena (including the democratic state) and functions as a device that disconnects people from their cultural context of origin.

A crisis factor on Representative Democracy remains in its foundation rooted in Rousseau's "*Volonté Générale*", in view of the increasingly complex and compartmentalized society groups, in such a way that no longer sees a general will in which some assembly or parliament can be guided, but multiple and plural volitions, that legitimately dispute the prevalence in the political arena. The political faction that momentarily prevails misses the accession of multiple overdue volitions, which aggravates some feeling of mismatch between representatives and represented groups. Plurality is the new brand of democracy, whose new foundation comes to the protection of minorities and a substantive agenda on Fundamental Rights. (Cappelletti, 1993, p. 44).On this agenda is necessary to overcome two obstacles between at least two communicating individuals: the gnoseological and axiological abyss. The first takes up the idea that the limits of language mean the limits of the world (Wittgenstein, 2010, p 245). This means that language, which is the coacervate of legal norm, is immanent (thus, limited), while the thought, which is the source the hierophany, is unlimited, transcendent. Hence, there will be mismatch between what the subject thinks and what he tries to convey through language[90]. The Axiologic Abyss, in turn, refers to the gap between values/moral systems, and occurs because of relative moral evaluations. Each individual shall have his worldviews, which were determined by the understanding of the cosmos arising from both, cognoscitive devices and socio-historical contingencies, especially religion.

The first step to skip both the abysses is in the "Undeniability of the Legal Standard", which takes up the quarrel concerning retro-substantiation of the Legal Norm (Kelsen, 2003, p. 29). Under the basis that: i) the strict logic does not necessarily is consistent to a strict rationality; ii) it is impossible to prove any fact or knowledge of something by pure rationality, i.e., analytic sense *a priori*. Consequently, one must recourse to *Petitio Principii*[91], based on skepticism[92], leading to a temporary suspension of reason, in the order to pursue knowledge - particularly in this case, reasons for the rule itself, which allows the interpreter and legal operator to avoid inaction in the face of something that seems incognoscible. Then we must, paradoxically, absolutize relativism as the foundation of any Legal Theory in pace with the promotion of social dynamogeny. Thus, he only allowed justification for ideals like justice and democracy is a relativistic philosophy, i.e., a mere functional justification. Such reason leaves the decision concerning social value in charge of active individuals

[90] In theory, religion itself can be viewed as linguistic device by which man denotes his last and irreconcilable concerns against 'Pure Reason' (Tillich, 1958, p. 77).

[91] For the impossibility of proving any fact or knowledge of something by pure rationality, the only appeal shall be the fallacious arguments, like the story of the hero (and folkloric mendacious) Baron Münchhausen who escaped the quicksand by pulling on his own hair. The expression was coined by the philosopher Hans Albert, but the argument itself is presented in the works of classical skeptics, as Agrippa and Diogenes Laërtius (Albert, 1991, p.15).

in the political reality (Kelsen, 1993, p.161).

In conclusion the immanence of legal norm should tangent religious transcendentalism, not to legitimize it, but to understand it. However, in such an effort, the jurist as hermeneutist should neither forget the Legal Doctrine, founded on a Critical rationality, nor the uniqueness of the human existential absurdity. In theory, as in Hermeneutic Circle (Gadamer 1975, p. 307), there must be a systematic process of understanding and interpretation, being the legal text read from its parts and those from the whole, whose meaning is transcends the immanence of the text itself.

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