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Five minutes of Legal Positivism

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ABSTRACT

On semptember 12,1945, after twelve years of the national-socialist regime and six years of another world war, Gustav Radbruch, one of the most notable jurists and legal philosophers in Germany, circulated among the students of Heidelberg Law School his notorioustext "*Five minutes of Legal Philosophy*". This concise and emphatic work, in sum, attributesto legal positivism the responsibilities foracts of savagery and arbitrariness committed, under the protection of law, by the nazi. The following paper intendsnot only to refute Radbruch'scriticismof positivism – demystifying and deconstructing most of the confusions and misunderstandings built from the wrong conclusions of this legal philosopher – but also, in the course of this workto offer some perspectives on the concept of legal positivism.

KEY WORDS: Legal positivism; Radbruch; five minutes.

RESUMO

Em 12 de setembro de 1945, após doze anos de regime nacional-socialista e seis anos de mais uma guerra mundial, Gustav Radbruch, um dos mais conhecidos juristas e filósofos do Direito da Alemanha, fez circular entre os alunos da Faculdade de Direito de Heidelberg o conhecido texto "*Cinco minutos de filosofia do Direito*", de sua autoria. Neste breve e enfático escrito, em síntese, atribui ao positivismo jurídico as responsabilidades pelas barbáries e arbitrariedades cometidas pelos nazistas, sob as proteções do Direito, ao longo de seu período no poder. O artigo que se segue pretende não só contestar o libelo de Radbruch contra o positivismo - desmistificando e desconstruindo boa parte das confusões e incompreensões que foram erguidas a partir das equivocadas conclusões deste jusfilósofo - como, neste percurso, oferecer algumas perspectivas sobre o conceito de positivismo jurídico.

PALAVRAS-CHAVE: positivismo jurídico; Radbruch; cinco minutos.

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Introduction

On September 12th, 1945, after twelve years of national-socialist régime and six years of another world war, Gustav Radbruch, one of the most notable jurists and legal philosophers in Germany, circulated among the students of Heidelberg Law School his notorioustext "*Five minutes of Legal Philosophy*".This concise and emphatic work, in sum, attributes to legal positivism the responsibilities for acts of barbarism and abuse committed by the Nazi under the protection of law throughout the duration of their period in power. In his own words, he holds that "this conception of law and its validity, that which we call Positivism, was the one which left the people and jurist defenseless against the most arbitrary, cruel and criminal laws" (Radbruch, 2009, p. 69)[2]. Detailed analysis of the criticism of legal positivism shows that the greater part of objections raised against this conception of the study of Law are based on exactly the same theoretical distortions and historical inconsistencies present in this work of Radbruch's – a text that, one does not need to point out, appeared in a moment of extreme consternation and torment for thinkers committed to humanist notions. Thus, the revision of the ideas contained in these five minutes of legal philosophy shows itself essential not only for a correct comprehension of legal positivism but also necessary for a more sober debate of its propositions. The following article, then, intends not only to dispute Radbruch's libel against positivism – demystifying and deconstructing a significant part of the confusions and miscomprehensions raised from the erroneous conclusions of this legal philosopher – but during the course of this refutation, to offer some insights into the concept of legal positivism. Aiming at a clearer contraposition of arguments, the expository structure follows the method adopted by Radbruch in his original text, that is: concise, fluid and separated into "minutes".

First Minute

[2]This criticism of legal positivism and the conclusions regarding the responsibility of this approach for Nazi acts are repeated in later works by Radbruch, especially in "*Legal arbitrariness and supra-legal Law"* and "*The renovation of Law"*, both of 1946.

Orders are orders; this is the law of the soldier. The law is the law, says the jurist. But while for the soldier, a man charged with practical tasks, there is always the possibility of opposing the obedience of orders he considers unjust, the jurist, as a student of Law and not its creator or applier, objections of this nature are meaningless, for it is not his task to discuss the justice (the *value*) of laws or the social convenience of its concrete observance by citizens, but to describe and study the legal precepts that are effectively in force in a given society. The law, as a species within the group of norms that aims at directing human conduct, is valid (*validity*) because of its condition as law, independently of its possible and eventual compatibility with presupposed moral rules, it is always law when, through empirical analysis[3], it is found that its precepts are mandatory and have the capacity of imposing themselves and become effective socially.

This conception of the study of Lawor, to some, the science of Law which we call legal positivism - a wide group of numerous, varied and contrasting schools of thought[4] - is not responsible, as it is vulgarly understood, for leaving defenseless the people and the appliers of Law against arbitrary, cruel and criminal laws in effect today and in oppressive and totalitarian regimes throughout history. It was not the positivist jurist, as a theorist that merely identifies and analyses the Law currently in effect, the one guilty for the existence and application of these precepts, not even recommending or postulating the duty of giving concreteness to these abominable precepts, a problem given over to the vicissitudes of a political reality, depending exclusively on the existing relations of power within a given society.

[3]The term "*empirical*" is used in the text to express the essence common to all legal positivist currents: the theoretical demand that it be possible to *factually* observe the existence of any given norm in a specific social grouping. One must warn, then, that in the present work "empirical" refers to what is called "*conceptual positivism*" and to the "*thesis of the social fact*". On these conceptsfundamental to the debate on legal positivism see NINO, Carlos Santiago. *Introdução à análise do Direito*. Trans. by Elza Maria Gasparotto. São Paulo: Edited by. Martins Fontes, 2010, pages42-50; DIMOULIS, Dimitri. *Positivismo Jurídico*: introdução a uma teoria do direito e defesa do pragmatismo jurídico-político. São Paulo: Ed. by Método, 2006, p. 78 and following; and HOERSTER, Norbert. *En defensa del positivismo jurídico*. Trans.by Ernesto Garzón Valdés. Barcelona, España: Ed.by Gedisa, 2000, pages 9-27and following; and HOERSTER, Norbert. *En defensa del positivismo jurídico.* Trans. by Ernesto Garzón Valdés. Barcelona, España: Ed.by Gedisa, 2000, pages 9-27.

[4]At the end of the "fourth minute" there is a brief explanation on the two main positivist currents involved in contemporary debates.

Second Minute

There is no doubt that many were the despots and governments that, under the pretense of accomplishing the interests of the people, equality or the common good, implanted, through the legal system, true empires of terror that stripped all or part of their citizens of their most basic and fundamental guarantees, hopes and aspirations inherent to the human condition. However, in spite of legal positivism recognizing these arbitrary precepts as law, it does not maintain that "*that which the holders of power judge convenient for the common good, the fancies of a despot, punishments decreed without law or previous condemnation*" (Radbruch, 2009, p. 70) should be the content of Law or that such legal norms should be applied. Positivist jurists are not the legislators of such precepts, much less judges of the morality of any given legal system. As scholars of the Law in effect, they differentiate the contemplation of the reality that is evidenced through fact, the legal norm that "*is*", from the precepts that should be adopted by any specific conception of justice – norms that "*should-be*" in effect.

At the core of legal positivism, as we know, is the rejection of any metaphysical-idealistic formulation of an *a priori* Law determined by content of divine origin, from natural law or of duties arising from an absolute rational reflection. On the contrary, and in consonance with this foundation of positivism, Hans Kelsen[5] emphasizes that, under a historical analysis, since classical antiquity one observes an intimacy between authoritarian, totalitarian and anti-humanist policies with the discourses identifying Law with norms of a presupposed "Justice", independent of the human, all too human, wills and laws positively established. To keep only within the 20th century, in the fascist Italian State and its "*sentimentodelloStato*"; in national-socialist Germany and its notions of "*volksgemeinschaft*" (community of the people) and "*volksgeist*" (spirit of the people); and, lastly, in the USSR, with its legal system aiming at the fulfillment of the "*revolutionary will of the proletariat*" (or "*will of all the people*", as was later

[5]Sobre o ponto, conferir as obras de Hans Kelsen sobre as relações entre as concepções de justiça e as organizações políticas, especialmente KELSEN, Hans. *Teoria General del Estado*. México: Ed. Ediciones Coyocán, 2008, p. 470-473; KELSEN, Hans. Absolutismo e relativismo na filosofia e na política. In KELSEN, Hans. A Democracia. 2. ed. São Paulo: Edited by Martins Fontes, 2000; KELSEN, Hans. Fundamentos da democracia. In KELSEN, Hans. A Democracia. 2. ed. São Paulo: Ed. Martins Fontes, 2000, especially pages 195 and following.

claimed), what one observes is a deliberate abandon and belittling of juridical custom, of the primacy of legality and of the principles of the rule of law in name of norms and objectives of "justice" on which they depended. That is, what one observes on the varied dictatorships of the last century, in line with the vast majority of antidemocratic currents of thought and owing nothing to the many forms of natural law, is strong anti-positivist attitude.[6]

Third minute

The concept of Law is one of the most controversial themes in legal and philosophical thought. If to chemists and biologists it may seem somewhat unusual that the general definition of a field of study can generate so many disputes and debates, the question "what is Law?", on the contrary has always been - and still is – a significant part of discussions in the legal field. Such a situation is, within a first outlook, fruit of the ambiguity and vagueness of the word "Law" itself, as well as its inappropriate use in language. As an ambiguous term, "Law" can mean, among other things, a coordinated set of norms (legal system), a legally protected interest (subjective right, a determined point of view on the correctness of human actions (law as justice),

[6]Cf. NOVAIS, Jorge Reis. *Contributo para uma teoria do Estado de Direito*. Lisboa, Portugal: Edited by Almedina, 2006, Chapter V; BOBBIO, Norberto. *O positivismo jurídico*: lições de Filosofia do Direito. São Paulo: Ed. Ícone, 2006, p. 236; VAN CAENEGEM, R. C. *Uma Introdução Histórica ao Direito Constitucional Ocidental*. Lisboa, Portugal: Ed. Calouste Gulbenkian, 2009, pages 298 – 347. Specifically with respect to nazism , LOSANO, Mario G. *Sistema e estrutura no Direito*. Volume II. São Paulo: Ed. Martins Fontes, 2010, Capítulo V, and MÜLLER, Ingo. *Los Juristas del Horror*. Bogotá, Colombia: Ed. Alvaro Nora, 2009, especially chapter 6, of the Second Part, and chapter 3 of the Third Part. On the Soviet legal system and the paradoxes of "socialist legality" see RAÓ, Vicente. *O Direito e a Vida dos Direitos*. 6ª. São Paulo: Ed. Revista dos Tribunais, 2004, Capítulo 5.Hannah Arendt comes to the same conclusion: *That lawful government and legitimate power, on oneside, lawlessness and arbitrary power on the other, belonged together andwere inseparable has never been questioned. Yet, totalitarian rule confrontsus with a totally different kind of government. It defies, it is true, all positive laws, even to the extreme of defying those which it has itself established (asin the case of the Soviet Constitution of 1936, to quote only the most outstandingexample) or which it did not care to abolish (as in the case ofthe Weimar Constitution which the Nazi government never revoked). But it operates neither without guidance of law nor is it arbitrary, for it claimsto obey strictly and unequivocally those laws of Nature or of History from which all positive laws always have been supposed to spring.It is the monstrous, yet seemingly unanswerable claim of totalitarian rulethat, far from being "lawless," it goes to the sources of authority from whichpositive laws received their ultimate legitimation, that far from being arbitraryit is more obedient to these suprahuman forces than any governmentever was before, and that far from wielding its power in the interest of oneman, it is quite prepared to sacrifice everybody's vital immediate intereststo the execution of what it assumes to be the law of History or the law ofwhich, since it is inspired by the sources themselves, can do away withpetty legality. totalitarian lawfulness pretends to have found a way toestablish the rule of justice on earth—something which the legality of positive law admittedly could never attain.*(ARENDT, 2009, pp. 513-514)

or the selfsame field that studies Law (Legal Science or Theory of Law). As a vague term, it does not offer, through the strict and abstract analysis of its signifying properties, an essence or intrinsic quality that is independent of social observation and its use in language[7]. To further complicate the issue, it is common among scholars the confusion of two absolutely distinct levels of language: the plane of metalanguage, of propositions that aim at offering knowledge on legal reality – occupied by the Science or Theory of Law, and the plane of the prescriptive language of legal precepts, the linguistic propositions that sets legally binding norms of behavior – Law itself.

Within a second outlook, many of the disagreements regarding the concept of Law are the result of difference and conflict between the content of Law and the values recognized as desirable by a given observer. Many jurists, abandoning the guidelines of legal positivism, attribute to themselves the power and even the duty of evaluating the justice and obligatoriness of legal precepts. To these, the norms of a legal system would only be valid if they conformed to a specific set of prescriptions: the Law, to be Law, has to have prescriptions compatible with the will of the gods, natural law or, more recently, with a moral code that becomes evident through the use of reason or through popular acceptance.

Although there are varied currents within legal positivism, two traits can be promptly recognized as common to all of these: a) legal positivism –taking into account its adherents since the beginning of the last century[8] – is a philosophical and juridical attitude strictly related to the metalanguage of Law, that is, it is a theoretical proposition that addresses the study of Law, not the determination of the normative content of the prescriptions under analysis; b) its adherents, intent solely on apprehend and produce knowledge on norms in effect (the object of their field of study), separate Law, understood as a set of binding prescriptions of conduct verifiable empirically in a given society, from the prescriptions that should be incorporated by imperatives

[7]This is demonstrated by Carlos Santiago Nino, in NINO, Carlos Santiago. *Introdução à análise do Direito*. São Paulo: Edited by Martins Fontes, 2010, pages 11-17. For an introduction to the complexities related to the answer to the question "what is Law?" see HART, Herbert. *O conceito de Direito*. 5ª ed. Lisboa, Portugal: Ed. CalousteGulbenkian, 2007, Chapter I.

[8]Mainly Hans Kelsen, Alf Ross e Herbert Hart.

of justice or popular convenience. In other words, positivist scholars understand the norms of Law are legal independently of their being just (morality) or legitimate (political conscience of the subject subordinated to it); legal positivists differentiate the *validity* of norms from the *evaluation* of their content.

Fourth minute

The vast majority of the accusations put forth by Radbruch, however, not only do not reflect the reality of legal positivist thought – at least since the beginning of the last century –but show a complete incomprehension of its ideas. As a general preliminary observation of grat importance, and which is, however, object of gross misapprehension within the academy, one must stress that the positive Law which is the object of legal positivism is not identical to "codified Law", the written and formalized law, or with the norms included in any formal legislative instrument. Though these constitute the most common sources of Law in the countries of roman-germanic tradition and are, without a doubt, sources of positive Law, customs and practices are also identified by positivists as sources of positive Law – representing, as is of common knowledge, the greater part of "legislation" in countries adherent to *Common Law*. Positive Law does not mean statutory Law – which is the one pertaining a given legal document, while the other is a set of norms resulting of human will endowed with the capacity of enforcing themselves!

Legal positivism does not defend – unlike natural law and moralist doctrines – that the law, because it is the law, is or should be just, that is, it never sought to extract from the mere observation of the legal validity of certain precepts their conformity to certain ideals of justice. In the same vein, it does not assert that once a norm is verified to be in effect it should, in fact and mandatorily, be observed by the citizens, enforced by authorities or applied by the judicial organs of the State; as a current of thought related to the study of Law, it understands that

making judgments on this question are beyond its realm of study[9]. Another inadequate and commonly disseminated criticism of positivist thought is the so-called "mechanical application of Law", which ascribes to positivists the thesis that organs applying the Law, and especially judges, have as duty and function mere subsumption, automatic and lacking any reflection on the nuances of the case in question, of the facts to the existing legal norms. Legal positivists were, on the contrary, the first jurists to assert and demonstrate that the language of Law contains ambiguity, vagueness and semantic openness that make any such process impossible[10].

Within the field of current positivist thought there is a distinction between two different species of legal positivism. On one side we have exclusivist positivists, authors such as Hans Kelsen, Alf Ross and Joseph Raz, who observe the legal phenomenon as autonomous and independent from interactions with systems of morality present in a specific society; on another we have inclusivist positivists, authors such as Neil MacCormick, WilfridWaluchow and, having greater prominence in Brazil, Herbert Hart, recognizing that although the validity of Law is not subordinated to a necessary conformity to any moral norms, observe that moral imperatives normally influence both the positing of norms or their application, which would demand an enlargement of the analysis of the Science of Law in order to encompass, starting from the Law in effect, these connections.[11]

Fifth minute

[9]This distorted conception of legal positivism has been criticised by Bobbio under the designation of "*ideological* positivism".See BOBBIO, Norberto. *O positivismo jurídico*: lições de Filosofia do Direito. São Paulo: Ed. Ícone, 2006, Chapter VII. In the same vein, see NINO, Carlos Santiago. *Introdução à análise do Direito*. São Paulo: Ed. Martins Fontes, 2010, pages 36-41.

[10]As Hart demonstrates in HART, Herbert. O positivismo e a separação entre Direito e Moral. In HART, Herbert. *Ensaios sobre Teoria e Filosofia do Direito*. São Paulo: Ed. Elsevier, 2010, pages 68-78.

[11]Cf. WALUCHOW, Wilfrid. Legal positivism, inclusive versus exclusive.*In* E. Craig (Ed.), *Routledge Encyclopedia of Philosophy*.London. Available in the Internet: http://pt.scribd.com/doc/56008841/Waluchow-Legal-Positivism-Inclusive-Versus-Exclusive, accessed in 03/10/2012. In Brazil, addressing this point, see DIMOULIS, Dimitri. *Positivismo Jurídico*: introdução a uma teoria do direito e defesa do pragmatismo jurídico-político. *Op. cit*., p. 134.

In the same way that it would be considered eccentric and nonsensical for a scientist or any observer to refuse to recognize that water evaporates at 100º Celsius at normal conditions of temperature and pressure, who denied the fact that the sun rises every morning because of the movements of our planet, or yet, that bemoaned the fact that raindrops fall because of the force of gravity, it is equally senseless for a scholar or scientist of Law to state the non-legality or non-effectiveness of norms that, independently of their opinion, intervention or critique will continue to be applied and imposed in the social reality that surrounds him. Legal positivism, as philosophy of law concerning the metalanguage that is the study of Law, does not have the capability, power or legitimacy to decide on the content or justice of legal norms. The personal positions of scholars of Law on the value of empirically active precepts do not have the privilege of revoking or altering the factuality of the effectiveness of norms.

Concerning another aspect of the question, it is not minimally rational to attribute to a given grouping of ideas - philosophies or scientific approaches, whichever their propositions – the responsibility for the occurrence of any event, good or bad, in the world of facts. Humanity, that has already tasted of the tree of knowledge and recognized the death of God, should know that the condition of freedom imposed on men condemns them to bear the eternal burden of choosing and defining which course of action to be followed by himself and observed by others. It falls to social groups and concrete individuals – free, dangerously free, virtuously free – to be responsible for their choices and the consequences thereafter. Ideas do not kill or promote the general wellbeing; to blame legal positivism is to ignore men's responsibility for their acts. To act justly and to make the Law just should be what moves all men that, detaining power, posit the Law; and this, be it accepted or not, does not need undergo the sanction of the desires of scholars of the legal phenomenon.

Conclusion

The positivist study of Law aims, simply, at analyzing and producing knowledge on the norms that effectively and compulsively regulate the behavior of social groups. It does not,

however, ignore the importance and necessity of philosophical, axiological or sociological speculation on its content and value, but directs them to other specific subjects. The Law, with its intimate relationship with the prevailing power in a given society, becomes binding independently from academic opinions on its justice: power, where the Law is born, does not ask permission to natural law, rules of reason or, much less, the opinions of jurists. Like the *gorgons*[12], who in Greek mythology transformed into stones the ablest warriors that dared gaze their eyes, the Law, in the shadows of power, always imposes itself and is carried out even in face of the most justified and legitimate aspirations of justice. In face of power even the most illustrated wills bend, paralyzed like stone, incapable of offering any resistance to its decisions. To make the Law just is a possibility, the responsibility for making it so rests with men, guided by their virtues and by the actual configuration of power.

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[12]Assim já se manifestava Hans Kelsen: "*O problema do direito natural é o eterno problema do que está por trás do direito positivo. E quem procura uma resposta não encontra – temo – nem a verdade absoluta de uma metafísica, nem a justiça absoluta de um direito natural: quem levanta o véu e não fecha os olhos é ofuscado pela Górgona do poder.*", Apud LOSANO, Mario G. *Op. cit*., p.121.

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