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HABERMAS AND LEGAL POSITIVISM

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ABSTRACT
This article analyzes Habermas' critique of legal positivism based on the relationship between law and morality, focusing on the three demands that are made to morality, namely: cognitive, motivational and organizational demands. Proponents of a strong relationship between law and morality, like Dworkin, argue that morality should be called upon to solve difficult cases of law. Habermas seems to claim just the opposite, namely, that it is the law that is called upon to fill the cognitive deficit in morals. The text explores the consequences of this statement for Habermas's discursive theory of law, in relation to one of the fundamental theses of legal positivism, that morality cannot be a foundation for law precisely because of its cognitive indeterminacy. The text compares how much the discursive theory of Habermasian law approaches or departs from this fundamental thesis of legal positivism.
Keywords: Habermas; Discursive theory of law; Legal positivism; Philosophy of law; Moral.

Law and morality: separation or subordination

There is not one single and uncontroversial definition of "Legal positivism", but this theoretical perspective can be characterized by a relatively broad set of theses. One of them is the "social facts thesis", according to which the existence of law depends exclusively on social facts. Other is the "separability thesis" according to which there is no necessary connection between law and morality (HART, 1961). In any case, "legal positivism asserts (or assumes) that it is both possible and valuable to have a morally neutral descriptive or conceptual theory of law." (BIX, 2005, 120). St. Thomas, for example, does not say that the "*lex iniusta non est lex*"

(SAINT AUGUSTIN, 1952, I. V. 11), but that "*non lex sed legis corruption*" (AQUINO, I-II, q. 95, r. 4.) [it is not law, but a corruption of law]. Even in the application of law, he states: "*injustum judicium judicium non est*" (AQUINO, II-II, q. 70, r. 4, ad 2), [an unjust judgment is not a judgment]. Nowadays, Alexy defends the thesis that a morally wrong legal rule or decision would be defective in the sense that it is not a legal rule *tout Court* (ALEXY, 2002, 40; 2002, 2010, 167–82).

Habermas's criticism of legal positivism is quite evident in his work. However, In the chapter of his work specifically dedicated to legal theory, when legal positivism is explicitly discussed, it is limited to the theses of Kelsen and Hart, and even briefly (HABERMAS, 1994, 247-248). Contemporary reformulations of the positivist these are not directly mentioned. Therefore, in order to evaluate the relationship between the discursive theory of law and legal positivism, one must keep in mind the relationship between law and morality that he proposes. If the thesis of the separation between law and morality can be considered one of the main elements in the definition of legal positivism, it cannot, then, obliterate the treatment of the mentioned relation, which is at the core of Habermas' work on law. In fact, already in the preface to *Between Facts and Norms*, he writes that the complementary relationship between law and morality is no longer understood by him, in the work in question, in the same way as it was in the *Tanner Lectures*. In this sense, he imputes to Apel an access to the problematic "overextends the normative approach" (HABERMAS, 1996, 522, note 4), thus suggesting, as his own position, a less normative connection of law and morality or, perhaps, a simpler functional connection. The hypothesis of this study is that Habermas reverses this relationship. If before in the *Tanner Lectures* he defended that morality complemented law, now *Between Facts and Norms* it is the latter that complements the former. Better said, although he maintains a reciprocal complementation (HABERMAS, 1996, 106) between law and morality, the legal complementation of morality has a clear prevalence over the latter, as we shall see.

The consequences of such a change in stance will determine a good part of the clarifications that this article intends to make. It also should be added the thesis of the neutrality of the discourse principle, a thesis that will originate a principle of justification proper to morality and also a principle proper to law, suggesting a strong independence of law relative to morality. Regarding, specifically, the role of discourse ethics in Habermas' philosophy of law, some sustain its suppression from *Between Facts and Norms* architecture, an interpretation that would bear a strict connection

with the thesis of moral neutrality of the discourse principle. The two theses mentioned here, complementarity and neutrality, concern internal determinations of the discourse theory of law itself, as formulated by Habermas, and are, therefore, of particular importance for the intended objectives.

Furthermore, from a structural point of view, the treatment of legal positivism in Habermas' work may be mapped out as follows: 1) legal positivism is criticized directly, starting with Habermas' examination of Hart's rule of recognition. It is at this point, therefore, that Habermas deals directly with Hart and seems to criticize him from a Dworkinian perspective, that is, the criticism is due to the rule of recognition validating what would be law only through the legality of legislative procedures, to the detriment of consideration of content. (HABERMAS, 1996, 102). In the resolution of difficult cases, this would lead to decisionism, since the judge would make his judgment in a discretionary way. However, as we intend to show, not only is the appeal to content problematic in the terms of the discursive theory of law, the specification of such content is also left to the operation of law itself, due to the thesis of the cognitive indeterminacy of morality; 2) in the very title of his work *Faktizität und Geltung*, the word *Faktizität* indicates a direct reference to the core of legal positivism, in a sense that will be explained below. Regarding the second word of the title, it refers, in turn, to the core of his discursive theory of law. It seems, thus, that he is trying to reconcile legal positivism with the discursive theory of law. The point, however, is that such a reconciliation is done with a clear advantage for the theses of legal positivism. It is worth noting, in addition, that Habermas is a fierce critic of natural law theory, the historical rival of legal positivism. Even though he categorically states that "The discourse-theoretic concept of law steers between the twin pitfalls of legal positivism and natural law"(HABERMAS, 1996, 453). It is only natural law that he claims is no longer available. (HABERMAS, 1996, 199). What Habermas wants is to replace natural law with discourse ethics. However, discourse ethics being of a post-metaphysical strain one would wonder whether it can fulfill, even in an analogous way, the function that natural law once fulfilled, and how would it do so.

Next, legal positivism will be exposed, especially in its exclusivist version, in order to then compare its arguments with certain consequences implied in Habermas' discursive theory of law. With this move, it is possible also to supply a gap in Habermas' assessment of positivism, specially Raz's exclusive positivism. (DYZENHAUS, 1996, 134).

Legal positivism: the separation thesis between law and morality

Raz, among others (ALEXY, 2004, 156-67; 2007, 162–9; VOLPATO DUTRA, 2008, chap. 1), points out that one of the central problems of the philosophy of law is the nature of law, that is, the search for an answer to the question of what is law. In this sense, he points to three theories that attempt to determine what law is: (1) the linguistic theory, partly followed by Hart, according to which "all legal statements are statable by the use of sentences of the form 'Legally p' (RAZ, 1994, 198). (2) the lawyer's perspective theory, partly followed by Kelsen and Dworkin, for which "the law has to do with those considerations which it is appropriate for courts to rely upon in justifying their decisions" (RAZ, 1994, 199). Raz notes that theories with this perspective have in sight the moment of deliberation, which would lead to the search for a justification, ending up assuming a specifically moral connotation, since morality would concern precisely the best justifications of norms and actions; (3) the institutional theory, such as that of Austin, Bentham, and Raz himself, according to which "law consists only of authoritative positivist considerations" (RAZ, 1994, 206). A theory thus conceived would have no moral connotation because it would deal with the executive part of law and not the deliberative part.

According to this conceptual framework, to have a more precise definition of legal positivism one could resort to a passage from Austin's work:

> The existence of law is one thing; its merit or demerit is another. Whether it be or not be is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation (AUSTIN, 1954, 157).

Notwithstanding this formulation, in the Anglo-Saxon world, legal positivism became a caudate of Hart's philosophy, whose main work was born as a critique of natural law, as well as of Austin and Bentham. One of the key points of Hart's theory in relation to that of Austin (and Bentham), especially based on coercion, which conceived law as a command, was to consider law from the perspective of the participant. The internal viewpoint to law, that is, that of the participant, allows Hart to formulate law with approximations to morality, certainly one of the key aspects of his positivism being quite different from other formulations of it.

Let us see how this is explained. According to him, law consists of primary rules directed to people in general and secondary rules directed to the authorities. The secondary rules tell how to identify, modify and apply

the primary rules. The rule of recognition, Hart's most important concept, is a secondary rule directed at the authorities. The rule of recognition is "a rule for conclusive identification of the primary rules of obligation" (HART, 1961, 92). In the words of a commentator: "is a framework of normative presuppositions that underlie the law-identifying behavior of the officials in the system" (KRAMER, 2004, 110). A secondary rule will operate as such even if it remains inarticulate, rather like the grammar of natural language – according to which speakers adhere to a set of prescriptions that determine their speech –, it is operative even if the subjects are unable to make its rules explicit.

Regarding this issue, Dworkin argued that the rule of recognition, on the one hand, could not account for the legal status of the principles that make up the legal order. On the other hand, if the rule of recognition was able to differentiate principles from rules and understand their role, it would no longer serve what Hart claimed it to serve, because due to the indeterminate scope of principles, it could not function as a theoretical instrument to identify what the law is (DWORKIN, 1977, chapters 2 and 3). Hart, in his Postscript to *The Concept of Law*, published posthumously (HART, 1994) rejected this accusation, adopting an inclusive interpretation of his own positivism (HART, 1994, 250), an interpretation that will be explained below.

On the one hand, neither Austin nor Kelsen - who both positioned themselves against the competing theory of legal positivism, namely, natural law theory - are the main focus of contemporary debates in relation to this current interpretation in the philosophy of law. On the other hand, the current debate is much more internal to legal positivism itself than in opposition to the competing theories of Dworkin, Habermas, and natural law.

The mentioned debate within positivism occurs between the defenders of "inclusive legal positivism", named by Hart himself in his Postscript as "soft legal positivism" or "incorporationist", and the defenders of "exclusive legal positivism", also known as "hard legal positivism". The bone of contention between the two groups lies in the interpretation of a central point of legal positivism, precisely that of the connection between law and morality (VOLPATO DUTRA; LOIS, 2007, 233-252). The first group, which includes Raz, Marmor, Himma, Shapiro, among others, defends that morality is not a necessary criterion, much less a sufficient one, to give a rule a legal characteristic. For them, the contents of the law, as well as its existence, are completely determined by the social source from which it originates. The second group, represented by authors such as Coleman and

Hart himself, maintains that the law may have a connection with morality. We will return to this point later.

This opposition among positivists arises, in large part, from the reaction of positivist theory to the criticism made by Dworkin in *Taking Rights Seriously*, especially against Hart. He made several criticisms of positivism, but two of them are particularly interesting for the present context: A] law is not only composed of rules, but also of principles. This would give law, according to him, an essentially controversial characteristic, which would be incompatible with Hart's rule of recognition; B] legal validity is not, by its very nature, separate from considerations of content and merit. Above all, it is not separated from moral issues. According to Dworkin, for the above reasons, legal positivism could not adequately account for the role that moral principles play, especially in the resolution of difficult cases.

In later texts, Dworkin made his conception more explicit. According to him, the acts of the legislative and judiciary, taken as a whole, presuppose a political morality. This political morality makes up the law. Therefore, political morality already operates at the very source from which the law originates, in such a way that the effectiveness of a law as a reason to act depends on a large extent to its content. For example, Nazi laws would not deserve respect because they were flagrantly immoral in terms of a morality of equal respect and consideration, starting with the fundamental disregard for the lives of all. In fact, Dworkin maintains that the empirical differentiation of legal institutions, that is, the sociological question of what "makes a particular structure of governance a legal system rather than some other form of social control, such morality, religion, force, or terror" (DWORKIN, 2006, 95) has "neither much practical nor much philosophical interest" as compared to the "doctrinal question" of what "makes a statement of what the law of some jurisdiction requires or permits true?" (DWORKIN, 2006, 96). In the end, Dworkin's position is that "we might treat law not as separate from but as a department of morality" (DWORKIN, 2006, 34), that is, "we might treat legal theory as a special part of political morality distinguished by a further refinement of institutional structures" (DWORKIN, 2006, 35).

Inclusive legal positivism is a kind of response to Dworkin's criticism of positivism, which accepts that morality may be part of the sufficient conditions for the validity of law in a given legal system. However, this inclusion is always being a contingent acceptance, derived from a choice originated in the source of the law, and not originated in the nature of the law itself. Thus, inclusive legal positivism is a reaction (KRAMER, 2004, 2) of legal positivist to allow accommodating these and other criticisms from

Dworkin, without abandoning the main point of the theory, that is, the foundation of law in social facts and conventions. In this perspective, inclusive legal positivism could be defined as follows: "it can be the case, though it needs not to be the case, that a norm's consistency with some or all of the requirements of morality is a precondition for the norm's status as a law in this or that jurisdiction" (KRAMER, 2004, 2). That is to say, such a condition of validity is not inherent to the concept of law, but can be imposed as a test of validity in a specific legal regime.

Therefore, inclusive legal positivism is inclusive because it contemplates moral principles among the criteria that guide authorities in determining what is law, and it is positivist because it rejects the view according to which every legal system must have, among its criteria of determination, moral standards (KRAMER, 2004, 2). Indeed, it may be the case that a moral principle is a sufficient criterion for determining the legal character of a norm, but this is not a necessary condition inherent in the very definition of a legal norm. Thus, what Dworkin grants is that moral principles may enter the legal order, but they don't necessarily have to be part of the law. Inclusivists are thus accommodationists of morality in the legal system. However, the charge that is leveled at them is that they make so many concessions that their possible gains would end up constituting a Pyrrhic victory (DWORKIN, 2006, 188). Hart, in this sense, as already mentioned, can be considered a case of inclusive legal positivism, something he himself admitted in his Postscript, and Coleman is one of its contemporary exponents.

In turn, exclusive legal positivism "maintains that the very nature of Law is inconsistent both with the role of moral principles as legal norms and with their role as criteria for validating legal norms" (KRAMER, 2004, 2). Thus, when morality functions as a standard that affects a decision of the authorities, it is because the decision was not taken on an exclusively legal basis, as it should be. In other words, "the operativeness of such principles in adjudication is not to be mistaken for their having become elements of the Law" (KRAMER, 2004, 5). Just as the use that law makes of arithmetic does not transform it into a legal concept, in the same way, the fact that law employs moral concepts does not give it the power to transform them into legal concepts, so that, according to the exclusivists, law and morals are essentially separate, and not just accidentally separate, as could be inferred from the inclusivist position.

For the exclusivist position, there would be certain properties intrinsic to law that those who shuffle with morality would not account for (COELHO, 20018, 273), such as, "its claim to authoritativeness, its capacity to guide behavior, its coventionality, its regularity, its institutional stratification

capped by some Paramount courts" (KRAMER, 2004, 9). Shapiro, for example, maintains that inclusivists fail to account for "Law's essential 'guidance function'" (SHAPIRO, 2000, 127-170). This would occur because inclusive legal positivism "allows the existence of a valid legal norm to depend on controversial moral questions that law's introduction was supposed to have eliminated" the motivational and epistemological guide, but in fact law would end up being ineffective in this particular regard, by reasons that will be pointed out later. Raz, whose theory will be presented below, as one of the main representatives of the exclusivist position, maintains that the necessary connection between law and morality "it is insufficient e.g. to establish a prima-facie obligation to obey the Law". That is, such position would not account for the essential "authoritative nature of Law" (RAZ, 1994, 211).

In summary, the exclusivists argue for the separation thesis between morality and law, namely, that the criterion for the legal validity of any norm cannot include moral tests, and, along with this, they support the "sources thesis" as sufficient to determine what the law is, rather than the thesis of the merit of the norm. The aforementioned sources thesis can be formulated as follows: "that the existence of legal norms must depend exclusively on whether they have the appropriate source in, e.g., precedent or parliamentary legislation" (WALUCHOW, 2008, 87).

In the same way as Hart constructs his theory as a critique of natural law theorists and of Bentham, Raz opposes Dworkin, whom he sees as a representative of natural law, albeit with a nuance of his own, and also opposes Hart as a representative of inclusive legal positivism. The problem at issue in Raz's philosophy of law, "in particular it concerns the question whether it is ever the case that a rule is a rule of law because it is morally binding, and whether a rule can ever fail to be legally binding on the ground that it is morally unacceptable" (RAZ, 1994, 210). The main point is to analyze the link between morality and law, in order to know whether this link is a necessary and a sufficient condition for the validity of a legal rule. For Hart, as seen, the content and existence of law should be considered a social fact, but with a possible connection with morality, even if contingent and precarious.

Raz summarizes three theses on the aforementioned relationship between law and morality, which also allow us to classify the various existing theories on the subject. They are (a) the origin or source thesis (the sources thesis), according to which all law is based on the established source from which it originates; (b) the incorporation thesis, according to which all law is based on the established source from which it originates or

somehow has a link to such a base; (c) the coherence thesis, according to which law is based on the established source from which it originates in conjunction with its best moral justification (RAZ, 1994, 211). As can be seen from the last two theses, law can be enriched by norms not originating directly from the established source from which legal norms originate, and "the coherence thesis insists that every legal system necessarily includes such laws" (RAZ, 1994, 211). Dworkin's theory can be classified as coherentist according to the previous analysis, just as Hart's can be considered as belonging to the incorporationist thesis. Raz, of course, intends to follow the first theses.

The fundamental concept in which Raz bases his theory, as already mentioned, is that of authority. What is interesting is that he analyzes this concept from an unusual perspective, namely that of motivation for action. He transforms authority into a reason to act (RAZ, 1994, 211), which can then be compared with other reasons to act, thus allowing him to determine its specific qualities in relation to morality, which is what interests him. What is distinctive about orders from authority "is their special peremptory status" (RAZ, 1994, 212-213), that is, the reason for action from authority is final, it has to be carried out. This means that the authority's decision has to be followed for the simple reason that it was given by the authority.

According to Raz, the authority's order that functions as a reason to act can be considered according to a double aspect. The first is that of the dependence or connection with other reasons, such that a reason to act is related to other reasons to act. In this sense, it is a reason that comes glued with other reasons. Nevertheless, such a characteristic cannot be understood as if the authority's order counted as one reason among others. No, it summarizes a set of reasons in determining action. The second aspect is that of preemption. As preemption, the authority's order is a reason that replaces other reasons and not an additional reason among others for action. It is a reason for action that "replaces the reasons on which it depends" (RAZ, 1994, 212) so that it will determine what to do.

If the first aspect, that of dependence, which summarizes a set of reasons, were the only possible one, then authority would have a function of mediating the reasons that people would have for acting. In this way, a father could take as justified the alimony he is ordered to pay because he already believed that parents should support their children. Understood in this way, authorities, according to Raz, would only reflect dependent reasons. Therefore, authority needs to be understood according to the second aspect, as a reason that replaces other reasons, in order to mark the peremptory propriety of its order. As we shall see, it is precisely this second aspect that seems to be missing in the inclusivist perspective, due

to its contamination by moral reasons, obviously allocated in the perspective of authority considered under the first bias.

Authority, in the formulation that Raz gives it, is such that it can no longer be questioned from the reasons for which it arises and is determined (RAZ, 1994, 219). That is, the rules issued by authority aim to offer a final and binding decision on matters subject to even moral divergence. This requires that they be based not on a moral content, since this is itself subject to dispute, but on the mere fact of their issuance by the competent authority. Preemptively, law would be born as a *Deus ex machina* to resolve a conflict (RAZ, 1994, 225). Therefore, the source of authority cannot reside in a moral theory, but has to operate as "pre-emptive reasons" or as a reason for action that excludes others (RAZ, 1994, 199). In sum, "following this analysis, inclusive legal positivism must fail, it is argued, because it is inconsistent with a core aspect of law, the legal system's purporting to be a justified practical authority" (BIX, 2006, 37). As will be shown below, Hobbes and Schmitt had already called to attention aspects very similar to these ones.

This does not mean that such a reason for action cannot be criticized. What is excluded is an action that corresponds to the criticism, so that "it is merely action for some of these reasons which is excluded" (RAZ, 1994, 213). That is, reflection on other reasons for acting can continue, but there can be no action that follows from them if contrary to that determined by authority. For example, one may have reasons for not paying income tax, such as corruption in government, but the action of evading the tax is excluded by the authority. *In verbis*, "the only proper way to acknowledge the arbitrator's authority is to take it to be a reason for action which replaces the reasons on the basis of which he was meant to decide" (RAZ, 1994, 213). Preemption is not mixed with other reasons, it does not summarize other reasons, but *replaces* them. In this sense, one can say that the legislature creates reasons for action, replacing any others, and the judiciary applies them.

The next step in his argument is to connect authority and law: "if the claim to authority is part of the nature of the Law, then whatever else the law is it must be capable of possessing authority" (RAZ, 1994, 215). This means that even a bad law has to be obeyed. Therefore, if law has authority, it follows that it has all the non-moral or non-normative attributes of authority (RAZ, 1994, 218). Therefore, the existence and content of an authority directive "cannot depend exclusively on the reasons for it. The existence and content of every directive depend on the existence of some condition which is itself independent of the reasons for that directive" (RAZ,

1994, 220). That is, it has to be able to honor the mentioned second aspect of authority. Thus, the most common sources of law do not obey moral conditions. This is because it is a self-evident fact that a law can be arbitrary and can fail in its acquiescence to the reasons on which it would depend. Likewise, a law need not even bear this connection with moral reasons. It can simply be a law only in the second aspect that was declined above. It needn't have connection with other reasons, so that the most important aspect is certainly the second one mentioned, preemption.

Hobbes, on the other hand, established authority as a counterpoint to the indeterminacy of law. According to him, all laws need to be interpreted, since two factors contribute to generate conflicts of interpretation: the first is the diversity of meanings of words; the second is the blindness that passions operate. According to him, however true the interpretations may be, without the authority of the State, they would not be laws, that is, even with all the evidence of truth, an interpretation would not be law for the reason that it is true (HOBBES, 1985, Chap. XXVI). The sentence, therefore, is an interpretation that resolves a conflict of interpretations. Such interpretation becomes law, having the force of law, not because of its intrinsic truth, but only because it is given by the authority of the sovereign. (HOBBES, 1985, Chap. XXVII). This is what Heck calls absolutist positivist legalism. (HECK, 2004, 135-6)

Schmitt takes chapter XXVI of Leviathan, pointed out in the previous paragraph, to classify Hobbes as a representative of decisionism, whose conceptualization refers to the antithesis between *auctoritas and veritas: auctoritas, non veritas, facit legem*. (SCHMITT, 2004, 39). Schmitt explains, with precision, what can be extracted from the teaching of the Hobbesian sovereign power, namely, the decision can add something that could not be contained in the content of the norm. So, the decision becomes indifferent to content, in such a way that, if the decision (was thought of as a syllogism in which the rule occupied the position of the major premise and the fact the position of the minor premise, in the conclusion, that is, in the decision, there would be an element not contained in the premises, and this element would be that of authority, precisely what determines the concrete content of a norm, as well as its effectiveness, indifferent to its justice (SCHMITT, 1995, 30). This position uncouples the predicate of the strength of a decision from that of its justification, its moral truth: "the legal strength of a decision is something distinct from the result of its justification" (SCHMITT, 1995, 32). All that matters is to establish the authority as the one that has the competence to decide, because, he apostrophes, "anyone could refer to a correct content if there were no ultimate instance. Therefore, the problem is one of competence: the legal quality of the

content of a precept does not even allow this problem to arise, much less to be solved" (SCHMITT, 1995, 33).

It is possible to conclude from the above argumentation that moral principles either do not fulfill the function of motivating, of making a practical difference in terms of the reasons for acting, as Raz thinks it is the case, or they do not fulfill the epistemological function of clearly saying what to do (HIMMA, 2001, 271-310). In this sense, legal precepts fulfill the epistemological function of knowing what to do. If law were not capable of determining the content of norm, only virtue would remain. But the legal system does not survive on virtue, by definition.

The problem is that, in order to establish the "separability thesis" as the fundamental aspect of the positivity of law, legal theory cannot be a pure "analytical" and descriptive one. To be intelligible, the choice of this feature of the positivity need be motivated. As stated by Gerald Postema:

> […] no theory, even one which restricts itself to rather general and abstract characterizations of legal practice, or analyses of tis structuring concepts, can be divorced from consideration of the aim, point, or function of the institutions of law without distortion of those institutions. And thus, no account of the nature of law can hope to advance our understanding of law and legal practice without relying at important points on normative considerations (POSTEMA, 1996, 335).

This is the reason why some legal positivists believe that the exclusivist model cannot be defended in a strictly analytical way. For them, exclusivist positivism needs to be defended "morally", "normatively". For "ethical" or "normative" positivists, the separability thesis is not a purely conceptual thesis: "the claim of the normative positivists is that the values associated with law, legality, and the rule of law [...] can best be achieved if the ordinary operation of such a system does not require people to exercise moral judgment in order to find out what the law is" (WALDRON, 2001, 410-433, p. 421). Therefore, Ethical or normative legal positivism is a prescriptive thesis that affirms the value of the separability thesis and support the "exclusive positivism". The theory

> ...presents an aspirational model of law according to which it is a presumptive condition of the legitimacy of governments that they function through the medium of specific rules capable of being identified and applied by citizens and officials without recourse to contentious personal or group political

> presuppositions, beliefs and commitments (CAMPEL, 1996, 2).

Two examples may help to understand the point of view of the exclusivist positivism that is defended by the Ethical Positivists. The first is the constitutional command that forbids cruel punishments, since its determination depends on the moral notion of cruelty, of which there is no consensus (HIMMA, 2001, 275). One might ask: Is the death penalty, carried out without any physical pain, cruel? Is imprisoning someone for twenty years, for example, during their entire youth, let's say, from the twenties to forties, cruel? The point is that cruelty will only operate, legally, by an act of determination of the authority, and not by the intrinsic justice of the specific content that derives from it, since such content is in and of itself problematic. Thus, in the United States, the death penalty is not considered cruel by the Supreme Court, whereas in Brazil, it can be considered cruel. Therefore, in fact, the moral notion underlying the norm is unable to provide a reason to act or to determine, from an epistemological point of view, what to do.

The following example can also illustrate the same points. Suppose a scientist says in 2010 that the big bang theory will be proved if the resolution of the equation α is positive. Does this mean that the scientist has proved the big bang theory? Suppose that in 2020 the equation α is positively solved. Would that scientist have proved the theory at that year? The point is that there is something that needs to be determined, but such determination is referred to a concept that is in and of itself indeterminate. To these arguments directed against those who connect law to morality, one must also add a consideration that Dworkin articulates as political positivism (DWORKIN, 2006, 27), namely, the difficulty of attributing to the author of the laws, the legislator, the rule deduced from a moral principle, due to an indirect derivation that is made from the principles. In other words, as Dworkin sustains, legal positivism carries an aura of defense of democracy. Raz may express this clearly: the incorporation thesis "makes the law include standards which are inconsistent with its mediating role, for they were never endorsed by the law-making institutions on whose authority they are supposed to rest" (RAZ, 1994, 229).

Concerning Habermas, the decision, therefore, is the issue that is outlined as a problem in his philosophy of law. He intends to discipline it in the tangle of communicative processes. However, the reasons that lead him to bring together communicative rationality and law do not allow him to maintain a strict symmetry with the operation of discourse theory in discourse ethics. If in the latter, on the one hand, the communicative

processes are in full force, for example, having as much time as necessary, on the other hand, in the law, they are interrupted at a given moment, in such a way that, at this precise moment of interruption, the Schmittian formulation of the decision is the one that insists on avoiding the communicative procedures. To put it clearly, an element alien to the communicative procedure intrudes itself into the law, that of the authority that joins a given interpretation. The question is whether his discursive theory is capable of avoiding a Schmittian objection, namely, that the decision is an element that does not follow from the content of the norm.

Having made these considerations, one can point out to a possible approximation of Habermas' discursive theory of law with the defense of authority as made explicit by the ethical legal positivists.

Habermas' discursive theory of law: the thesis of complementarity

Considering the above exposition, it becomes feasible to glimpse a possibility of analysis of Habermas' position in order to better understand some consequences of two main theses of his philosophy of law, namely, a) the thesis of moral neutrality of the discourse principle, together with b) the thesis of the complementarity between law and morality.

The relationship between law and the theory of communicative action, as it is presented in the first chapters of *Between Facts and Norms*, aims to address the problem of social integration. In other words, the question that law has to solve is that of integration, faced with a pluralized live world, faced with secularization (HABERMAS, 1992, 1996). What takes place in modernity is what Nobre calls a plurality of ethics (NOBRE, 2018, 16). Such plurality of ethics can reach the point of violent conflict, as the religious wars in Europe have shown. Besides this plurality, communicative rationality itself carries within itself not only a risk of dissent (HABERMAS 1996, 21-22), but also anarchic germs, arising from the very way it conceives the rescue of validity claims, namely, discursively (HABERMAS, 1996, xi).

It is in this sense that law is designed to solve this problem concerning integration. It solves it because one of its elements is based on the "*artificially produced facticity* found in the threat of sanctions that are legally defined and can be imposed through court action" (HABERMAS, 1992, 30). In other words, law is capable of being clothed with the force of the factual, whether in the sense of a sanction that can be imposed (fine), as a penalty for a deed, or as exclusion from society of that individual who does not comply with its determinations (imprisonment, death penalty), or through

agents of the State doing what the individual does not do spontaneously, as is the case when there is the expropriation of property to pay a debt. To put it clearly, law has force, a force that is determined as tension between power and violence. It is in this sense that the very definition of law that Habermas offers can be read: "By 'law' I understand modern enacted law, which claims to be legitimate in terms of its possible justification as well as binding in its interpretation and enforcement" (HABERMAS, 1996, 79). This definition contains at least three essential elements: substantiation, binding interpretation, and coercive imposition. To the first element Habermas responds with the principle of democracy. However, he devotes at least two chapters of his work to interpretation, precisely one of the central points dealt with by Hobbes and, contemporaneously, a central part of the objection of exclusivist legal positivists, both to inclusivist legal positivists and to the position that links law and morality. This is precisely the point that is at issue when Habermas deals with the complementarity of law in relation to morality with regard to its cognitive aspect.

In fact, Habermas intends to replace a conception of law that sees it as a special case of morality, that is, as if law were a limited, incomplete, restricted morality, a position that he imputes to Kant (HABERMAS, 1996, 79). This implies, according to the conception of discourse theory, that law ends up subordinated to morality. Nevertheless, this position rejected by Habermas, and which he himself sustained in the *Tanner Lectures*, is interesting for being a normative treatment of law. Now, this perspective is replaced by one that he names as complementary sociological relationship between morality and law. If we ask what such a sociological relationship would be, one answer is that it is a functional explanation, that is, not a normative one (HABERMAS, 1996, 111-113). Therefore, the explanation of the role that law plays is not normative, but functional, sociological. This terminology suggests a proximity with the positions of the exclusivist legal positivists, as well as with the way Hobbes and Schmitt conceived law, that is, as an institution devoid of normativity, but capable of deciding.

This impression seems confirmed when one analyzes in detail the terms of the complementarity envisaged by the discursive theory of law. According to Habermas, law compensates for deficits arising from the decomposition of traditional ethics, therefore, as already leveraged, problems arising from plural ethics. There are three relieved demands, namely, cognitive, motivational, and organizational. In this vein, special emphasis should be given to the cognitive requirement, precisely the first of them named by Habermas. It is in this sense that already at the level of the substantiation of principles a problem occurs that comes from the discursive formulation of morality itself, namely its inability to provide a

catalog of duties. On the level of application, in turn, the problem is that of the fallibility of opinions in the conflict of interpretations. The latter is the most important point, insofar as a decision is required in a conflict event. In this case, among other things, the norm should be interpreted. It is at this stage that authority intervenes as a complement, through the legislative branch that formulates the norm and, more importantly, through the judiciary branch that resolves the interpretative conflict in a definitive manner, that is, with the force of *res judicata* (HABERMAS, 1996, 113-115). Note that it is a matter of resolving a conflict of interpretation of a norm, therefore, it is a matter of deciding on one interpretation among several, which the law definitively does with regard to the determination of the action. This, precisely, is contained in the definition of the concept of law that Habermas offered, namely, as one that provides an obligatory interpretation that is imposed through an artificial sanction. For a better explanation of this it is possible to refer, *mutatis mutandis*, to Bishop Hoadly's phrase quoted by Hart (HART, 1994, 141): "Nay whoever hath an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spake them" (HART, 1994, 141). If it is law that specifies the particular cases of the norm, that is, that will interpret it in view of the circumstances, then it is law that determines the content of the principle in question, not morality. As suggested above, one of legal positivist's central objections to morality is its cognitive indeterminacy. This is true for Kelsen (1991, 53, 69s), Hart (1994, 141) and even for Weber (1961, 164).

In this vein, Habermas (1994, 19) himself admits that communicative rationality does not provide substantive guidelines for action. Certainly, indeterminacy can also be claimed in relation to law, since it is a rule formulated linguistically and therefore, as Hobbes' analysis shows, subject to vagueness. However, what is specific to law is precisely the power to make its interpretation by authority binding and to enforce such an interpretation. This resource is precisely what morality does not have. So, in the positivist formulation, morality cannot be called upon to settle a dispute, because any conclusion it may offer can always be the subject of a new dispute, and it has no power to bind action to its interpretation, much less to determine clearly what to do. When the law intervenes, it does so in a way that ends the discussion for that case; however, it will not be the truth of the norm's content that will determine the solution, because this will always be under dispute, but the authority will impose an interpretation. This is what is summarized in the saying *auctoritas, non veritas, facit legem*. Now, it is precisely the character of authority, of power, that is put by Habermas as a complement to the cognitive insufficiencies of morality.

However, in such a complementary relationship intended by Habermas, the role of law seems to have overridden that of morality.

Morality plays a negative role of vetoing legal norms that are not compatible with the principles established by it. Nevertheless, by Habermas' own disposition on the subject, principles are indeterminate and must, therefore, be complemented by law. But, if the law can say, in a definitive and authoritative way, the content of the principles, it is law that takes upon itself the determination of the principles themselves, given that these are not only indeterminate, but, fundamentally, controversial in their scope of application. So, how his theory differs from the way certain legal positivists understand their own position with regard to morality? As said before, according to positivism, the possibility of definitively resolving a conflict can only occur because authority lends coercion to a given interpretation, which then becomes valid not because of its intrinsic truth, but because it emanates from authority. By the way, this is what Hobbes teaches us in chapter XXVI of *Leviathan*.

Concerning the possible connections between positivism and Habermas position, Heck, for example, lapidary betrays that "discursive ethics is *tout court* replaced by democracy" (HECK, 2006, 19-30). Kettner (2002, 201-218), analyzing *Between Facts and Norms* in its entirety, concludes that discourse ethics has disappeared from the undertaking of this work, a statement that has a clear reference to the change operated by Habermas with regard to the relationship between morality and law. Apel maintains that the neutrality of the discourse principle as sustained by Habermas has a connection with the lack of normative justification of the legal form (APEL, OLIVEIRA and MOREIRA, 2010, 103-116). So, it seems as if Habermas were defending a peculiar kind of legal positivism perhaps, with some analogies with a kind of positivism also imputed to Kant (HECK, 2007, 88; WALDRON, 1995-1996, 1535-1566), or, in a more muscular way, he would end up positioning himself in a way analogous to Kelsen and Hart: "The similarity here between Habermas' position and that of modern legal positivism — in particular the work of Hans Kelsen and H. L. A. Hart — is notable" (HEDRICK, 2010, 86-87). But if we have in mind the normative (ethical) version of legal positivism, we can better understand Habermas' position. Like the ethical positivists, Habermas is prescribing (in a normative, not purely analytical way) the thesis of the separation between judgements of morality and legal judgements. It is precisely for this reason that Tom Campbell, a proponent of ethical positivism, sees in the Habermasian theory of democracy an analytical tool capable of providing plausible arguments to justify "the point of law", the value of the separation between law and morality at the retail level.

> the current work of Jürgen Habermas supports the conclusion that the theory of deliberative democracy implies that we ought to be striving to improve the quality of dialogue in representative politics, rather than locating the resolution of political issues in the debates of specialist lawyers, even if they do have a measure of political and economic independence enjoyed by few other groups in society. Indeed, it could be highly detrimental to the ideals of democracy if the case for judicial independence relating to such matters as tenure, appointment, salaries and pensions was thought to be part of an argument for increasing the power of courts in relation to such controversial political issues as the proper content of fundamental rights, rather than preserving their role as impartial adjudicators of fact and administrators of pre-existing positive law (CAMPBELL, 2004, 267).

What is specific to this "Habermasian ethical positivism" is the value, the foundation, the point that justifies the adoption of the separation thesis as the central aspect of Law: a theory of democracy defined in terms of discursive reason. The separation between Law and Morality is valuable because it promotes a discursive conception of democracy.

Habermas as an "Ethical Positivist"?

The definition of law in chapter 2 of *Between Facts and Norms* implies the type of function that the exclusive legal positivist attributes to the legal system and that, according to Habermas, morality cannot fulfill. And for Habermas, like the Ethical Positivists, this account of the nature of law is aspirational, because rely on normative considerations. Now, Habermas, in a first moment, defines law in such a way that it fulfills the function of obligatory interpretation and imposition. In a second moment, he establishes a relationship with morality, however, he does not abandon his definition of law in this connection, on the contrary, he seems to demand that law complements morality in its cognitive deficiencies. If so, how can Habermas' receptions of Dworkin's philosophy of Law be reconciled with such a position?

Habermas' discourse theory of law not only neutralizes morally the discourse principle, but also thinks law as a complement to morality, including in such complementation not only motivational insufficiencies of morality, but cognitive deficiencies. And this is precisely the problem. If

positivist authors are, frankly, non-cognitivists, or even skeptics, Habermas' cognitivism is weakened due to the procedural bias of his theory (LENOBLE, 1994). In other words, it is a weak non-cognitivism in relation to content (VOLPATO DUTRA and OLIVEIRA, 2017, 533-546). On the other hand, what he considers an advantage for morality – the abstract character of his propositions as a necessary determination to generate consensus and deal with matters of justice in the interests of all –, implies a de-potentialization of content, which he himself recognizes, as already mentioned. All this not only relegates morality to a negative correctional role in relation to law (VOLPATO DUTRA and OLIVEIRA, 2017, 233-252), that is, to a set of principles against which law may not attempt, but also imputes to law itself the determination, the specification, of the principles that should limit law itself.

The aforementioned negative correctional role that morality performs has led some interpreters to see in *Between Facts and Norms* an operativity of discourse ethics greater than Habermas himself admitted. Regh, for example, identifies in the principle of morally neutralized principle of discourse traces of the morality that Habermas seems to have intended to extirpate, namely, unanimity (REGH, 1996, 1147-1162). However, this apparent prevalence of morality runs up against the thesis of the complementary character that law plays in relation to the cognitive aspect of morality itself. In effect, if it is law that says the particular cases of applications of a norm or a principle, it is law that determines the content, not morality. Thus, considering the Habermasian concessions on this point concerning the deficits of morality, in what sense could he still appeal to the distinction between popular sovereignty and the morality of human rights as sources of justification of law? In this regard, it is worth repeating Heck's interpretation, quoted above: "discourse ethics is *tout court* replaced by democracy" in *Between Facts and Norms*.

Thus, the appeal he makes to law to complement morality seems to even reverse what Dworkin holds and what Habermas himself did in the *Tanner Lectures*. Dworkin seems to appeal to moral principles to complete the cognitive deficits of law. However, since Habermas desubstantiates morality, he seems to have slipped into a weak cognitivism regarding content, which has as a consequence a cognitive deficit, the filling of which resorts to law, more specifically, to the element of authority [*auctoritas*] of law, to a decision made by law. Therefore, there seems to be an incongruence between accepting Dworkin's theory based on principles and attributing to law the function, among others, of filling the cognitive deficit of morality. Dworkin would like to fill the gaps in the law with moral principles, while Habermas seems to defend just the opposite.

Finally, it is important to mention two points regarding this discussion that Habermas dealt with at different moments, but which should be interpreted in a connected way.

(a) The first point, as mentioned above, concerns the reception of Dworkin's philosophy of law. However, in relation to this point, Habermas takes two precautions. One is to give a legal nature to moral principles, interpreting them as the basic rights that he himself proposes. Habermas thus thinks that he can avoid the naturalistic connotations of Dworkin's proposal by replacing the notion of value, or a realistic moral theory, with the concept of basic rights, which implies a legal transformation of their moral structure, capable of honoring the deontological sense of the priority of the just over conceptions of the good (HABERMAS, 1996, 203-204). With this transformation, Habermas thinks he can detect as operative, in the principles sustained by Dworkin, standards equivalent to the basic rights that result from the application of the principle of discourse on the legal Form (HABERMAS, 1996, 206-207). With this, Habermas rehearses an interpretation of Dworkin closed to his procedural position.

Therefore, one can already glimpse in these formulations an attempt to discipline morality through the form of law, which Habermas himself operates with his system of basic rights of procedural lineage, in continuity with which he intends to receive Dworkin's notion of principles. It should also be noted that the amoral core of the subjective right that Habermas puts at the basis of his system, in order to avoid a moralizing determination of the genesis of fundamental rights, works with the liberation of communicative responsibility (VOLPATO DUTRA, 1998, 234-286). Of legal strain, freedom can no longer order the only element that could indicate a mark of correction capable of gravitating the decision, namely, the communicative motivation of the search for the best argument. Liberated from this motivation, which is required as the mark of a freedom that operates in morality but not in the juridical sphere, how can such a freedom now come to complement a deficit that can only be explained, most of the time, by the operation of a freedom outside the communicative tracks?

(b) The second point is that Habermas criticizes the Alexian thesis of the special case. The discursive model of law proposed by Habermas cannot be equated with the model of discursive ethics, as do Alexy. Nor can the primacy of morality lead to the conclusion of the special case thesis argued by Alexy. This thesis argues that legal discourse is a special case of practical-moral discourse in general. It is a special case due to some peculiarities intrinsic to legal discourses, such as the existence of positivized norms, the limitation of time for a decision to be made, and the coercive

nature of the decision. However, according to Alexy, such specialties do not deprive legal reasoning of its moral nature. Habermas (1996, 233), in turn, rejects the special case thesis because it suggests a false subordination of law to morality.

Thus, Dworkin and Alexy must be read complementarily, for if Dworkin Habermas accepts a certain moralization of law, it does not go so far as to transform it into a special case of moral discourse. Now, what Habermas seems to want to honor is the moment of the artificial facticity of law, making every effort to avoid the subordination of law to morality. But he seems to carry out such an intent in an exaggerated manner, to the point of placing law as a complement to morality in an aspect that he could not do, under penalty of accepting determinations proper to exclusivist legal positivism.

There is a certain inconvenience in the register that law is conceived as a complement to morals precisely to attenuate moral cognitive indeterminacy, and that, at the same time, morals have to come to rescue the law when it is unable to solve questions of application, especially in difficult cases, a point that he seems to admit from the reception of Dworkin's thought. Notwithstanding, for Habermas it is law that comes to the rescue of morality, not morality to the rescue of law. The moralization of law is refused, not only because of a division of labor between law and morality, but because morality, given its high abstract demands of universality, cannot offer a determination for practice, being in a motivational way or under an epistemological point of view.

In fact, if morality could generate a concrete decision, then Habermas would not need to resort to an element that seems exogenous to moral discourse theory. That is, it would seem acceptable to relieve morality from the exigence of motivational efficacy, because surely there is enough anthropology to conceive of man as prone to take exception to the moral norm, but to appeal to the factual element of law to fill in the cognitive content of a moral norm that leaves Habermas struggling to answer Schmitt's objection that the content then said goodbye, because, as already quoted, "anyone could refer to a correct content if there were no ultimate instance", precisely the point of Raz's legal positivism. Now, Dworkin can only combat the exclusive positivist thesis because he can mobilize substantive moral principles that he takes to be absolute, whereas the discursive theory of law seems to concede too much to legal positivism.

According to Habermas (1996, 85), "law, according to the positivist view, could only assert itself as a particular form that furnished specific decisions and powers with the force of de facto bindingness". Certainly, the attenuations in the moral cognitivism of discourse ethics that Habermas

seems to operate in *Between Facts and Norms* do not go as far as the incommensurability defended by some authors such as Raz (1986, 322), for whom "A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value" or Waldron (1999, 187), for whom moral objectivity is irrelevant to legal decisions, since moral realism has little to say about moral disagreements. Faced with stronger versions of non-cognitivism, Habermas always takes refuge in the possible cognitivist gain of the procedures of discourse ethics. But still Habermas can be accused of being a victim of his own definition of legal positivism, given the elements of his analysis of the concept of law, as well as his analysis of the complementary role that law performs precisely in relation to the cognitive aspect of morality.

Conclusion

Habermas's position can best be understood as a particular case of "ethical positivism", a moral defence of an "exclusivist" position on the relationship between law and morality. The thesis of the separation of legal and moral judgements at the retail level, at the level of the exercise of jurisdiction, is a valuable objective to be pursued, for it is capable of promoting the authority of political decision-making processes which are, on the whole, justified according to the universalistic principles of discursive ethics. In other words: the separation thesis is justified by deliberative democracy.

Consistently with such theses, Habermas advocates a model of constitutional jurisdiction according to which the essential object of judicial review is the guardianship of the deliberative political process, and not the substitution of legislative political processes for judgments of morality to be exercised by courts. Ultimately, legitimacy for political decision-making must reside in discursive procedures open to all those potentially affected by such decisions, and not in non-representative institutions populated by professional jurists. And this is the reason why advocates of ethical positivism can identify in Habermas a natural ally capable of providing plausible arguments to justify "the point of law", the value of the separation between law and morality at the retail level. And, for the same reason, the discursive theory of law and democracy can and should be complemented with an elaboration on the positivity of law based on a morally universalistic foundation, such as ethical positivism.

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