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Some Advances in Legal Practical  
Reason: For a Progressive Dialogue  
with Contemporary Hermeneutics

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## **Some Advances in Legal Practical Reason: For a Progressive Dialogue with Contemporary Hermeneutics**

*Abstract: This paper intends to critically discuss some points of the contemporary thesis concerning constitutional hermeneutics and methodology of law. Once identified some authors and the lines of argumentation affiliated grosso modo to the linguistic turn and rhetoric, as well as the core of the transcendental powers of communication (v.g. N. MacCormick, R. Alexy, K. Günther), the objective is to identify some dialogue with economics and political science, enlightened by recent researches about Hegel-Marx interpretations of social life. Of course the discussion inevitably passes through methodological questions, opposing analytics vs. dialectics, idealistic vs. realists standpoints. In a effort to foment the inclusive dialogue between points of view concerning the concept of law that may create (not necessarily) radical opponents, the lines of conclusion intents to revisit some foundations of Hegelian "method" (so to speak) and intends to give a modest contribution to a more profound analysis of the relations between sein and sollen categories, in order to enrich the discussions about technology and social life, specially the life of the law nowadays.*

*Keywords: hermeneutics, methodology, Hegel, Marx, dialectics, Alexy, Günther, MacCormick*

### **I. Introduction - The linguistic realism and the linguistic turn: subject plus history**

When Ludwig Wittgenstein – who had been one of the supporting theorists for the Vienna Circle’s neo-positivism – brought about the “linguistic turn” and rejected the worldview of his own *Tractatus*, philosophers, including those of law, could no longer ignore the **constitutive aspect** of language in the relationship between subject and object of knowledge, then opening new possibilities and making new requirements for some epistemic disputes, now under the lights of the linguistic paradigm.

Legal interpretation, specially constitutional hermeneutics, reverberates today much of these disputes in philosophy, inclusive in law. Of course, all these concepts are not precise when one approaches a particular movement or author, but they are at the basis of key issues in contemporary hermeneutics. The very notions of realism and idealism are in the core of major differences in philosophy, inclusive in epistemic and legal issues.

Taking for granted the historical opposition between consciousness and praxis, there are important developments in the 20th century with the so called analysis of language, which is

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generally represented by the *turn* from analytics to pragmatics in the search of meaning. The language was raised from a logical-semantic to a practical and realistic level, highlighting subjects in context and historical action.

Aligned with this new conception of knowledge through action, different contributions to legal reasoning and hermeneutics arose. On the one hand, the **dialectical-argumentative realisms** (Chaim Perelman, Theodor Viehweg, Luís Siches e.g.) that relied on linguistic concepts to revive the Aristotelian topic-rhetoric model and, accordingly, always conceived decisions in a special relation with historical and determined limits (the auditorium, the *topoi*, the values etc.). On the other hand, the **linguistic-pragmatic realisms** (Klaus Günther, Robert Alexy, Neil MacCormick etc.) are present tendencies somehow founded with Hegel's and Marx's dialectics, with contemporary shelter in linguistic turn of L. Wittgenstein, J. Searle, J. L. Austin and in the transcendental foundations of Karl-Otto Apel and Jürgen Habermas.

This branch is seen in the varied **philosophies of praxis** at odds with the so-called **philosophies of consciousness** and claims to find, amid history and meaningful contexts, safer criteria for the practical reason, that is, the truth of the oughts, that is, the right answer.

Habermas' theory had major repercussions in legal thinking until the present time, very clearly with German writers, like Alexy and Günther. Habermas himself later turned his analysis to law, and between his ideas and those of Alexy there are many touch points concerning the possibility of correct decision.

The purpose of the analysis herein is, therefore, dedicate some lines to the second appointed branch of realism in jurisprudence, with Alexy chosen as an example for discussion, even though the branch of rhetoric, from Viehweg to Perelman, deserved equal treatment.

Thus the present paper intends to discuss some lines around two important questions:

1) What are the limits to linguistic meanings that give an approximate but **more concrete** demarcation to the reasons that defines professional interpretation in law?

2) What is the role of language in determining these limits? In other words: Are there **non-linguistic levels of reality** that influence practical reason?

## **II. The legal reasoning according to Robert Alexy's linguistic-pragmatic realism**

The truth, for Alexy, is described as a consensual relationship, a *well-established consensus*, achieved through a rational discourse of rational communication between individuals equally rational. The search for consensus is *the main* condition of possibility for a practical reason.

In the case of a normative statement, a moral judgment or a rule of law, for example, we then face a practical discourse. Alexy remarks that "the mere mention of the fact that normative claims are open to discussion is not yet conclusive reason to ensure that they can be improved by correction or justification. These discussions may be mere instruments to persuade, to psychologically influence someone else. The essential question is whether there are rules or criteria to distinguish the good from the bad reasons, valid from invalid arguments"<sup>2</sup>

In argumentative justification, the important thing is that there is always possibility of additional arguments to support a given thesis. But to relegate the justifiability to progressive agreements is too baseless argumentation, without fundamentals, an infinite regression. To stop such a regression, one can arbitrarily decide and put an end or instead justify the discussion in circularity. This is the "Trilemma of Munchausen", according to Alexy:

"... it can be avoided by replacing the requirement for a new chain justification by a series of conditions which governs the procedure of justification. These conditions can be formulated as rules for rational discussion. The rules of rational discussion does not relate only to the statements as do the rules of logic, but reach beyond them to govern the conduct of the speaker. In this context they can be called 'pragmatic rules'. The observation of these rules certainly does not guarantee the certainty of all conclusive results, but it certainly sets the results as rational. Rationality, then, should not be treated as conclusive certainty. This characterizes the basic idea of the practical-rational discourse theory."<sup>3</sup>

Another important question is where these rules come from and why they would be followed. This is another face of the *foundation problem*, which Alexy aims to solve using some Habermas' thesis. It's notorious that, even Alexy's rules of the "general practical discourse" are derived in some way from Habermas, to whom "the conditions of discourse are ideal when 'the communication is not prevented either by external contingent factors or by internal restrictions of the very structure of communication'".

That's why this foundation is called "transcendental pragmatic". Alexy explains:

It is transcendental to the extent that the rules are justified by showing that its validity is a condition of the possibility of linguistic communication. And it's pragmatic because these are rules of discourse that does not deal exclusively with the syntax or

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<sup>2</sup> ALEXY, Robert. **Teoria da Argumentação Jurídica**. Tradução de Zilda Hutchinson Schild Silva. São Paulo: Landy, 2001, p. 180.

<sup>3</sup> Idem, p. 180 e 181.

semantics, but go beyond that to regulate the relationship of the speaker with their own expressions.<sup>4</sup>

This is the foundational path of legal reasoning in a "general theory of practical discourse." Law, therefore, would be an institutionalization of the rules of discourse, as a guarantor of its application and is not only consequence, but also necessary for the resolution of practical issues in order to guarantee the right decision. In fact, if the rules of discourse allow, at least approximately, a wise decision, nothing better than to institutionalize them and make their enforcement through the law.

### III. Some criticism

Some critics made against the dialectical-argumentative realism (Viehweg, Perelman, etc.) can also be made to the linguistic-pragmatic realism of Alexy because, from a dialectical point of view, rationality is based on pragmatic rules that are created by subjects in historical situation, whose logic is founded on an ontology that is variable, but mainly *linguistic*. Hence other relations between the *subjects who speak* and *tangible reality* are considered overcome or outdated.

With respect to the central problems of legal interpretation, Alexy proposes necessary (transcendental) rationality even in conflictive circumstances that hardly would allow any correct parameter for the response. By rules of practical discourse, the right answer appears at least as a regulative idea, a concept which is present in the subjects in dispute, but that could only be affirmed as possible through a procedure.

Therefore some critics to Alexy precisely emphasize his formal rationality, which would be an approximation of some models of **procedural justification**. In this regard, Alexy has clearly stated that "there is not indeed **material** moral theories that, for every practical question, allow a conclusive, intersubjective and safe extraction of a single right answer." However, the criticism of his proposals deserve a more detailed appreciation, because within the branch called philosophy of praxis there are some clearly identified variants in "internal disputes" among its own supporters, with recurring charges of "return" to the philosophy of consciousness patterns.

Hence, a critical appraisal of the various "linguistic legal realisms", represented here by Alexy, may bring about some critique lines of the core of communicative action theory. Let us return to some fundamental tenets of Habermas.

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<sup>4</sup> Idem, p. 107

#### **IV. From Habermas to Honneth.**

Habermas wanders: if modern man became aware of instrumental reason's effects in terms of ideological colonization of the "lifeworld", may the revealing criticism of this abuse finally be provided within the historical contexts? In other words, can reason criticize itself, backed in a dimension of praxis that performs its own rationality? Habermas says *no*, presupposing a transcendental imperative of communication that gives a universal content to practical reason **from outside** of the varying contexts in the different forms of culture. By contrast, Hans G. Gadamer, in the light of the thought of Martin Heidegger says *yes*, because the very understanding of the existential world already carries the critical emancipatory potential as long as it builds the "being" upon hermeneutic action which cannot leave intersubjective contexts of communication.

For this reason, Habermas — and his search for a universal, eternal, non-historical criterion to judge facts ultimately by means of a transcendentalism that returns to the Kantian tradition — resumed the "unfinished project of modernity" and was accused of return to the Enlightenment's dimension and limits, to the philosophy of consciousness which he sought to overcome.

In briefest outline, this controversy is an example that shows the vivid tension between idealism and realism today, it's still a dispute between consciousness and history, and here is more controversial than we can solve on a simple synthesis.

At this point it is interesting that, following the tradition of Frankfurt, Axel Honneth draws attention to the need to combine an axiological point of view inherent to social struggles that underlie the meanings assumed by a community and, as such, are previous or at least concurrent to emancipatory communicative reason possibilities. It is an attempt to return to Hegel and Marx from the point of view of the primacy of the conflict as a source of ethical meaning.

Honneth — a philosopher trained in the tradition of the Frankfurt School — was Habermas' assistant and now is director of the Institute for Social Research at the University of Frankfurt. He raised some critiques of the model of communicative reason to consider that consensus is one of the forms of social emancipation that has support in the morality inherent to the social struggle, in its various forms. This means that Habermas' proposal for a universal emancipation with the theory of communicative action — which is founded in a transcendental necessity of recognition of the various spheres of human search for understanding — neglected important aspects of the investigation of the concrete foundations of rationality.

To Honneth, Habermas' proposal contains ambiguities, especially in the distinction between lifeworld and instrumental rationality of the dominant system, because his historical explanation of social evolution — in regard to criticize the mechanism of historical materialism and of the theory of systems — is itself somewhat mechanical. But it should be noted that these ambiguities do not allow to see clearly the extent to which "lifeworld" rationality enters the one of the "system", so that the assumption of a communicative action that enables the emancipation seems a simplistic answer, in Honneth's view, which is concerned with the most radical and concrete causes of the instrumental rationality itself.

Thus, Honneth proposes a kind of anti-idealist turn against Habermas, because if there are inevitable elements that allow the consensus and understanding in the world, which allow to comprehend morality, they are the various forms of social struggle that, in a contradictory reality, permit to clarify the emancipatory potential of "classes", violated in their aspirations for recognition of rights. 5

Nevertheless, this essay seeks to investigate some contribution to the understanding of the hermeneutical senses in more concrete and more realistic bases, as a contribution to constitutional hermeneutics or as a critical point of view of some contemporary theories of rhetorical-argumentative or linguistic-pragmatic inheritance, or even of those theories which assumes the right answer in practical reason. The relationship between social conflict and morality — whether in the sphere of labor through a remaining notion of class struggle today, or in other contradictory spheres — is a open question that requires, even today, a lot of research.

Supported by some readings like this one performed by Honneth, it's necessary to investigate more deeply and directly the realistic foundations of concrete dialectic arguments, at the core of Hegelian-Marxist methodological matrix, in search of their main keys to comprehend the legal phenomenon nowadays.

Therefore, it is necessary to revisit the epistemological roots in the philosophy of praxis. May Hegel and Marx reveal unexplored grounds for a critical practical reason, even at a historical moment in which many theorists insist to call post-Marxist or post-modern? If the answer is affirmative, these theories may sum up a hard attack to the core of communicative

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<sup>5</sup> It's important to note that despite the "return to Marx", Honneth's reproduces the known critique of the Marxist dialectics as unilateral. Honneth says:

But the unilaterality of his model of conflict through aesthetic of production also prevented Marx, in theory, to situate properly the diagnosed alienation of labor relations in the fabric of intersubjective recognition, so that he could make more transparent his moral positions in the social struggles of his time. [HONNETH, Axel. **Luta por reconhecimento**. São Paulo: Ed. 34, 2003, p.234]



action, with negative effects to the legal thinking theories based on this point, specially those which defend a procedural working instead of a material investigation.

## V. Hegel, Marx and dialectics revisited

In effort to discuss some theoretical elements of Hegel and Marx's dialectics, shall we quote some interesting arguments from Brazil, specially from Jorge Grespan, professor of department of history in University of São Paulo.

According to Grespan, Marx died before writing about the translation of the Hegelian method, which was, as he said, "upside down". However, Marxist dialectics has structural differences in comparison to the Hegelian one, deep categorical differences, which is well explained in this "inversion of dialectics". First, the "inversion" was described by the German verb "*umstülpen*" that would be better translated as "*to turn inside out*", as when one reverses a glove from inside or roll up the sleeves of a shirt.

This inversion is given to the concepts of *determinations of reflection* in Hegelian logic, and through dialectical articulation between *identity* and *difference*. Differences between members of civil society would be merely partial and *external*, because the State — the fulfillment of reason — has the function to give cohesion to these differences, making them an identity as a totality. In Marx, this logic is turned inside out. In the words of Grespan:

That is, returning to the metaphor of the glove turned inside out: the difference in Hegel was outside and identity on the inside. If, for Hegel, identity is the prevailing "moment" in determination of the difference, for Marx, "conversely", the difference is what prevails over the identity and determines it, more than is determined. In other words, both logical figures determine one another, as required by the dialectic; but idealism says, on the contrary, that the identity is the greater whole, covering the difference and solving it; while materialism thinks, if not the preponderance of difference, at least that this difference is irreducible to any identical-and-conciliatory-unit. Hegel would have had the merit to "discover" this mutual determination of identity and difference, which is the very contradiction; but he "then mystified" this logical relationship, as far as he stated that the identity prevails to form a world as unity, while its diversity and conflict were only apparent. <sup>6</sup>

This distinction between this two forms of dialectics shows that Marx's materialist thesis sees the difference, the conflict and the contradiction as **essential**, while the idealistic

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<sup>6</sup> GRESPAN, Jorge **A dialética do avesso**. São Paulo: Xamã Editora,2003., cit. p.32

Hegelian thesis sees the difference as **external**, purporting that reality organize itself through reason and that identity is what matters, in a manner the State can overcome the contradictions by its ability to merge the differences.

Secondly, still according to Grespan's analysis, the *overcoming* thesis, in terms of primacy of the identity or the difference, turns out very different in Hegel and Marx, since the very notion of contradiction is different in the two authors. So that, in Hegelian dialectics, there is the contradiction between two opposing terms, understood the positive and negative. Something is dialectically alive provided that is *founded* on the overcoming of self-denial, which is a necessary moment. This notion of contradiction in which a term is founded on the basis of the denial of its opposite is an implication that Grespan describes as a "sinking into contradiction":

This "sink in contradiction" is, however, a defined logical category. In opposition, the positive and the negative refer to one another, and so each one includes the other as part of his other self. On the other hand, *neither lowers itself to be simple part from the other*, each one can be defined as something, a whole. [...] That is, if on the positive side the negative is only one moment that must be noted, therefore this negative could not be itself a whole from which positive would be a simple component. To set itself up as something — necessarily entire — positive cannot be reduced to a moment of its opposite definition. Hence it refuses to the opposite this status of totality claimed for itself. And the same goes vice versa for the other. Thus, the opposition of two terms is presented as the opposition between mutual inclusion and mutual exclusion, which guides their relationship.<sup>7</sup>

Based on this notion we may understand why the contradiction between capital and labor asserted by Marx's dialectical logic is not of the same kind, because the dominance of capital over labor means that only capital can be understood as a totality that "sinks into its negation", that is labor, so that capital recognizes labor as its "moment", but denies it to self-maintaining:

In other words, at the same time that capital must include labor force in itself as its variable moment, to increase and be defined as capital, it also has to exclude labor as possible totality, because if this were the case, labor would not produce to it, and therefore, there would be no longer capital. <sup>8</sup>

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<sup>7</sup> Idem, p.35

<sup>8</sup> Idem, p. 38

Labor has not the ability to submit capital as one of its moments, then, through this denial, overcome itself as a totality and this is an impossibility **derived from a concrete logic**, in contrast to what could be conceived formally, in a Hegelian way, in a conceptual linkage between capital and labor, at the end overcome by the spirit.

Based on these ideas, the Marxist inversion occurs in three conceptually related theses:

(1) the dialectics is seen with support in the contradictions of reality. The logic is put upside down to search its roots in the concrete point of capital's tendency to annihilate labor;

(2) That's why the philosophy of history was put on track to conceive that materialistic holders of the productive forces — which are another historical subject nothing spiritual — could now effectively change history with conscience: men, by the action, determine and change the world (including the Hegelian state);

(3) the challenge to dialectical method is to confront the tension between the structures of various historical manifestations of these contradictions and the ability of the involved subjects to take action and overcome these contradictions, at the best moment for that.

These elements, moved to present day, reveals another special point: that action of concrete men and their **material relationships are not, in the Marxian dialectics, totally free**. The time of revolution in Marx is indeed a historic moment that requires the suppression of labor by capital, in use of its inherent exploitative capacity. So the key points of the various Marxisms, which are around the contradiction between capital and labor, become complex if brought together the history of the development of capitalism in the twentieth century and the collapse of socialist states, among other factors.

We believe that the root of these problems is that *action* set in the *method* generated enormous tensions between concept and reality that, if well understood, gave rise to many discussions about the viability of a Marxist philosophy in the twenty-first century. The critiques of Marxism, in this sense, focused primarily on the problems of precise identification of how much action can change the world and to what extent the structured world is non-changeable (not in the sense of a static world, but in its moments as a process, which contains a rigid concrete structure). But as we will see, this is precisely the richness of this possibility of a *method*.

If, for instance, the rejection of Marx's ideas is usually argued thanks to the fail in categorical representation of the world and because the inability of their political class actions

to actually change the world, we understand that a better comprehension of a *dialectical method* complexity can overcome the criticism, which are inclusive necessary for the *description* and *transformation* of the world itself as a *becoming*. This is the wealth that Marx (and Hegel) bequeathed to the philosophy of our days. Taking it for granted or simply overcome is a poor decree of end of the history and critical thinking.

## **VI. Concrete dialectical method and objectivity**

Before we face the proper questions about law, what to say, nowadays, about a dialectical *method*?

Much of the criticism of a Marxist method of “understanding” the world can be organized in the following arguments:

1) there were faults on detailed analysis of the contradictory relations between capital and labor considering that capitalist system in the twentieth century, creatively, acquired complexities and ways of maintenance that disproved the diagnoses of both Marx cyclical crises of capital and the progressive falling rate of profit that leads to permanent structural crisis,

2) the theory of value based on the labor force, which is the basis of surplus value and class conflict, would not apply in monopolist capitalism, dominated by a different notion of profit based on a determination of value by financial capital or unproductive labor,

3) the consciousness of the proletariat as a result of praxis would not have been effective and, historically, the political action of working class has chosen the paths of institutional action, by way of political parties, not through revolution, and then it was co-opted by the system of capital and emptied its role as a historical subject par excellence,

4) concrete praxis would have failed as a descriptive, ethical, and emancipatory proposal, not only because of what the Soviet empire has become, but also thanks to the increasing strength of State with the fall of the USSR,

5) the centrality of labor to dialectical thinking would not offer shelter to the emancipation of man once the overwhelming face of capitalist domination is a negative and progressive source of inequality: then justice, for Marx, being something to come in the future post-capitalist, would exhaust the ethical alternatives in the present moment, which he called *pre-history* of all mankind.

The central point is, therefore, the tension between structure and human capacity to change this structure and the scientific results of theoretical approaches.

We note that in principle all the criticism could not be sustained based on categories of representation, typical of the philosophy of consciousness, but in light of categories of action and dialectics.

Analyzing the concept of Marx's dialectics with the intention to clarify alleged theoretical misunderstandings internal to Marxism itself, the czech philosopher Karel Kosik defended a thesis that seems quite convincing on the subject of what interests us here, a *dialectical method* as a process of knowledge and action. Any errors of men, accordingly, should not put an end to what Marx himself did not propose as such a closed and final system:

To the extent that Marxism did not apply the Marxist dialectic to its own theory and practice, this omission has produced at least two important consequences.

First, this omission meant a fertile ground in which could appear periodically and alternatively, (a) the revolutionary thesis, which believes that revolution will solve *all* the contradictions of human reality, (b) revolutionary and post-revolutionary skepticism, which believes that revolution *cannot solve any* of these contradictions.

Second, Marxism lost a great opportunity to develop one of the primary problems of dialectics, in which Hegel failed and that is of main importance to the *moral act*. I think particularly of the problem of the end of the history, or to express it in other terminology, the meaning of history.

To Marx, materialist dialectics was an instrument used to report and describe in a critical way the contradictions of capitalist society. But when Marxists come to take their own practice and theory, they confuse materialism and idealism, dialectics and metaphysics, critical and apologetics. In this sense, we must conceive the fidelity to Marx as a return to consequent reasoning and to the application of materialist dialectics to all phenomena of contemporary society, including Marxism and socialism themselves. In the same vein, we must also formulate the question why there is a tendency for apologetics, metaphysics, idealism.<sup>9</sup>

From the perspective of action (praxis), a transition is possible, not as a denial of any representation of reality at all. What Marx provided, at this point, was a twirling in method to avoid the monological dimension of mere positivism.

The problem in this respect is that there is always the risk of adjustments of the description of the world from a dialectical point of view, because the relationship between development of concrete structures and men power of transform these structures is the main

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<sup>9</sup> KOSIK, Dialética da moral, moral da dialética. **Revista Civilização Brasileira** III(15) Rio de Janeiro, set.1967, p.95

puzzle that Marx proposed to solve. In this sense there are not exactly errors, unless one take it as a decision to stop.

Let us see some elements about the *foundation* in dialectical method to better comprehend this methodological matter.

## VII. The truth and real contradiction

To endorse this thesis with another contribution of Brazilian literature, it's possible to say that, conceptually, dialectics does not admit a *foundation* in the classical sense, at the same time it has to found its principles in a problematic sense. Let us read the interpretation of Ruy Fausto, professor of University of São Paulo:

Dialectics was born as the discourse that suppresses the foundation (first one). This suppression (Aufhebung), inserted in a totalizing scheme, is presented as a kind of "suspension" of the founding act which waits for the passing of time (the "prehistory" time). It is necessary that time flows so that we can proceed to the foundation. Thus, the act of founding is somehow "put in brackets", "put out of circuit" in benefit of time course. So this "Aufhebung" — renamed "Ausschaltung" for the sake of comparison — associated with time allows rich comparison between the dialectics and understanding discourse.

Indeed, considering the idea that this relation with time is also a relation to the "world" we are allowed to say that **if** the discourses of understanding (transcendental philosophy in particular), put the world (and time) in brackets to perform the founding act, on the contrary dialectics puts the founding act in brackets to theoretically and practically possess the world.<sup>10</sup>

At this point it is important to note how the research of dialectical problems of capitalism in the effort to unfold Marx' ideas has been perpetuated. It only makes sense to face reality and its contradictions appreciating the historical facts of the development of society. Advanced capitalism brought interesting challenges to Marxist theory of labor-value and also for the very identification of the various facets of capital (especially with the dynamic markets in which the new powers of speculative capital are evident).

But the same advanced capitalism seems to confirm many dialectical contradictions based in social life, specially bound with the core of material production. One of the loudest voices of this claim is Hungarian philosopher István Mészáros, to whom the various forms of

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<sup>10</sup> FAUSTO, Ruy, **Marx: Lógica e Política**. Tomo I. São Paulo: Brasiliense. 2a ed. 1983. Cap.1 Dialética Marxista, humanismo, anti-humanismo.

contradiction are noticed in every part of the world, by the way of national and international crisis of the States or in other sectors, for instance, the contradiction between:

- (1) production and its control;
- (2) production and consumption;
- (3) production and circulation;
- (4) competition and monopoly;
- (5) development and underdevelopment (...);
- (6) capital's structural domination of labor and its insurmountable dependence on living labor;
- (7) authoritarian decision making in the productive enterprises and the need for their "consensual implementation"
- (8) the expansion of employment and the generation of unemployment;
- (9) growth of output at all costs and the concomitant environmental destruction.<sup>11</sup>

Among others, these remarks are all grounded inevitably in the capital-labor contradiction, hereafter understood as a *foundation* of class struggle in a dialectical sense (cf. supra).

For that reason, there are new interpretations about "real" contradictions beyond the original idea of capital and labor. Presently the dialectical research seems to have assumed an environmental point of view, that is: human action (so labor) must no longer be conceived ignoring the natural resources and the limitations of raw materials, even oxygen and water. Whether this is autonomous or dependent to the contradiction between capital and labor is also an open question.

Portuguese professor Boaventura de Sousa Santos, although criticizes Marxism, is positioned on this matter:

Inspired by James O'Connor and Karl Polanyi, I believe that capitalism is constituted, not by one but two contradictions. The first contradiction, formulated by Marx, and symbolized in the rate of exploitation, expresses the social and political power of capital over labor and also the tendency of capital to the crises of over-production. The second contradiction involves the so-called production conditions, that is, everything is treated

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<sup>11</sup> MÉSZÁROS, István. *Socialism or Barbarism: From the "American Century" to the Crossroads*. New York: Monthly Review Press. 2001, pp.13-14

as a commodity despite not having been produced as a commodity, for example, nature.

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But, as we have seen, a *dialectical method* is acceptable only in terms of a dependent relationship with reality. That was and is presently the point of the critical theory of the Frankfurt School. Originally, the theories of Theodor Adorno and Max Horkheimer denounced the real contradictions of instrumental reason era, through a dialectical method. After their disengagement from Marx's material aspects, Habermas and Honneth followed the dialectics path even though the material contradictions (of production and of ecological limits, at minimum) have been no longer re-examined, redefined, criticized, with a theoretical risk of abstraction.

Jurisprudence and, thus, hermeneutics, if conceived regardless of concrete factors, are also in danger of becoming abstract or, what is the same, a theoretical mystification.

### **VIII. Conclusion: dialectic, contradiction, ethics and legal standards**

Given these considerations about a method based on real contradictions, it's necessary to discover their relationship with the formation of values and legal senses, then note **the limits reality imposes on law interpretation around the "reasonable" idea**. What are, therefore, the grounds of values, directions, wills and legal reasoning according to a dialectics of concrete?

The central thesis is: The category of *capital* has assumed an overwhelming and global position and thus has enormous influence on how people view the world and, ultimately, **limits** the socio-cultural elements, including the critical thinking that constitutes noble efforts to contain the destructive pressure of profit.

This thesis has led to strong arguments against Marx, specially about the emptiness of the ethics in confront of compelling structures of reality. As to Marx capital would be seen as an *absolute* subject, of an *absolute* history, which finds a *totalizing* answer and dictates the rules for all spheres of life, of whose "colonization" there is no escape, he was accused of focusing contradiction in every action and productive material work, with a "social being" teleologically determined solely by reproduction. This criticism came from the later theories of Adorno and Horkheimer and is among the many criticisms of Habermas.

So what would remain of a dialectical theory with no offers concerning the very possibilities of ethics, oughts, law and interpretation?

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<sup>12</sup> SANTOS, Boaventura de Sousa. **Pela mão de Alice: o social e o político na pós-modernidade**. São Paulo: Cortez. 2003, p.44-5.



The approach must, then, investigate the concept of “social being” to Marx, as a point of departure. It’s known he had not a purely economical concept of it. The “social being” includes dialectical relations among all aspirations of consciousness and concrete needs. Marx did not fail to face the issue from the standpoint of material dialectics. What matters here is that every moral action, any *telos*, the entire emancipation of consciousness that may be Marx's “social being” are not *determined* by the material productive labor, but *limited* by it. In this regard, the concrete dialectics has a negative proposal, in the sense of a minimum point of departure to identify the bounds for any action in our globalized world.

Hence the following questions: Are concrete contradictions of Marx "totalizing" in the sense denounced by Habermas? And is a theory about justice and about the limits of meanings **possible** within the capitalist mode of production?

The answer is of course problematic:

**No**, while the possible meanings of language have its effectiveness, ultimately, limited by the contexts of actual reproduction of societies, dominated by the increasingly conflictive logic of wealth accumulation. At this point, justice as universal equality and dignity would be far from desirable and very near to unicorns.

**Yes**, to the extent that this limitation of “ought” comes from the “real being” at present societies, which are all to a greater or lesser extent under the influence of the capitalist regime, **although** this “being” is in fact daily changed by the uncountable forms of praxis, inclusive the simple *faith* in ethics. The humanization of man and of his work (and therefore of all spheres of life), according to Marx, is an ethical proposition *per se*, idealistic in the sense that it confronts the real, and non-idealistic as far as it searches (or have the potential to search) for the very concrete grounds of our existence.

Thus the major legal problems or so called “emancipatory” issues of humanity, such as the environmental rights, human rights, women's rights, child protection, the ethnic tolerance and so on cannot simply be thought realistically, that is, in terms of its full effectiveness, without a comprehensive approach of the obstacles and the various faces of the perverse logic of a destructive regime.

That’s why the ideas of Axel Honneth are interesting for claiming a return to the conflictive dimension as the basis of ethics. It shows a special interest in material conflicts and refuses the “end of history” thesis. Given historical impossibility of class consciousness in the nineteenth and twentieth centuries and the perverse increase of the exploitation of mankind, there are very open questions to think about.

Hence, a deeper understanding of the theories of argumentation and hermeneutics based on consensus requires a stronger rediscover of the philosophies of Hegel and Marx. The limits of the linguistic senses to economics, labor and nature, far from determinism, are a reality that calls for further investigation, much further than many **external** analysis like Law and Economics purports.

The glaring example of the financial crisis of 2009, when the U.S. Congress voted against the bailout package to Wall Street and, days later, was **forced** to revise the decision shows easily how there may be concrete limits to the definitions, hence to practical reason, beyond the procedures and guarantees of the transcendental dialogue.

Jurists may think about balances and proportionality, about the grounds of human rights, about the ethical and political justification of equality and freedom, but must do it without the naïve belief that the social democracy and rules of participation form a strong bastion against the devastating powers of capital. Take for instance the migration problem in the advanced democracies: there's something to do with intolerance, and thus with the right of equality, and there's much more to do with capitalism production and concrete social relations. May I wander: Of course my respect to others depends ultimately on my effective sense of dignity, which is based on my profession, on my relation with nature and on my health, guaranteed by clean water and pure air.

Then, Alexy's tenets about rationality in law seems to face history, but lacks more concrete approaches, so to take more sincerely the dialectical powers. Otherwise, the hermeneutics of legal reasoning keeps rounding a *method* that, after all, stresses the linguistic barriers to interact with reality, and fails to continue a concrete-based search of meanings, performing only allegedly an overcome of the Cartesian model of consciousness.

The various linguistic and pragmatic legal realisms — which rest on the pragmatics of senses or on the need of transcendental consensus — are important as far as they present the questions of language as a new labyrinth of Daedalus, in which the substantial conditions for a rational practice of changing, included here the law, fall under the limits set by the maze, from which one cannot leave without the charge of irrationality. This labyrinth is nothing but the Wittgenstein's discovery of the limits of world because of language.

The assumption here is that there should be fundamental structures in a non-strictly linguistic reality, which support the consensus and possible directions, allowing an **ontological primacy** in a dialectical sense. The various concrete manifestations of the social, economic, cultural, political and legal being may be analyzed with a more comprehensive form of objectivity, which throws light on the real role of legal rationality, understood either

as consensus or as a conflict. It's inside Wittgenstein's linguistic labyrinth — even purporting to be a reality in which we operate — that we can think of our history, the soil where it was built, the reasons why we are inside and what is possible to think about what's out there.

The "mystery" that a concrete dialectics should investigate is about the dimensions of conflictive and concrete reality, beyond the limits of language, even though reasons and actions pass through language and search for consensus day after day.

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