Science of Law in the 21st century

Philosophy of Mind, neurosciences and legal responsibility

Profª Doutora Maria Fernanda Palma

I
Topic Justification

1. The topic that the Research Centre of Criminal Law and Criminal Sciences wants to highlight as demonstrative of the challenges of the legal thought in the 21st century is the questioning of the traditional ideas of legal responsibility brought by the popularization within the scientific community and the neurosciences media ~~and that~~ of a philosophy of mind, let us call it naturalist, that tends to accept the reduction of traditional concepts of consciousness and will to certain concrete phenomena brain/mind. As we will see, this is not the unique challenge and probably it will not be the most crucial topic to the legal thought. However, deserves the highlight because it brings to discussion the nature of the legal science and its evolution problems.

Hence, this will be the link of Law with philosophy of mind and neurosciences the main reference of this brief speech.

2. Nevertheless, it will also be necessary to do a very short reflection about two more general questions: the dilemmas of the affirmation of Law as a legal science, also mentioned in the general topic of the session, and, on the other hand, more specifically, the framework regarding the great options about conception, meaning, sense and *raison d´être* of the Law throughout Philosophy of Law and its own historical – factual situation of the Law phenomena.

Thus, a few notes about the traditional problem of Law scientificity as well as the Law contemporary phenomena nature and the type of thought that they raise are needed

II

From the Science of Law as a normative scientific rule to the possibility of its autonomy in the light of politics, economy and social morals

3. The problem of the affirmation of Law as a science, that I've integrated on the sciences of the mind as Dilthey`s sustained, raises problems of interpretation/comprehension opposed to the sciences of nature, supported by the causal/explanatory paradigm, and mainly in the 20th century has represented , an effort to regulate the following main question –knowing if it is possible to establish the truth/validity of the solutions offered by the Law in the same way as it is possible to check the truth /false of the scientific statements. The refuge of an extremely important methodological line of analytical type, according to Austin and Hart's tradition, or continentally following the neo-Kantian tradition (radicalized with Kelsen), only focused in determining the criteria of the formal logic of the legal statements within the normative systems, supported by the deepening of the deontic logic and also in the comprehension of jurists secular thought in the interpretation and legal decision, , in fact corresponded to the Law theories experience as coherence Touching, however, the unsubstantial of validity´s problem, the denial theories of the importance of one the question of the truth, the so called deflationists theories which deny that truth is a substantial property of something including the statements and that has a semantical identity that is more than, as said by P. F. Strawson (1964), a kind of approval of something as if we use a predicate of truthiness, not to say, but to support something (Lynch., Michael, 2001).

I do not deny the value of any line of analysis that is focused on the knowledge of the legal logic or, alternatively, under a realistic impulse to ascertain its practices. However, throughout those ways, the Law renounces to discuss alternatives to its role in the contemporary societies.

The strictly analytical lines, skeptical about the questions of validity and about the content of values, raise a reductionism of the subject of Law as it already happened, in its historical time, with Neo-Kantianism. One must consider that the critical and legitimating thought, which is extra-systematic by nature, does not have , place in the legal thought for that orientation.

Thus, the legal thought that tends to reduce Law to a theory of logic consistence of rules, withdraws from the discussion about the validity and "quality" using a valuable word to the economical models of the normative systems. Nevertheless, this discussion about the quality of the normative systems and, in general, of the normative options is what allows its evolution, modification and cooperation with others. For example, the construction of international legal orders through cooperation and not only by simple assimilation politically conducted, presupposes a discussion of validity, value and quality. And such discussion does not have to be a simple ideological discussion, without seeking answers yet unknown, strange to the critical thought and not redundant.

4. However, in other line of thought the Law maintained the demand of comprehension and interpretation of the system´s values, like is clearly in the case of Ronald Dworkin (1986), who defines the legal interpretation as a discovery according to the stimulus of cases, especially the hard ones, of a coherent integration of the values generated by the system. Making here a comparison that Dworkin himself does not establishes with the generative grammar of Chomsky (1957), he suggests that legal interpretation does not only relate system´s values with cases, building a solution previously not prepared (it´s the end of the stories which are begun to be told by rules and concluded by judges) but also has ways to create a definition of pragmatic values, concrete values yet unconceived, but resulting from an integrative role of interpretation.

In one of the two possible readings of Dworkin's thought, the one that overcomes a kind of positivism of the system´s values (a positivism of values), it would exist instead a *generative autonomy* of the legal rules or of the system itself that, without an external input of a legal decision, could *generate* the solutions for the unthought cases, just like in a language where the possible combinations of sentences are not yet all provided.

It's challenging the relation of a conception of Dworkin's kind, which doesn´t reject the definition of the system´s values as a problem of interpretation of Law, with the cybernetic, in the sense that Law would only naturally became independent from the politic, economic and religious level, becoming a system with identity, when it would be capable of understanding itself, to reflect about its own history difficulties and *modus operandi*. To the autonomy characteristic of the formal systems, it would oppose an

autonomy based on the self understanding and self validation of the systems, totally dependent of the quality of its values.

5. On the other hand, the comprehension of what Law is, through an investigation about its logic frames and values, does not only lead to its autonomy as a fact and as a meaning, but also opens doors to a dialog between systems: an interaction with other systems of thinking and action, opened to receiving information and also to the effective communication of thinking models. In conclusion, if the imprisonment of Law as a system means its autonomy as a subject of thought and action, it's also truth that it allows, at least, its comparison with other systems and other sciences. Such comparison raises communication, in the sense that allows the introduction of other ways of integration of new values and other processes of justification.

Just to give you a concrete example before we talk about neurosciences and Law, the knowledge about the role of culture, language, religion, gender or sexual orientation, as central issues for the comprehension and development of itself by each person, might be decisive to set the rights, broadening the contents of what should be elevated to fundamental rights and freedoms.

The Law, while opening itself to the knowledge of other areas of thought, broadens the reference information about its subject or even broadens its object as it has happened recently regarding environment or animal rights.

The remaining question is whether there are values exclusively legal, which are inherent to the specific role of the Law, if there are ways of solving conflicts imposed to other areas of action, such as politics or economy, which will also affect the options of analysis and ~~of~~ investigation of other sciences.

The assumption I consider plausible is therefore, that the way of thinking values through Law is formative and guiding to other areas of thought, assumption which I resume into this simplified statement: the justice criteria, such as equity and acknowledgement of the other, cannot stop being a guide to other sciences in general, not so much as regulative law for the sciences or a right to science, but mainly as a way of composing the investigation object through options about what needs to be though - which is visible in the fields of medical investigation, psychology or sociology, for instance.

A bridge between Law and Neurosciences may be established regarding on how relevant Law decisions are madeup both by the rules beneficiaries and by legal experts, and also if there is a specific way of brain and mind functioning in the legal thought, like Goodenough, Oliver argued in Mapping Cortical Areas Associated with legal Reasoning and Moral Intuition (2001). Despite those investigations are generally unsuccessful, they remain interesting while questioning on how an option of values emerges in certain contexts, turning relative what prior were absolute moral judgments and, on the other hand, they suggest that there is a model of though in legal decisions inherent to mind build of the human being and that it cannot be an exclusive characteristic of legal experts.

III

6. In this context, how should we think the relation between neurosciences and the Law? Why should we elect this topic as the central subject of the investigation?

The answer comes from some inner internal considerations to the Law:

– The difficulty of Law in using traditional criteria of responsibility when facing the new demands t of an automated society and with the interaction of complex systems;
- The subsistent need of Law in maintaining its own language close to ethics, but simultaneously autonomous;
– The constant *inefficiency* of Law to solve problems that appears to be unsolvable, such as crime and the recovery of the convicted ones c with the correspondent disbelief in justice that it represents.

In this way, Law needs to understand what is at stake on the matter of conscious, volunteer, intentional or merely negligent behavior in the light of behavioral sciences and of the functioning of the brain, eventually redefining the traditional concepts, understanding what must prevail from them or reflecting whether if it can or cannot give up of ethical conceptions of responsibility based on a reflexive consciousness on itself.

During the 20th century, an intensive discussion about the concept, role and meaning of the consciousness regarding mental states of the mind was developed from the Libet experience, which at least undermined the causalists conceptions fundamental for the relation between mind and behavior and the ordinary notion of time, which is linked to the causality of antecedent/consequent.

For the legal investigation that discussion raises a necessity of reorganization of the meaning of conscious decision in responsible behavior, not to deny its importance, but much more to redefine its meaning.

In an article currently being published on the Mind and Responsibility Conference Minutes, organized by the Centre of Investigation on Criminal Law and Criminal Sciences, with the F.C.T. support, which, I might add, is already published on the Centre's Journal *Crime Anatomy* (*Anatomia do Crime*), I tried to show that the conscious decision is mainly an acquired meaning after the action of itself and by third parties and, therefore, it cannot be understood as a causal engine of behavior.

That article is going to be available to you as representative of a project of critical redefinition of the criteria of criminal charge that involves mental states of the mind.

Adding to what has been already said, it's important to note that although in contemporary societies the Law continues to make use of a traditional language regarding the states of the mind, there are systematic interactions that tend to empty the relevance of those states within the systems of assigning responsibility, giving special importance to objective and funcionalist criteria, where only a relation of an individual with an assumption scheme of demanding action is at stake.

However, if this type of analyses is helpful to show that, through its own interacionist logic and dynamic, Law has already overcome the demand of a conception of will and a consciousness of dualistic type, introverted and causal, one can also argue that a legal ethics redefinition of the free and responsible person and of the fair measure of responsibility according to the information proposed by neurosciences remains for discussion. The role of traditional ethical language had a reason to exist, but if that language is disused, her role must be satisfied otherwise.

On the other hand, new questions arise to challenge the «traditional grammar» of Law. One of the most attractive questions and of strong discussion in this field is the one of knowing if there is a duty of enhance human skills to meet the demands of

responsibility which fall upon certain agents concerning certain professional competences or merely social (such as driving) or if, in other cases, that enhancement already reached by technology is illegitimate. This problem reflects itself in the context of the right to health and of the duties of the State in the protection of health; in the eventual responsibility of not enhancing skills on the body or even in the so called *moral enhancement* through means and therapies based on technology – this is a question that relates, for example, with social recovery of certain condemned, to whom the question of social duties of moral improvement may be placed, through intervention techniques on physical and mental autonomy of certain agents in specific cases of criminality such as sexual and violent crimes.

There is also a confluence multidisciplinary area waiting for a very brave investigation – the relation of mental health interacting with the environment in general and with the present punitive system. But not only the criminal responsibility requires extra-legal comprehension of the skills of the agent to avoid the fact and to be sensitive to penalties, as it is also necessary to understand the contribution of the current punitive system to the mental health itself.

Law isn´t merely an answer to criminal and social problems of development, as it must be also understood as part of the ruling reality. Disbelieve in *justices*, it´s removal from the fundamental references of development of itself is a fact and a problem with which contemporary normative options must deal with. This ambivalence and roundness of Law as a reality and decision about reality, guiding normative legitimating option and with the need of legitimation makes the future of Law questionable in the 21st century. It's not just about *which Law*, but *if Law*, in an apparent broadening to other domains, will not become something else.

The grounds of normativity, as they have been discussed by the legal philosophical school of Frankfurt, are among all the great questions of our times, from the punitive efficiency to the normative acknowledgement of the other, to legal answers to terrorism, globalization and universilization of the normative systems.

The Law scientific Project of investigation for the 21st century is one of critical discussion regarding the legitimate normative options and also about the possibility of different normative systems communicates among each other through a profound investigation of goals and limits of normative orders and the constructive role of the

human being that competes to justice. In short, it's a project of science – knowledge of the Law itself, its values and the relation with other systems.

Quoting Michael Kohlaas of Heinrich von Kleist, in a world without rights and without Law, which is, in many cases, the real history of individuals and entire societies, it wouldn´t be worthy living in. Taking justice as a condition of existence, always set as a fight and as a fight to knowledge, the investigation in the field of Law, as a contra factual statement, is, in this sense, a part of the investigation about the way of achieving the most profound needs of human beings and, therefore, can't be imprisoned into strict systematic logics that can only be understood as techniques inside technique, as Fernando Pessoa stated, neither can be minimized as a Science.