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CRITIQUE OF THE JUSPOSITIVIST THEORY OF JUDICIAL DECISION

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Contextualization: The decision-making paradigm of legal positivism presents two distinct phases, which consist of the exegesis (or mechanistic) period and the normativist (or limited discretion) phase. However, throughout history, there was post-positivist development based on these theories, especially given the level of legal complexity of some cases, in which a considerable degree of judge discretion persists..

Objective: The objective of this article is to discuss the replacement or complementation of the juspositivist model of subsumptive visualization of the phenomenon of judicial decision, due to its excessive formalism, aiming to obtain a version with descriptive fidelity and, also, greater normative potential for the protection of rights fundamental.

Method: Regarding the methodology used, it is noteworthy that the inductive method was used in the research phase, the Cartesian method was used in the data processing phase and the final text was composed on a deductive logical basis.

Results: It was concluded that it is necessary to continue improving legal science, particularly with regard to the theory of judicial decision, overcoming formalistic constructions, in order to refine its descriptive and normative aspects, through the incorporation of recent interdisciplinary discoveries in the fields of economics and psychology, aiming to construct a theoretical paradigm that is more than positivist, and not less, while avoiding regressions to the previous theory of natural law.

Keywords: Judicial decision-making theory; Legal positivism; Fundamental rights.

CRÍTICA DA TEORIA JUSPOSITIVISTA DA DECISÃO JUDICIAL

Contextualização: O paradigma decisório do positivismo jurídico apresenta duas fases distintas, que consistem no período de exegese (ou mecanicista) e na fase normativista (ou de discricionariedade limitada). Entretanto, no decorrer da história, houve desenvolvimento pós-positivista a partir destas teorias, mormente diante do nível de complexidade jurídica de alguns casos, nos quais persiste considerável grau de discricionaridade do julgador.

Objetivo: O objetivo deste artigo é discutir sobre a substituição ou complementação do modelo juspositivista de visualização subsuntiva do fenômeno de decisão judicial, em razão de seu formalismo excessivo, visando a obter uma versão com fidelidade descritiva e, também, maior potencial normativo para a tutela dos direitos fundamentais.

Método: Quanto à metodologia empregada, destaca-se que na fase de investigação foi utilizado o método indutivo, na fase de tratamento de dados o cartesiano e o texto final foi composto na base lógica dedutiva.

Resultados: Concluiu-se ser necessário prosseguir com o aperfeiçoamento da ciência jurídica, particularmente no que diz respeito à teoria da decisão judicial, superando construções formalistas, a fim de refinar seus aspectos descritivos e normativos, mediante a incorporação de recentes descobertas interdisciplinares nos campos da economia e da psicologia, visando à construção de um paradigma teórico mais do que positivista, e não menos, evitando ao mesmo tempo regressões à teoria anterior do direito natural.

Palavras-chave: Teoria da decisão judicial; Positivismo jurídico; Direitos fundamentais.

CRÍTICA DE LA TEORÍA JUSPOSITIVISTA DE LA DECISIÓN JUDICIAL

Contextualización: El paradigma de toma de decisiones del positivismo jurídico presenta dos fases distintas, que consisten en el período de exégesis (o mecanicista) y la fase normativista (o de discreción limitada). Sin embargo, a lo largo de la historia ha habido un desarrollo pospositivista basado en estas teorías, especialmente dado el nivel de complejidad jurídica de algunos casos, en los que persiste un grado considerable de discrecionalidad del juez.

Objetivo: El objetivo de este artículo es discutir la sustitución o complementación del modelo juspositivista de visualización subsuntiva del fenómeno de la decisión judicial, debido a su excesivo formalismo, apuntando a obtener una versión con fidelidad descriptiva y, también, mayor potencial normativo para la protección. de derechos fundamentales.

Método: En cuanto a la metodología utilizada, cabe destacar que en la fase de investigación se utilizó el método inductivo, en la fase de procesamiento de datos se utilizó el método cartesiano y el texto final se compuso sobre una base lógica deductiva.

Resultados: Se concluyó que es necesario continuar mejorando la ciencia jurídica, particularmente en lo que respecta a la teoría de la decisión judicial, superando construcciones formalistas, con el fin de perfeccionar sus aspectos descriptivos y normativos, a través de la incorporación de recientes descubrimientos interdisciplinarios en los campos del derecho. economía y psicología, con el objetivo de construir un paradigma teórico que sea más que positivista, y no menos, evitando al mismo tiempo regresiones a la teoría anterior del derecho natural.

Palabras clave: Teoría de la decisión judicial; Positivismo jurídico; Derechos fundamentales.

INTRODUCTION

The objective of this article is to discuss the replacement or complementation of the juspositivist model of subsumptive visualization of the judicial decision-making phenomenon, due to its excessive formalism, aiming to obtain a version with descriptive fidelity and, also, greater normative potential for the protection of fundamental rights.

With this objective in mind, the first subsection of the research presents a synthesis of the description of the juspositivist profile of decision-making phenomenon, of a subsumptive nature. For this research, the focus is on the theorethical version developed by Hans Kelsen, considering his great academic prominence in the brazilian environment and, also, notable influence in foreign authors, like Herbert L. A. Hart and Norberto Bobbio.

The development of this first subsection facilitates the transition to the second section of this work, dedicated to the discussion of the first hypothesis raised, which is about the descriptive fidelity of the subsumptive model of decision-making phenomenon, considering the already mentioned kelsenian model, from the perspective of an external observator. If considered counterfactual, questions arise regarding capacity for improvements, complementation or even replacement. This question is related to the descriptive fidelity of the judicial decision of legal positivism theory and, consequently, its theoretical validity.

Following in a logical sequence, the third subsection of the researchreturns to the discussion of the second hypothesis, concerning the question of whether the decision-making standard represents a useful tool to assist the protection of fundamental rights, according to the predominant constitucional model, characterized by expressing a set of fundamental rights through flexible concepts, from the perspective of a system participant. This question is associated with the utility of the juspositivist decision-making theory as a tool to assist the legal actors (judge, attorney, prosecutor and others) to interpret the normative standards with the aim of adressing demands about fundamental rights.

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As for the scientific method, it is noteworthy that the inductive method was used in the investigation phase, the cartesian method in the data treatment phase and the final text was composed on a deductive logical basis. Throughout the various research phases, techniques such as referent, category, operational concept, and bibliographic research were

employed[1].

1. SYNTHESIS OF THE JUSPOSITIVIST THEORY OF JUDICIAL DECISION[2]

The decision-making paradigm of legal positivism presents two distinct phases, that consists on the exegesis period (or mechanistic phase) and the normativist stage (or limited discretion phase).

The first movement incorporated the mechanistic view of case resolution, which has lead to a characterization as legalistic or exegesis-based legal positivism (or, according to Luigi Ferrajoli, paleopositivism). The most known stream of this line is the school of exegesis (*école de l'exégèse*), where the judge should decide strictly bound to the reading of the normative text, acting as if they were just the voice of the legislation (or, as it turned out popular, the "mouth of the law" or *bouche de la Loi).* An example of legislation that had the objetive of promoting this mechanistic perspective, the Napoleonic code brought a complete regulation of a citizen's life, from their birth to the moment of family constitution, to assuming obligations and acquiring property, and eventually death, with the subsequent succession[3].

This version had a brief existence, due to the realization that the judge possesses some room to maneuver on case resolution. It became unrealistic to conceive their activity as mere reproductive of legislative options, fixed in legal texts.

Because of that, a new version of the positivist judicial decision theory was developed, abandoning the old mentioned mechanistic description, because it was unrealistic in describing the decision-making phenomenon. This marked the advent of normativist legal positivism, so-called because of the realization that the judges activity also implies the construction of norms, although they are tied to the resolution of concrete cases.

According to authors such as Hans Kelsen, Herbert L. A. Hart and Norberto Bobbio, there are factors that prevent the absolut uniformity application of the legal system, like normative gaps, normative contradictions, and the ambiguity of natural language used to construct legal texts (statutes and precedents), which prevent the resolution of concrete cases strictly linked to pre-established commands. This way, judges have more room to maneuver the creation of the resolutive norm for that concrete case, even with some level of adherence to higher guidelines (limitation of discretion).

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[1] PASOLD, Cesar Luiz. **Metodologia da pesquisa jurídica**: teoria e prática. 15 ed. São Paulo: Emais Editora, 2021.

[2] The most detailed synthesis of Hans Kelsen's doctrine can be found in ZANON JUNIOR, Orlando Luiz. **Curso de filosofia jurídica**. São Paulo: Tirant lo Blanch, 2019. p. 215-223.

[3] BOBBIO, Norberto. **O positivismo jurídico**: lições de filosofia do direito. São Paulo: Ícone, 2006. p. 77.

This development happened because of the realization that, next to easy cases (easy subsumptive resolution), there were situations with additional complexities, due to its specific peculiarities, lack of clear norms (gap), the disagreement on applicable legislation (antinomies) or even due to the indeterminate concepts in linguistic formulation of the legal texts, which difficults the judicial-making linked to the system (hard cases).

Thus, the theory of decision-making began to incorporate a bifurcation based on the level of difficulty on case resolution. In less juridic complexity demands, the decision-making could be seen as a simple subsumptive application of the resolutive rule fixed previously on the legal system, allowing a resolution within predictable parameters. On the other hand, on more complex controversies, commonly because of the absence or the linguistic vagueness of the legal text, judges would have to rely on their own discretion, creating the resolutive juridic rule, even if considering more general guidelines of the system, using analogy, recourse to tradition (*consuetude*) or moral principles.

Herbert Hart specified that the hard cases are characterized by uncertainty about the compatible solution to the legal system, representing a "grey zone" or an open texture zone. In these cases, judges are allowed a more flexible decision-making, assuming the act of a lawmaker that has to supply this lack in the system (*interstitial legislation*)[4]..

According to Luigi Ferrajoli, this level of discretion in the resolution of hard cases represents a deficit of judiciary legitimacy, considering the break in the separation of powers principle, as the judge will have the job to discretionary create the legal rule, acting as a lawmaker, to apply it later in a concrete case resolution, creating a precedent with potential to guide future interpretations[5].

This view of the judicial decision-making theory usually aligns with the perception that, at least for easy cases, the system could incorporate a set of pre-established responses for the prompt resolution of future cases, capable of simple subsumption application when their incidence conditions are met.

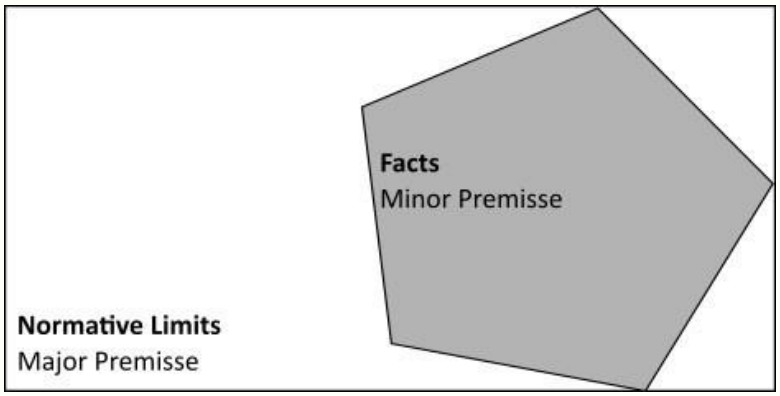
This theory of bifurcation in legal application, however, is softened in Hans Kelsen's nomodynamic perspective, since admits some level of discretion (lower), even in easy cases. This version of the juspositivist decision-making theory establishes that, (a) first, the judicial decision involves some level of discretion even in easy cases and, (b) second, the judicial activity is the final stage on the normative production scale (the system's endpoint).

[4] HART, H. L. A. **O conceito de direito**. São Paulo: Martins Fontes, 2009. p. 171. In a similar way: HART, H. L. A. **Ensaios sobre teoria do direito e filosofia**. Rio de Janeiro: Elsevier, 2010. p. 118.

[5] FERRAJOLI, Luigi. O constitucionalismo garantista e o estado de direito. In STRECK, Lenio Luiz. FERRAJOLI, Luigi. TRINDADE, André Karam (org.). **Garantismo, Hermenêutica e (Neo)constitucionalismo**. Porto Alegre: Do Advogado, 2012. p. 249.

In what regards the first point (a), the legal norm means something that must happen, that is, it designates an indicative rule for the human conduct (*Sollen*)[6]. When the judicial scrutiny regarding the occurrence of its incidence conditions ocurrs, the legal norm serves as a criterion to the judicial analisis, i.e., works like a "interpretation schema", because it is throught the norm that the legal actor knows and describes the factual reality[7].

However, it is impossible for the lawmaker to foresee all the incidence scenarios and their uncountable peculiarities and circumstances, and that is the reason why the legal norms are constructed with some level, bigger or smaller, of generality and impersonality. Therefore, they can be seen as a window (*Rahmen*), through which the judge perceives the factual circumstance, to deliberate a resolution possible to fit within its frame, in an approximative way, as delineated by the graphic representation below:



Following this line of reasoning, Kelsen asserts that "legal-scientific interpretation must avoid, with utmost care, the fiction that a legal norm only allows, always and in all cases, one interpretation: the 'correct' interpretation. This is a fiction that traditional jurisprudence uses to consolidate the ideal of legal certainty. In view of the multi-meaning of most legal norms, this ideal is only approximately achievable"[8].

Additionally, regarding the second point (b), it is worth noting that the author addressed the normative production dynamic, establishing the hierarchical and formal scaling of legal authorities and, consequently, of the legal norms they formulate[9]. This concept later

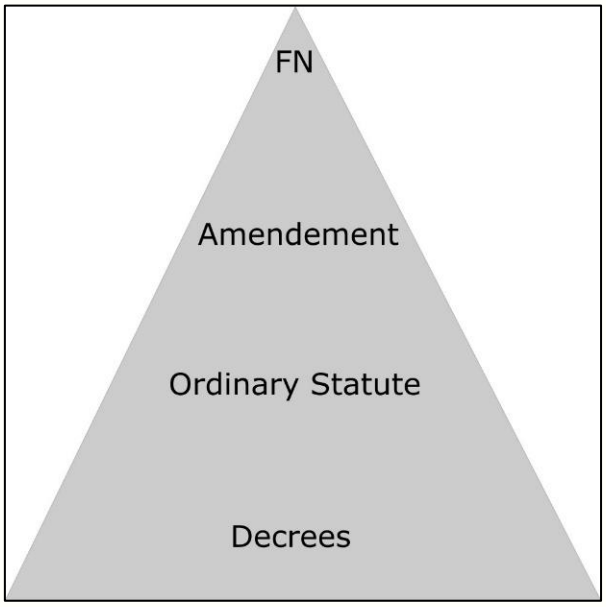
[6] KELSEN, Hans. **Teoria pura do direito**. 7 ed. São Paulo: Martins Fontes, 2006. p. 5.

[7] KELSEN, Hans. **Teoria pura do direito**. 7 ed. São Paulo: Martins Fontes, 2006. p. 4.

[8] Free translation from the portuguese version, that reads "a interpretação jurídico-científica tem de evitar, com máximo cuidado, a ficção de que uma norma jurídica apenas permite, sempre e em todos os casos, uma só interpretação: a interpretação 'correta'. Isto é uma ficção de que se serve a jurisprudência tradicional para consolidar o ideal da segurança jurídica. Em vista da plurissignificação da maioria das normas jurídicas, este ideal somente é realizável aproximativamente". KELSEN, Hans. **Teoria pura do direito**. 7 ed. São Paulo: Martins Fontes, 2006. p. 396.

[9] KELSEN, Hans. **Teoria pura do direito**. 7 ed. São Paulo: Martins Fontes, 2006. p. 9.

received the denomination of Kelsenian pyramid of rules:



Source: Graphic composed by the authors of this work, based on KELSEN[10]

According to this perspective of the legal system, the judicial decision is characterized as a subsumptive operation strictly tied to the hierarchical formatation of the legal system, always with some residual level of discretion, lesser on the easy cases and more intense on so-called hard cases, usually due to phenomena such as anomie, antinomy and ambiguity, as previously mentioned.

Indeed, for the theoretical proposition currently under consideration, interpretation is the mental operation that settles the meaning of superior norms to, according to them, constitute the norm that will underpin the legal body decision (administrative, legislative or judicial)[11]. The law application, then, is a new stage (or phase) of the legal system's dynamic, because it comprehends assessing the higher provisions meaning in the hierarchy to establish a new degree at the bottom of the pyramid.

The deliberation of a decision-making body (like the judges) is not merely declaratory, as it does not discover a pre-existing and finished right, but rather constitutive, precisely because establishes a lower norm with effects on a specific situation (usually a resolution of an individual issue)[12].

In this logical line, the creation and application of law are exactly the same thing,

[10] Graphic composed by the authors of this work, based on KELSEN, Hans. **Teoria pura do direito**. 7 ed. São Paulo: Martins Fontes, 2006. Principalmente, p. 247.

[11] KELSEN, Hans. **Teoria pura do direito**. 7 ed. São Paulo: Martins Fontes, 2006. p. 387.

[12] KELSEN, Hans. **Teoria pura do direito**. 7 ed. São Paulo: Martins Fontes, 2006. p. 261-262.

because they reflect the setting of an inferior norm in accordance with the superior[13]. For the author, only the mere application of a sanction to the concrete case and cration of the presupposed fundamental norm are not simultaneously creative and applicative acts of the norm, as they embody borderline hypothesis of the dynamic theory under consideration[14].

In conclusion, it is possible to assert that, in accordance to this internal dynamic within the legal system, judicial decision is conducted by subsumption, that is, through the logical correspondence of the inferior norm with the superior[15]. However, it should be noted that the determinations arising from superior norms are never absolutely complete, leaving always a level, higher or lower, to the discretion of the body applying the law. Therefore, by completing this space of conformation (the frame of the window), the judge exercises an act of will that can result in more than one consequence that fits to the superior norms and, consequently, admitted by the law, especially considering its formal authority[16].

2. DESCRIPTIVE FIDELITY OF POSITIVIST DECISION THEORY

Having outlined this synthesis of the juspositivist model of decision-making, it is viable to start the discussion about the descriptive fidelity of the subsumptive model of decision-making phenomenon.

First of all, it is important to emphasize that the descriptive standard synthesized above has been disseminated at the academic domain for a considerable period, probably because of its formal sophistication, structural simplicity and, in the field of forensic practice, for stimulating a higher degree of legal certainty, by advocating the vinculation of legal activities to a hierarchical scale of authority, as presented in the previous section.

As emphasized by Jürgen Habermas, “the contribution of political power to the proper function of the law, which is to stabilize expectations of behavior, starts to consist, from this moment on, in the development of legal certainty that allows the recipients of the law to calculate the consequences of their own and other people's behavior”[17].

It is essential to mention that this importance given to legal certainty does not

[13] KELSEN, Hans. **Teoria geral do direito e do Estado**. 4 ed. São Paulo: Martins Fontes, 2005. p. 195.

[14] KELSEN, Hans. **Teoria geral do direito e do Estado**. 4 ed. São Paulo: Martins Fontes, 2005. p. 195.

[15] KELSEN, Hans. **Teoria geral das normas**. Porto Alegre: Sergio Antonio Fabris, 1986. p. 339-340.

[16] KELSEN, Hans. **Teoria pura do direito**. 7 ed. São Paulo: Martins Fontes, 2006. p. 392-395.

[17] Free translation from the portuguese version, that reads “a contribuição do poder político para a função própria do direito, que é a de estabilizar expectativas de comportamento, passa a consistir, a partir deste momento, no desenvolvimento de uma segurança jurídica que permite aos destinatários do direito calcular as consequências do comportamento próprio e alheio”. HABERMAS, Jürgen. **Direito e democracia**: entre facticidade e validade. V 1. Rio de Janeiro: Tempo Brasileiro, 2003. p. 182.

mean, simply, to establish the prevalence of a formal criterion over other material values usually protected by multiple state legal orders, like liberty and property, among others. From a more precise perspective, legal certainty is directly related with the structuring of a legal system that harmonizes the axiological choices of a specific society, to be accomplished by the authority formally competent. In democratic states, legal certainty aims to preserve the balance of high values to the community, usually throught legislative activity. That way, in front of conflicting interests, it is up to the the decision-making body (that could be the judge himself, in litigated cases) to observe the axiological weighing structure of the system, mitigating the risks and uncertainty costs[18].

In this line of reasoning, it is possible to argue by the paradox of legal certainty, considering that, "simultaneously, it enslaves, by limiting axiological options, and frees, by harmonizing interests according to a predictable value agenda"[19].

Despite the acknowledged merit of the juspositivist paradigmatic model, a revisionist current concerning its principal theoretical elements has gained a significant reaction in academic and forensic ambients. This post-positivist movement aims to replace, modify or overcome the doctrine of legal positivism, wholly or in parts, as explained by authors such as Ronald Dworkin, Robert Alexy, Manuel Atienza and Richard Posner, among others[20].

Based on the critique of these authors, questions arise about the possibility of descriptive improvement in the decision-making phenomenon, surpassing excessively formalist versions, that do not reflect concrete reality, particularly in light of the outcomes of interdisciplinary empirical research in fields such as neurology, psychology (moral and behavioral), anthropology, economy and sociology, among others; and, the interest in enhancing the degree of legal certainty, but without disregarding the high values cherished by a specific society, gauged as relative axiological choices (and not metaphysical absolutes). Along this line, there is a contemplation of a new post-positivist paradigm that effectively represents an advancement compared to the previous theoretical model, in its descriptive fidelity and normative potential, creating a more-than-positivist model, without regressing to natural law theory.

In this line of thought, it is important to note that the scientific description of legal

[18] ATIENZA, Manuel. **El sentido del derecho**. 6 ed. Barcelona: Ariel, 2010. p. 181-182. PECES-BARBA, Gregorio. FERNÁNDEZ, Eusebio. ASÍS, Rafael de. **Curso de teoría del derecho**. 2 ed. Madrid: Marcial Pons, 2000. p. 325.

[19] Free translation from the portuguese version, that reads "simultaneamente, escraviza, ao limitar as opções axiológicas, e liberta, ao harmonizar os interesses societários de acordo com uma pauta valorativa previsível". ZANON JUNIOR, Orlando Luiz. **Teoria complexa do direito**. 3 ed. São Paulo: Tirant lo Blanch, 2019. p. 124.

[20] ZANON JUNIOR, Orlando Luiz. **Curso de filosofia jurídica.** 2 ed. São Paulo: Tirant lo Blanch, 2019, p. 277-388.

activity, in their various forms (legislative positivization, executive programming and judicial decision-making, especially), necessitates partial overcoming of the separation between law and moral argument, through the incorporation of interdisciplinary scientific arguments.

In this point, it is worth to remember that the thesis of separation between law and moral encompasses two central arguments: first, the social sources of law (and also morality), in the sense that all norms of conduct are artificial products of human societies, relative to their respective cultural contexts, deserving little importance on the invocation of absolute metaphysical postulates; and, second, the absence of a relationship between law and morality, as distinct and uncorrelated (at least formally) behavioral orders, embracing the exclusive (absence of any relationship), inclusive (contingent relationship) and differential (a moral principle does not interfere on the validity of a legal rule and the other way around, unless if expressly incorporated into the law).

The first argument regarding the cultural origin of moral and legal postulates, as mentioned above, finds wide acceptance in academic and forensic ambients, including among several authors of the post-positivist movement, and should be preserved. Indeed, it constitutes the theoretical element that provides the key point of overcoming the naturalistic model, as it removes the argumentative relevance of supposed theoretical postulates extracted of a superior metaphysical instance, in any of its justificatory aspects (cosmological, divine o or pure rationality). As an additional gain, the regression to discourses based on ethical (or ideological) absolutism is avoided, precisely because it considers that both moral and legal choices are social alternatives[21].

In this logical line, Jürgen Habermas remarks that "moral norms that regulate rational coexistence between subjects capable of speech and action are not simply 'discovered', but constructed"[22].

Any theories that intend to be post-positivist and, simultaneously, argue for the possibility of legal recognition of a superior moral order, imply a truly regression to the model of supposed natural law, of metaphysical nature. Alternatively, the development toward a theoretical standard of greater descriptive fidelity of reality must be alert of the progress facilitated by legal positivism in this regard, considering that not only law, but also the moral choices, are social constructions, that start from public opinion to everyday iteration and,

[21] REALE, Miguel. **Teoria tridimensional do direito**. 5 ed. São Paulo: Saraiva, 1994. p. 80. Also GRAU, Eros. **O direito posto e o direito pressuposto**. 7 ed. São Paulo: Malheiros, 2008. p. 20. Still PECES-BARBA, Gregorio. FERNÁNDEZ, Eusebio. ASÍS, Rafael de. **Curso de teoría del derecho**. 2 ed. Madrid: Marcial Pons, 2000. p. 18. And, finishing, SANCHÍS, Luis Prieto. **Apuntes de teoría del derecho**. 5 ed. Madrid: Trotta, 2010. p. 28.

[22] Free translation from the portuguese version, that reads "normas morais que regulam uma convivência racional entre sujeitos capazes de fala e de ação não são simplesmente 'descobertas', mas construídas". HABERMAS, Jürgen. **Direito e democracia**: entre facticidade e validade. V 1. Rio de Janeiro: Tempo Brasileiro, 2003. p. 196-197:

eventually, go throught institutional filtering, then integrating the legal system.

Therefore, it has already been noted that "the first contribution of juspositivism to be preserved for the proposition of a new post-positivist disciplinary matrix consists in the recognition of the undeniable artificial origin of legal sources (social fact thesis, social sources of the law or auctoritas, non veritas facit legem), which are a cultural product of society"[23].

The second argument, however, regarding the absence of a relationship between law and morality, is widely criticized and even with the acommodation of criticisms, has assumed counterfactual counters, which are incompatible with an effort for scientific seriousness.

Indeed, from the discriptive perspective of the legal phenomenon, the most well-known versions of the argument of the absence of a relationship between law and moral (exclusive, inclusive and differential legal positivism) does not have support in factual observation, from an external observer's standpoint. Therefore, taking seriously the reality as perceived by the proponents of legal positivism themselves, this proposition deserves to be abandoned because of its descriptive infidelity.

As for the descriptive faillure, it is important to note that Hans Kelsen previously stated that legal science should focus exclusively on describing the legal phenomenon, without concerns with the approval or disapproval of its content, lest it confuses "what is" with "what ought to be"[24]. This argument is highly relevant, considering that scientific studies must focus the descriptive aspect of the phenomenon, althought it is important not to forget that the various scientific fields have a normative facet strictly interconnected, whether in greater or lesser intensity, particularly in the case of legal science, which discusses what ought to be (the nexus of imputation), according to the lessons of the author previously mentioned[25].

However, while describing the legal activity, the author expressly recognizes the notorious fact that public authorities entrusted with legal activity, such as legislators, executive members, law enforcement and judges, are effectively influenced by moral principles, political issues and also tradition (*consuetude*)[26]. As a logical consequence, the legal norms produced are expressions, whether in a greater or lesser degree, of these moral and

[23] Free translation from the portuguese version, that reads "a primeira contribuição do juspositivismo a ser preservada para a proposição de uma nova matriz disciplinar pós-positivista consiste no reconhecimento da inegável origem artificial das fontes jurídicas (social fact thesis, social sources of the law ou auctoritas, non veritas facit legem), as quais são um produto cultural da sociedade". ZANON JUNIOR, Orlando Luiz. **Teoria complexa do direito**. 3 ed. São Paulo: Tirant lo Blanch, 2019. p. 120.

[24] KELSEN, Hans. **Teoria pura do direito**. 7 ed. São Paulo: Martins Fontes, 2006. p. 77.

[25] KELSEN, Hans. **Teoria geral das normas**. Porto Alegre: Sergio Antonio Fabris, 1986. p. 33.

[26] KELSEN, Hans. **Teoria geral das normas**. Porto Alegre: Sergio Antonio Fabris, 1986. p. 145-156, specially p. 148.

political preferences. Therefore, the scientific jurist, when responsible for describing these legal norms, cannot ignore this situation, which reveals a factual relationship between law and morality (and even other interdisciplinary fields, that will be further discussed).

Herbert Hart's considerations are even more incisive, in the sense that the influence of moral on competent authorities causes the infiltration of axiological choices in the legal system, indicating a factual interrelationship. In the author's words "the law of all modern states shows at numerous points the influence of both accepted social morality and broader moral ideas", so that "these influences enter the law either abruptly and explicitly, through legislation, or silently and little by little, through the judicial process"[27]. More than that, "there is, in all communities, a partial overlap of the contents of moral and legal obligations, although the requirements of legal norms are more specific and surrounded by more minute exceptions than those of their moral equivalents"[28].

The legal philosopher goes further, to mention that the effectiveness of the legal system itself relies, to some extent, on its alignment with the more widely diffused moral standard in each specific society[29]. That is, the prevailing moral choices in a specific society impact the production, interpretation and the application of law within those societies.

Consequently, the author concludes that "no 'positivist' could deny these facts or refuse to admit that the stability of legal systems depends in part on these types of correspondence with morals. If this is what is postulated as the necessary connection between law and morality, its existence must be recognized"[30].

Starting from the theoretical development of these recognized proponents of legal positivism, there is no justification to insist on the thesis of absence of a relationship between law and moral, considering the interpretations that results in exclusive and inclusive versions, explained before. The jurist, in an external perspective on the phenomenon, reveals the fact of the existence of interdisciplinary correlation of law and moral (and other fields of

[27] Free translation from the portuguese version, that reads "o direito de todos os estados modernos mostra em inúmeros pontos a influência tanto da moral social aceita quanto de ideias morais mais abrangentes", so that "essas influências ingressam no direito quer abrupta e explicitamente, através da legislação, quer silenciosamente e pouco a pouco, através do processo judicial". HART, H. L. A. **O conceito de direito**. São Paulo: Martins Fontes, 2009. p. 263.

[28] Free translation from the portuguese version, that reads "existe, em todas as comunidades, uma sobreposição parcial dos conteúdos das obrigações morais e jurídicas, embora as exigências das normas jurídicas sejam mais específicas e cercadas de exceções mais minuciosas que as de suas equivalentes morais". HART, H. L. A. **O conceito de direito**. São Paulo: Martins Fontes, 2009. p. 221.

[29] HART, H. L. A. **O conceito de direito**. São Paulo: Martins Fontes, 2009. p. 229.

[30] Free translation from the portuguese version, that reads "nenhum 'positivista' poderia negar esses fatos ou recusar-se a admitir que a estabilidade dos sistemas jurídicos depende em parte desses tipos de correspondência com a moral. Se é isso o que se postula como a ligação necessária entre o direito e a moral, sua existência deve ser reconhecida". HART, H. L. A. **O conceito de direito**. São Paulo: Martins Fontes, 2009. p. 229.

knowledge) and thus must describe it with fidelity, even indirectly, to enable greater normative potential.

It is worth questioning if the third and more tenuous version of the argument (now referred to as differential), proposed by Luigi Ferrajoli, would find correspondence with factual reality. As mentioned before, according to the proposition by the italian author, it is true that political authorities are influenced by moral factors (among others) and even incorporate the harmonization of values in the legal system, thought rules written with a more open style, enunciating principles. However, according to him, the argument of the absence of a relationship between law and morality would remain, in a subdued manner, only to reflect the perception that the law does not influence in what is moral and, likewise, morality could not impact the validity of legal rules.

Althought softer, this consideration is also counterfactual and does not hold up from the perspective of a tendentially impartial external observer, given that there is a reciprocal influence, including on validity and effectiveness.

Indeed, on one hand, the morality influences the authority responsible for producing the law (legislative, executive and judicial) and thereby impacts the definition in the legal system content, as already referred by Kelsen and Hart, in the preceding paragraphs. Furthermore, the impact of the axiological principles on the law is easily noticeable in the production of legal texts on morally charged issues, such as family constitution and the criminalization of abortion, among others, to the extent that further comments are unnecessary.

On the other hand, it is certain that the assessment of what is morally correct impacts on the validity (and even on effectiveness) of the law, given that the public authority does not act as an external observer, but as an agent involved in defining of what “ought to be”. In this condition, validity, scope and effectiveness of their legal activity will suffer the impact of moral issues. This is what Hart referred, expressly, in the afterword of his most well-known work, after dialogues with Ronald Dworkin, as previously quoted. It is noteworthy that, in the brazilian scenario, it is not uncommon to verify examples of this influence of moral on decision-making, specifically concerning the diffuse and concentrated constitutional control, including throught the invocation of evaluative postulates not expressly set forth in legal texts (i.e., which did not previously pass through the filter referred to by Ferrajoli).

The author could still consider that these decisions would not be technically legal, would be out of sync with the legal system or, as more widely propagated, would compromise the importante of legal certainty. However, this would no longer be a tendentially impartial observation of what actually occurs in legal activity, moving towards approval or disapproval of the facts. If one choses this type of argument, it would be the positivist himself who would

be confusing "what is" with what is "ought to be", contrary to Kelsen's recommendation of scientific effort, as described above.

Moving on to the authors with a post-positivist profile, Ronald Dworkin argued that morality is wider than law. In the author's vision, the political morality can be visualized as a large tree of axiological criteria for dispute resolution (*tree structure*)[31]. Once a formal authority selects and filters some of these evaluative options, an institutional branch of judgment criteria known as law emerges. Thus, law and morals are born from the same seed, differing only in the previous institutional recognition of the first one.

This theoretical construction follows the line proposed by Francesco Carnelutti since 1951, in the sense that "positive law was born as an artificial product in the trunk of natural law, which is born spontaneously in the world of the spirit, like plants in the world of nature"[32]. The difference is the substitution of natural law (absolut and invariable) by Dworkin's idea of a shared social morality in a particular community[33].

Even from a differentiated pragmatic perspective, Richard Posner also explicitly highlights the factual acknowledgment that there is a relationship between law and morals[34]. In his words, "moralistic criticisms of judicial decisions can lead judges to alter legal doctrine; Therefore, there is a complex intertwining of positive and natural law or, if you prefer, of law and morality"[35].

Moreover, this point is one of the few that converges with Dworkin's theoretical propositions, given its undeniable factual compatibility[36]. Indeed, the author agrees that the argument of separation between law and morality, adopted by legal positivism, is neither an accurate description nor a relevant guideline for judges, even thought he reiterates his denial that moral criteria are the most appropriate as a decision-making guideline (he preferes scientific bases)[37]. Precisely confirming this line of thought, refers that "the residue of jus-

[31] DWORKIN, Ronald. **Justice for hedgehogs**. Cambridge-MA: The Belknap Press of Harvard University Press, 2011, p. 405.

[32] Free translation from the portuguese version, that reads "o direito positivo nascia como um produto artificial no tronco do direito natural, o qual nasce espontaneamente no mundo do espírito, como as plantas no mundo da natureza". BOBBIO, Norberto. **Jusnaturalismo e positivismo jurídico**. São Paulo: Unesp, 2016. p. 79.

[33] DWORKIN, Ronald. **O império do direito**. São Paulo: Martins Fontes, 2007, p. 204.

[34] POSNER, Richard Allen. **A problemática da teoria moral e jurídica**. São Paulo: Martins Fontes, 2012. p. 180.

[35] Free translation from the portuguese version, that reads "as críticas moralistas das decisões judiciais podem levar os juízes a alterar a doutrina jurídica; portanto, há um complexo entrelaçamento de direito positivo e natural ou, se assim se preferir, de direito e moralidade". POSNER, Richard Allen. **Problemas de filosofia do direito**. São Paulo: Martins Fontes, 2007. p. 312.

[36] POSNER, Richard Allen. **Problemas de filosofia do direito**. São Paulo: Martins Fontes, 2007. p. 320.

[37] POSNER, Richard Allen. **A problemática da teoria moral e jurídica**. São Paulo: Martins Fontes, 2012. p. 7.

philosophical speculations that may still have some practical sense is the idea that legal positivism (Hart) is not an adequate descriptive or normative theory for North American law (Dworkin)"[38].

The pragmatic author also emphasizes that political morality must be understood as a social concept, i.e., a product shaped by life's demands, rejecting the conception of a superior and universal natural law[39]. In his vision, morality is a reflection of public opinion[40].

In summary of this first point, considering this lack of factual correspondence, the argument of the absence of a relationship between law and morals, in the three traditional versions (exclusive, inclusive and differential legal positivism), deserves to be abandoned. More than that, demonstrating the unsustainable metaphysics of the denial of a relationship between law and morals, the very thesis of separation between law and morality deserves to be discarded, given the factual existance of the correlation that the thesis itself negates. In this context, only the argument of the social sources of law remains, in the previous explained terms.

Therefore, a review of the decision-making theory deserves to go beyond a purely formalistic approach, incorporating descriptions of how morality effectively impacts the legal activity, drawing on interdisciplinary scientific studies specifically produced on this subject, especially throught interaction with neurology and psychology (moral and behavioral).

Furthermore, it is recommended to refine Kelsen's nomodynamics referred to in the previous section, to establish that the normative production is a more complex activity, that goes beyond the simplified visualization of a logical subsumptive sequence from a higher to a lower level in a hierarchical structure, especially because it also encompasses considerations of an axiological nature (and, based on recent scientific research, also other interdisciplinary elements).

On the other hand, it is still important to discuss the interest in expanding the degree of legal certainty, starting from the previous idea of not disregarding the high values cherished by a specific society, provided that they are assessed as relative axiological choices (and not metaphysical absolutes), in accordance with the prevailing postulate of the social sources of law (and morality).

Indeed, one of the gains of the mindset provided by the legal positivism theory

[38] Free translation from the portuguese version, that reads "o resíduo das especulações jusfilosóficos que ainda pode ter algum sentido prático é a ideia de que o positivismo jurídico (Hart) não é uma teoria descritiva ou normativa adequada ao direito norte-americano (Dworkin)". POSNER, Richard Allen. **A problemática da teoria moral e jurídica**. São Paulo: Martins Fontes, 2012. p. 169.

[39] POSNER, Richard Allen. **A problemática da teoria moral e jurídica**. São Paulo: Martins Fontes, 2012. p. 27-28.

[40] POSNER, Richard Allen. **Problemas de filosofia do direito**. São Paulo: Martins Fontes, 2007. p. 321.

resided in stimulating the authority of pre-established judgment criteria, reducing the costs, risks and insecurities arising from uncertainty. This is particularly advisable in democratic scenarios, where these decision-making parameters are produced by representatives of the community, according to public discussions conducted via pre-established legislative processes[41]. Moreover, it is relevant for market stabilization.

However, it should be added that there is factual indications of the insufficiency of written judgment criteria in statutes or precedents for the peaceful resolution of social conflicts, worth reiterating the three main factors that causes that, which are ambiguity (sometimes referred to as legal indeterminate concepts), the gaps in legal texts (or anomies) and the contradictions between judgement standarts (often called antinomies).

The first one refers to the ambiguity or vagueness resulting from the use of natural language in constructing normative texts (statutes) that serves as a basis for legal interpretation.

The second is the gaps of legal texts, namely, the lack of formal regulation for the entirety of the case under judgment or, at least, for some pending issues, usually resulting from the impossibility of foreseeing all application scenarios, specially considering the rapid pace of social dynamics.

And the third is the situation of contradiction between judgment criteria of the same type (between legal texts, for example) or different modalities (between legal texts and legal principles, for example), that eventually may not be resolved solely by employing traditional parameters (such as the postulates of chronology, hierarchy, and especialty) or those recommended by post-positivism (such as the balancing of moral principles).

The existence of these factors indicates the descriptive (and also normative) insufficiency of the nomodynamic subsumption theory, given that even in easy cases there is still room for the interpreter to maneuver, as already stated. Therefore, it is necessary to improve the description of the decision-making to understand how decisions are effectively made (the descriptive aspect of legal science) and what are the most suitable means to conduct interpretations with a reduction in discretion (the normative scope of the law).

Therefore, it is recommended to enhance the descriptive theory of the decision-making phenomenon, aiming to broaden the understanding regarding the difficulties in legal activity, beyond the dichotomy between subsumption and discretion, whether for purposes of legislation (legislative power, usually), governmental programming (executive power,

[41] HABERMAS, Jürgen. **Direito e democracia**: entre facticidade e validade. V 1. Rio de Janeiro: Tempo Brasileiro, 2003. p. 233-234. And AGRA, Walber de Moura. Neoconstitucionalismo e superação do positivismo. In: DIMOULIS, Dimitri. DUARTE, Écio Oto. **Teoria do direito neoconstitucional**: superação ou reconstrução do positivismo jurídico. São Paulo: Método, 2008. p. 431-446. p. 445.

typically) or dispute resolution (judiciary).

More than that, a reconstruction of the decision-making theory involves a discussion about interdisciplinarity, that takes into account advancements in other knowledge fields, such as neurology, psychology (moral and behavioral) and economy, among others. The significance of it extends not only to the descriptive approach (legal science describing legislation and decision-making), but also the controversial thesis that normative elements can be derived from other scientific fields.

About this matter, it is important to note initially that the legal system regulates various situations of life, covering economic, family, social, consumer, criminal, public governance, private business, environmental and tax regulations, just to mention a few broadly. By establishing normative guidelines on these diverse subjects, the various modes of legal activity (legislation, programming and decision-making, notably) seek foundation in scientific sources from related fields of knowledge.

For instance, it might be considered advisable for the regulation of a specific economic sector to take into account research findings conducted by economists about the subject, alongside axiological choices regarding the issue. Moreover, subsequently, in the event of a conflict whithin this market niche, the interpretation of this economic regulation could be misguided if the resolution of potential ambiguities, gaps, and antinomies in the legal text disregards elements of normative economics.

Similar reasoning can be applied to other fields of life, such as decision-making on medical error cases that considers normative elements of medicine regarding professional conduct; the concentrated analysis of the constitutionality of legal texts about biosafety issues, where the technical opinion of pharmacy and biology experts would hold normative value (after all, it is an abstract judgement of constitutional compatibility, where not only expertise is produced for factual analysis); deliberation on procedural issues impacting a considerable volume of access to jurisdiction, by analyzing statistical data about litigation (jurimetrics); and, the judgment of criminal matters concerning the legal typification of certain conduct, considering the value of the damaged property or legal interest, based on studies from anthropology, sociology and psychology, among countless other situations.

This is because it is evident that the law is not self-sufficient, as if it were a closed, autonomous, uncorrelated, and absolutely prevailing system over other branches of knowledge, given its incapacity to govern all life domains without considering correlated scientific studies. The legal science, precisely because it deals with the study of legal activity, requires a interdisciplinary dialogue with other scientific foundations; otherwise, it risks promoting technically poor decisions.

Hence, considering all the previous arguments, the conclusion of this section is

that the juspositivist theory of decision-making does not adequately describe with fidelity the judicial decision-making phenomenon and, because of that, requires improvements in its descriptive aspect, from the perspective of an external observer.

3. NORMATIVE UTILITY FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

This third subsection of the text focuses on the question of whether the juspositivist model of decision-making represents a useful theoretical basis for aiding in the judicial protection of fundamental rights, according to the predominant constitutional model, characterized by expressing a set of fundamental rights throught flexible concepts written in natural language, from the perspective of a participant in the system.

It is worth reiterating that the juspositivist theory represented an advancement over the previous natural law model, as it provided greater legal certainty by ruling out the possibility of invoking metaphysical moral postulates as an excuse to supplant axiological choices established by formal authorities, such as legislation produced by democratically elected congressmen.

On the other hand, it should be considered that, in contemporary constitutionalism, several fundamental rights are established throught normative texts with a notable opening texture (to paraphrase Hart). Although expressed with wording in incomplete and ambiguous natural language, these constitutional prerogatives are considered self-applicable, regardless of further regulation by infraconstitutional statutes or limitation in specific executive policies. This normative potential implies a corresponding link between jurisdiction and its implementation, either through the prohibition of contrary normative and executive acts, recognized as invalid through constitutional review, or even through the granting of specific judicial protection.

In this context, the previously anticipated formalist theory of subsumption presents a limited usefulness, merely as an element to be considered by the interpreter, consistent in the limitation to the linguistic constraints of the legal text (that is, the possibility of subsuming the decision-making to a vague normative text). This is insufficient as a theoretical tool, from the perspective of an internal agent responsible for analysing whether a constitutional right is at issue and, if so, defining its concrete normative effectiveness, especially in cases regarding the protection of fundamental rights involving values/principles to be considered.

Indeed, it is not denied that the positivist theory of judicial decision-making is relevant, by arguing that it should be possible to frame the outcome within a reasonable interpretation of the legal text, under deductive logic. However, this important assertion is

insufficient and leaves a wide discretionary margin to judges, besides providing little clarification regarding the notable influence of other relevant judgment criteria for decision-making, beyond the legal text (legislation and precedents), such as principles (including those expressly admitted in the legal system), executive policies, doctrine (legal and interdisciplinary) and tradition, all relevant, in a greater or lesser intensity, for the correct resolution of legal cases.

Therefore, the positivist thesis only indicates adherence to the subsumption of the legal text (in civil law) or the text of precedents (in common law), leaving the rest to the judge's discretion, constituting an act of will, according to Kelsen. When subsumption allowsgreater room for maneuver, in cases considered high-intensity (hard cases), it simply refers to the use of discretion, without providing further technical orientation to the professional performance of the agent involved in the decision-making process.

Due to this, the hypothesis in question concerns a considerable margin for improving legal science, complementing (or even surpassing) the purely formal visualization of the decision-making phenomenon, developed decades ago. There is room for studies aimed at sophisticating the theoretical tools available to the judge, without neglecting the reduction of their discretion, in the sense of directing the decision-making to more adequate results according to the statutes and precedents, enhancing the normative function of legal systems, especially regarding the protections of fundamental rights.

For an example, some post-positivist authors have proposed that these legal texts expressing fundamental rights should not only be interpreted as rules, but rather as axiological principles. These values would present an expansive tendency and, thus, would conflict with other values, recommending the judge a reasoning based on balancing, that could harmonize the involved interests.

Along this line, for instance, Ronald Dworkin understands that principles must be interpreted according to the dimension of weight or importance in each specific situation submitted to constitutional scrutiny. In his vision, the judge, instead of simply opting discretely for any conclusion capable of fitting subsumptively within the broad margins resulting from the indeterminate concepts expressed in constitutional texts, would also have the political responsibility of articulation, in the sense of the decision representing the harmonious balancing of the conflicting principles[42]. Thus, paradoxically, while constitutional rights are granted normative potentiality, there would be a reduction in legal discretion, which the existence has always been criticized by the author[43].

It should be added that Dworkin rejects the passive role of jurisdiction, as it tends

[42] DWORKIN, Ronald. **Levando os direitos a sério**. 2 ed. São Paulo: Martins Fontes, 2007. p. 42.

[43] DWORKIN, Ronald. **Levando os direitos a sério**. 2 ed. São Paulo: Martins Fontes, 2007. p. 61.

to lead to disrespect for minorities rights by political majorities[44]. However, he simultaneously deems inappropriate the other extreme, judicial activism, understood as the vehement practice of judicial protagonism in relation to other state functions, which ignores completely the content of legislation and precedents, aiming to impose the judge's personal and isolated view about what is best for the state and society[45]. According to the author, the "law as integrity condemns activism and any practice of constitutional jurisdiction that is close to it. It insists that judges apply the constitution through interpretation, not fiat, meaning that their decisions must conform to constitutional practice, not ignore it"[46].

Robert Alexy, in a similar way, understands that the fundamental rights are presented in the form of legal principles (of constitutional stature), to be weighed in case of conflict. In his words, the constitutional prerogatives functions as optimization mandates, that is, directions established by the legislator that, when judicially challenged, demand balancing, considering the factual and axiological peculiarities involved[47]. Furthermore, in order to reduce discretion when analyzing fundamental rights, the author proposes the law of collision, that shifts the argumentative burden to the judge to substantiate their decisions[48].

Unlike the aforementioned authors, other post-positivists point towards the construction of judicial decisions based on scientific data, whenever available and accessible, in order to enable decisive resolutions. Instead (or in a complementary manner) to the weighing of principles, the justification of the decision would lie in scientific foundations, through interacting with other fields of knowledge, such as economics and sociology, among others.

Following this second approach, Richard Posner presents divergent arguments and, from a certain perspective, bolder than those presented by the aforementioned authors. This is because the jurist is averse to the proposition of using moralistic arguments for judicial decision-making, as he understands them to be mere reflections of public opinion[49]. Alternatively, he proposes that interdisciplinary arguments be taken into account, by crossing the border of legal science with other fields of knowledge, notably economics, among

[44] DWORKIN, Ronald. **O império do direito**. São Paulo: Martins Fontes, 2007, p. 451.

[45] DWORKIN, Ronald. **O império do direito**. São Paulo: Martins Fontes, 2007, p. 451-452.

[46] Free translation from the portuguese version, that reads "direito como integridade condena o ativismo e qualquer prática da jurisdição constitucional que lhe esteja próxima. Insiste em que os juízes apliquem a constituição por meio da interpretação, e não por fiat, querendo com isso dizer que suas decisões devem ajustar-se à prática constitucional, e não ignorá-la". DWORKIN, Ronald. **O império do direito**. São Paulo: Martins Fontes, 2007, p. 452.

[47] ALEXY, Robert. **Teoria dos direitos fundamentais**. São Paulo: Malheiros, 2008. p. 90.

[48] ALEXY, Robert. **Teoria dos direitos fundamentais**. São Paulo: Malheiros, 2008. p. 94-99.

[49] POSNER, Richard Allen. **Para além do direito**. São Paulo: Martins Fontes, 2009. p. 9.

others[50]. In his pragmatic view, by analyzing according to these scientific guidelines, legal certainty, that is important for maintaining the markets, is just one more factor to be considered by the judges[51].

As it can be noticed, members of the post-positivist movement are making efforts not only to describe with greater precision the decision-making phenomenon (from the perspective of an external observer) but also, based on this, to propose alternatives of sophistication for the decision-making system, in order to enhance the adjudication of rights, including those of constitutional stature (then, from the perspective of a participant).

Therefore, in a concluding standpoint, it is argued that given the insufficiency of the classic juspositivist standart for the protection of rights, there is room for theoretical developments tending to create useful decision-making strategies to assist the legal actors (the participants, that is, judges, attorneys, prosecutors and others) in interpreting normative standards, particularly regarding demands concerning fundamental rights.

FINAL CONSIDERATIONS

Based on the arguments deduced throughout the text, the conclusion presented is in favor of recommending the replacement or supplementation of the juspositivist of subsumptive visualization of the judicial decision-making phenomenon model, considering its excessive formalism, aiming to achieve a version with descriptive fidelity (normative scope of science, from the perspective of an external observer), and also greater normative potential for protecting fundamental rights (normative facet of science, from the viewpoint of a participant in the system).

The first hypothesis was confirmed, in the sense that the description of decision-making developed by the juspositivist theory requires improvements, as it is incomplete and insufficient, even considering the nomodynamic version presented by Hans Kelsen, which influenced authors such as Herbert L. A. Hart and Norberto Bobbio. This is because the activity of decision-making is factually more complex, not limited to the formal subsuntive logic within the hierarchical structure of the legal system, especially because it also incorporates axiological considerations (and, based on recent scientific research, also other interdisciplinary elements).

As a suggestion for developments in legal science in this regard, from the perspective of a tendentially impartial external observer, recent developments in the field of

[50] POSNER, Richard Allen. **Problemas de filosofia do direito**. São Paulo: Martins Fontes, 2007. p. 587.

[51] POSNER, Richard Allen. **A problemática da teoria moral e jurídica**. São Paulo: Martins Fontes, 2012. p. 409.

neurology and psychology, among others, should be considered. These fields shed light on the issue of limited rationality and thus lead to a more accurate description of the reality of decision-making phenomena.

The second hypothesis was also confirmed, to indicate that the subsuntive model is marginally useful only for legal actors, from the perspective of an internal observer (participant of the system), as it merely suggests the importance of decisions being bound by the linguistic constraints of legal texts (legislation and precedents) produced by formal democratically elected/selected authorities, aiming to preserve some degree of legal certainty.

In this second aspect, the suggestion arises that the normative aspect of legal science be refined, starting from the previous recommended more faithful description, to provide decision-making instruments that allow to articulate the dialogue between the various legal sources considered legitimate in modern constitutionalism, especially to enable the protection of fundamental rights.

Therefore, it is necessary to continue the development of legal science, particularly regarding the decision-making theory, based on positivist constructions, in order to refine its descriptive and normative aspects, aiming for a more-than-positivist theoretical paradigm, and not less, while avoiding regressions to the previous natural law theory.

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