EDITORIAL

This number of the *Revista de Direitos e Garantias Fundamentais* (Journal of Fundamental Rights and Guarantees) of the Faculty of Law of Vitória is dedicated to the philosophy of law, understanding within it also the general theory of law. And the theme of the editorial is precisely this: what is the purpose of philosophy and its subdivision that most interests us, the philosophy of law.

With this aim, I want to suggest that the task of the philosophy of law can be summarized in two major fields of investigation.

On the one hand, it seeks to know what law is, how it can be discovered, known, consulted. For example, does law come objectively from the written statutes, that is, do statutes that arise from legislation have a specific and clear meaning for all who read their texts? Are the legislators – senators, congresspeople, deputies, councilors – responsible for the creation of law? Or legal texts do not have a proper meaning and law originates from what the judges decide that law means in each case, before a concrete conflict? And when society, those people to whom the laws are directed, simply ignores them (sometimes even the organs of the state themselves do not follow the law), does law consist of what statutes and judicial decisions say or of what its recipients – the people, the citzens – actually do? This is the problem of the knowledge of law, the problem of knowing what a **legal norm** is.

On the other hand, philosophy of law deals with the question of value, of ethics in law. For example, is justice what the established powers (executive, legislative, judiciary) decide to be fair or is it above the will of governments? In other words: is there an ethical rule that stays beyond the laws, above the Constitution itself? Say, a rule stating that abortion is a crime regardless of what the law and judges say, even if the Constitution allows it? Or is real law a rule that protects the human rights of all, even when national governments deny them to certain groups, as the Nazis did in relation to Jews or whites in relation to blacks in apartheid society? In other words, is the ethical content of law at the disposal or independent of the powers that

be, the positive law? This is the problem of **subjective rights**. The practical repercussions of these two orders of problems are immense and very important, once they concern the very meaning of the word "law."

In general terms, philosophy of law seeks to answer these two orders of questions, showing that it can be a useful tool for the professional and personal life: the lawyer who needs to decide whether or not to accept the defense of a particular individual, the chief of police who has to select the data that must be included in the police investigation, the prosecutor who must accuse or ask for the acquittal of a person or the judge who hesitates to convict a young man to 25 years in a cruel penitentiary system... All those law professionals will find their heavy tasks lighter with philosophy's help.

In other words, not only the justices of the Supreme Court who decide on the constitutionality of fetal abortion or stem cell research need the philosophy of law; people do not need it only in times of crisis and major decisions, but in everyday life, helping to get it better.

One of the characteristics of contemporary society has been the detachment from philosophy, the inability of jurists to simply think. This happens within a new context, in which law is overwhelmed by overloads. One of them is the **ethical pulverization**, which state law has not been able to cope with. This means that the other ethical orders – once law is one of them – become more and more individualized and in that pulverization only law remains as "ethical minimum", since moral, politics, religion and etiquette, for example, no longer function as dampers for social conflicts, all of which are brought into the law system.

This means that in complex societies every social group, and even every individual, has its own morality, its own religion, and only coercive law constitutes the ethical environment common to all. In a more homogeneous society, religion and morality tend to control deviant conducts, and only the most acute conflicts, such as those relating to criminal law, come to be legalized. No wonder that people who are not familiar with the law system think of criminal law when they speak of law, while jurists know that this is only a small portion before the other branches of law. In a complex society, in turn, any conflict is brought to the legal order, such as neighbors' quarrels or family disagreements.

In addition to this **overload of dogmatically organized law** within the social system, one observes another overload within the legal system itself, that is, the **overload of the concrete decision**, increasing the tasks and significance of the judiciary, to the detriment of the legislative branch, since the distribution of justice becomes more and more casuistic and the general rules weaken in importance. In the same way that dogmatic law is not prepared for the first overload, the judiciary is not prepared for this second one, and alternative dispute resolution procedures, such as conciliation, mediation and arbitration, grow. And the decision-making instances are also pulverized: the question of which of the three powers prevails in the creation of law becomes more complicated than one may see in the debate between judicial activists and their opposites, and today law is also in the hands of outsourced employees who are not even public servants.

The fact is that the ethical rules which are valid for all become only the legal ones and get to be decided upon only in the concrete case. While this is not enough to constitute the ethical bonds of individuals in a community, it is too much for state law to take control of all conflicts.

The solution offered by democratic modernity to the dilemma of ethical pulverization and divergences in complex societies is that law begins to decide them, first, according to the inclinations of the majority, because just is not this or that pattern of conduct, as to allow or prohibit abortion, arms trade, or commerce of sex, but what the majority decides to be just; secondly, positive law assumes an ever changing ethical content, since it will always be possible for new majorities to decide on ethical options divergent from the previous ones.

In relation to the control of ethical differences, there is also a linguistic problem, which legal semiotics studies and explains: in a highly differentiated society, significant signs tend to distance themselves more and more from the signified meanings. In law, this means that normative texts, like the words of the statutes, are differently understood by different individuals and groups, for each one reacts in his own way to vague expressions such as “bad faith litigation”, “public interest”, “moderate reaction”, “tax liability crime” and other terms abundant in the legislation. This makes legislation less functional in dealing with conflicts and hence overburdens those involved in the case decision, such as parties,

lawyers and magistrates, increasing the role of personal will and concrete interests, to the detriment of an allegedly general and independent "rationality". At the same time, it is harder to predict what will the concrete decision be like, making exegetical, literal or philological hermeneutic conceptions more and more obsolete, as shown by the modifications of legal hermeneutics.

With these problems as a background and following the due evaluation procedures required of a publication qualified as A 1 by CAPES, the Journal of Fundamental Rights and Guarantees seeks to contribute to the contemporary debate in Brazil and abroad.

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