v. 2, n. 22, 2022

Scientific Journal of Applied Social and Clinical Science

FRANCO MONTORO AND THE PHILOSOPHY OF LAW IN BRAZIL

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Abstract: Montoro explains that "one of the functions of philosophy is precisely to try to answer or clarify the great problems that men pose to themselves in moments of reflection". Based on these premises, this article approaches the vision of Franco Montoro and the Philosophy of Law in Brazil. in Brazil, which is already happening and resulting in the inclusion of Philosophy of Law as a mandatory subject in all legal courses in Brazil. There is no way to deny or minimize the importance of the Philosophy of Law. It is the one that criticizes, unifies and universalizes the various aspects of the legal phenomenon, also investigating its nature, its justification and its purpose; in short, it is through it that the concept, meaning and purpose of law can be perceived. In this respect, the Philosophy of Law is simply irreplaceable, or more than that, "it is inevitable".
Keywords: Philosophy – Philosophy of Law – legal education.

INTRODUCTION

André Franco Montoro, Professor and Philosopher, gave birth to several works on Law, Politics and Philosophy presenting the Philosophy of Law in Brazil, in order to offer an overview on the subject. It highlights what has been happening in the country in relation to methods, culture and human participation in the struggle for their rights and for the global development of society.

It emphasizes that in order to have the concept of Philosophy of Law, a precondition about the definition of philosophy itself is necessary. Science has a unity of concept as being the correct and experimental notion in relation to a certain object of study, in comparison with the concepts of philosophy which are several there is no way to define the Philosophy of Law immediately.

These various definitions are given by its methodology of action and also by its content.

Citing an example of the definition of philosophy from the partisans of logical positivism, who resemble philosophy as a metaphysical discourse that could not be empirically proven. Philosophical views, distinct from science, are based on the action of doubting and subordinating concepts and ideas to the evaluation of effective evidence. The mathematician, for example, would be aware of the connections between numbers, a philosopher would ask, "what does the number mean?"

Regardless of its definition, the Philosophy of Law reveals the following question: "What would law be?". Philosophy, normally having law as its object of study, has not yet managed to produce a philosophy of legal fact, dedicating itself most of the time to debates about the problem of justice or about natural law associated with metaphysics.

At the end of the 18th century, researchers began the elaboration of an authentic legal philosophy, leading to a plan to create a real or metaphysical philosophy of law, surpassing the philosophical treaty of law through a scientific theory of the juridical called General Theory of Law, determining that the positive law in force would only be detailed and recognized by a legal science without any mixture between metaphysical and legal elements.

According to Montoro, the collaboration of Hans Kelsen is of great importance, guaranteeing the independence of legal science supported by a differentiation between legal philosophy understood as a deontological judgment of law, and a descriptive theory of the positive legal phenomenon, abdicating the legitimacy of the procedure. philosophy for legal science.

The point of view of the aforementioned scholar, legal philosophy in a metaphysical context and general theory of law in scientific detail, an enlargement motivated by Marxism.

This emancipation consisted in changing the right to a simple method of social control, and the predominance of power. Leaving aside the fact that the law originates from the struggles for independence. In addition to eliminating the ideology of justice that would be defined as an inner feeling of the human being that is independent of legal buildings.

According to Montoro in his text "Studies of Philosophy of Law", in Brazil philosophy has been suffering a constant evasion in the Universities that teach the course. He questions this occurrence in several ways, one of which is through the "Pejorative Concepts" that philosophy has acquired over the years, and deduces that "Philosophy would thus be reduced to a series of interminable discussions, without any usefulness or serious role in social life." (MONTORO, 1981, pg. 4)

Saldanha (1998) says that philosophy always appears as an expression of more generic and more abstract thinking, but at the same time as a question linked to concrete provocations. According to the author, philosophy unfolds continuously, incorporates themes and problems, adapts to the times.

Historical transformations, in a way, the very emergence of philosophy, in the ancient world, was related to the crisis of religion, and the development of themes - with the first generations of *sofoi* after Pythagoras - grew as each thinker perceived in their predecessors something that had remained unanswered (SALDANHA, 1998).

DEVELOPMENT

For Montoro, Philosophy is clearly important and cannot avoid its use. There are books that consider Philosophy "the roots of knowledge", and this way, what we have today are its fruits. Montoro says: "one of the functions of philosophy is precisely to try to answer or clarify the great problems that men pose to themselves in moments of reflection".

One of his strongest arguments to present the importance of Philosophy is to observe the historical-evolutionary aspects that date from Ancient Greece where philosophy was present at all times, being a fundamental factor of human development.

In Brazil, despite not having a historical philosophical terminology, it is possible to construct from Greek words, prefixes and suffixes the rise of Philosophy in Brazil, which is already happening and resulting in the inclusion of Philosophy of Law as a mandatory subject of all legal courses in Brazil.

The Philosophy of Law is seen in different ways by different philosophers, authors and scholars, there are several definitions and different approaches. Which results in a series of problems regarding the denominations about the Philosophy of Law. Montoro in his work reports the following: "The Philosophy of Law comprises not only the study of the general problems of epistemology, axiology and the ontology of Law, but also the critical study of the principles and assumptions of the various branches of legal science" (MONTORO, 1981, p. 64).

For Miguel Reale (1988, p.14), "The Philosophy of Law would be a permanent and disinterested investigation of the moral, logical and historical conditions of the legal phenomenon and the Science of Law."

There are other definitions that come from historical sources located in Greek and medieval philosophy, composed of intense studies on law, the State, justice and various essential difficulties of Law. However, these studies cannot be considered as belonging to the Philosophy of Law, but to general philosophy or Theology. Being the Philosophy itself turned to the Law.

There is no way to deny or minimize the importance of the Philosophy of Law. It is the one that criticizes, unifies and universalizes

the various aspects of the legal phenomenon, also investigating its nature, its justification and its purpose; in short, it is through it that the concept, meaning and purpose of law can be perceived. In this respect, the Philosophy of Law is simply irreplaceable, or more than that, "it is inevitable".

Reale (1988) says that "the philosophy of law is located, paradoxically, at the base and summit of the legal edifice, representing both the foundations of legal experience (the transcendental principles and foundations) and the unitary and encompassing sense of law as an ideal experience. of justice".

For the jurist emeritus, the Philosophy of Law asks about the logical assumptions of the Science of Law and its research methods (Legal Epistemology); seeks to determine the objective meaning of its history, through a thousand social vicissitudes, in the various cycles of its evolutions and involutions, lulls and crises (Legal Cultorology, or Philosophy of the History of Law) and finally, confronts the central problem of the foundation of Law, inquiring about the values and ends that guide and must guide man in the legal experience (Legal Deontology).

Montoro reports in his work a synthesis of the most important objectives in Law Teaching, this being "Forming Brazilian Jurists". It emphasizes an intellectual, legal and university education appropriate to the style of Brazilians, with skills and abilities to judge, argue and defend their own ideas; a concrete formation and not only of mere information.

However, for this objective to materialize, immediate changes are needed in the existing teaching methodology of law, which reflects that "traditional law teaching rests on a pedagogy entirely centered on the teacher, in clear opposition to modern claims, which postulate a pedagogy centered on the teacher". student." (MONTORO, 1981, p. 87).

He also emphasizes that "for the student, knowledge is always a personal achievement and not something that is ready or that can be given as a gift". (IDEM p.88)

The referenced author presents several processes that can be worked as teaching-learning methods, both for the student and for the teacher. Such processes are, according to him: "active student participation, program design, open classes for dialogue, study and discussion groups, personal work, other tasks, preparation for life, professional setting, orientation for the present and the future". (MONTORO, 1981 p.88/89)

In the "Studies of Philosophy of Law" the author did not insert approaches about the remote procedures of the Philosophy of Law that classifies them as Discursive method that, in turn, is subdivided into deductive and inductive (the latter subdivided into sensitive or spiritual).

In the Chapter on the Philosophy of Law and Cultural Dependency, the author questions the representation of philosophy in the struggle for the development of man. It highlights the role of legal institutions created from an international perspective, which differs from the national one, mainly in relation to the goals to be achieved, that is, "the great nations seek to 'conserve' and the underdeveloped 'to overcome' or transform their condition". (MONTORO, 1981, p. 86).

It can be concluded, therefore, that these institutions bring nothing of legal development to the country, as they are shaped by standards of developed countries, and Brazil is a country em desenvolvimento. Afrom this argument, the need to overcome colonialism or cultural dependence is observed.

Montoro reports that "we can, therefore, say that the development of a nation depends on its ability to make decisions that its situation requires, which requires overcoming the condition of dependence or

subordination of a colonial type, notably in the field of intellectual and technical culture. Development fundamentally depends on the country's ability or competence to develop itself." (pg; 97).

As an example of cultural colonialism, some Brazilian Constitutions can be highlighted, such as:

Constitution of 1824 – of French inspiration;

Constitution of 1891 - American model;

Constitution of 1937 – the "Polaquinha" (because it is similar to Poland).

These, among others, simply copy the rules from abroad to be applied in the Brazilian context, making the existing problems even more complex.

Based on Montoro, one has a broad vision of what cultural colonialism can provide beyond the laws without applications; meanings or purposes that do not coincide with Brazilian interests because they are different from foreign situations; false concept of development and the basic importance of a national culture.

Following the basic concept of Philosophy, "an in-depth reflection on the problems of man and his circumstances". The first function of Philosophy is the conceptualization of development, not considering only those of economic, sociological, political and cultural scope, aiming at a broader view of these points; Another function that Montoro attributes to Philosophy is the analysis of important points of development and underdevelopment in the different angles of culture, in addition to the study of the philosophical objectives of development.

It must be noted that not all Philosophy is in favor of development, there are some that are contrary, such as: Brahmanism, Buddhism, Confucius, Myth of the eternal return, Greek philosophy and the Manu Code.

Being favorable, the biblical and Christian conceptions that assume a philosophy of development and transformation of the world. It is also observed from the perspective of Philosophy, a point of extreme importance, that is, the overcoming of cultural dependence, because a country to develop needs skills to decide based on its national culture in the scientific, technical, philosophical and art, thus sustaining national progress.

It is worth remembering that the author also emphasizes the role of philosophy with "the passage to more human levels of life, encompassing the "whole man" and "all men"; within this concept, the requirement of "active participation" in the development process stands out, contrary to the acceptance susceptible only of advantages. (MONTORO, 1981 p.123).

The author, in the text used to reference this article, emphasizes several denominations of logic, in order to arrive at a broad definition that includes all the important points of the matter. It can be "sayed that Legal Logic has as its object the study of the principles and rules relating to the intellectual operations carried out by the jurist in the elaboration, interpretation, application and study of Law." (pg. 134)

Stuart Mill (apud LESSA 2002) asserts that the philosophy of law can be divided into parts, in order to better understand it. The philosophy of law, which is a distinct but not separate part of the science of law, the final synthesis of that science, studies the method applicable to scientific investigations of law. The philosophy of a science is that it is up to indicate the method by which the same science must be studied, that is, its logic.

Legal logic can also be defined as a precise tool for studying all areas of law. Being the logic widely used by the jurist of any specialty on a daily basis, in opinions, appeals, petitions, justifications or studies. For a conclusion to be coherent, three essential rules are observed:

Identity principle: asserts that what is, is. If an idea is true, it is true;

Principle of non-contradiction: no idea can be false and true at the same time;

Excluded middle principle: an idea is either true or false.

Logic, in short, does not keep absolute correspondence with reality. It can be considered a logical law, when it is possible to reduce its legal norms in a body of doctrines from the principle of identity and other logical postulates.

The term Legal Logic can be extended to the study of rhetorical legal arguments and to the non-strictly logical rules of law interpretation.

Deontic logic can give Jurisprudence the foundation of deduction in the domain of norms.

In an attempt to define, Legal Logic has as its object the study of the principles and rules related to the intellectual operations carried out by the Jurist, in the elaboration, interpretation and application of the study of Law.

Menezes (1980) assures that the axiological critique of Positive Law is at the center of the concerns of Legal Philosophy. He affirms this based on the concept of Del Vecchio (apud MENEZES, 1980), who considers legal philosophy to be addressed in three directions, namely:

Logical investigation: which intends to give the logical definition of Law. Not what is to be understood by "law", by the scope in which the "just" and the "unjust" can be established, answering the question *quid sit ius?,* but what is understood by a given fact or act to be legally licit or illicit act, answering the question *quid sit iuris?* In this objective, the essential is researched in the various systems of concrete orders for a logical conceptualization that gives us the universal;

Phenomenological investigation: which determines the Law as a universally human phenomenon. Despite being historical, it transcends concrete national systems and immerses itself in a speculative meta-historical horizon referring to each nation in particular;

Deontological investigation : in which the tropism for the duty to be inherent to the idea of justice considered as a theory of values is manifested. The rational ideality of Law is a function of empirical reality. Nevertheless, the problem remains: how to convert ideal law into empirical reality? The answer, according to Del Vecchi (apud MENEZES, 1980).

Lessa (2002) says that the history of law consists of exposing the manifestations of law in all its forms, at different times and in different countries, the succession of legal traditions, the origin and progress of existing institutions, customs and successive laws. which mankind has obeyed, and the science of law.

Two parts, according to the author, comprise the history of law. In the first, the precepts of law, positive institutions, customs and laws are reported, or, in other words, they contain the narration of the artistic rules, the norms of conduct, which governed the voluntary activity of man in the past.

In the second, we are given a picture of the erroneous or true, or partly true and partly erroneous, doctrines with which jurisconsults and philosophers sought to explain juridical phenomena.

This being so, it is evident that the history of law only contains materials for the inductions of the philosophy of law.

The General Theory of Law differs from the Philosophy of Law for being a study that is entirely developed at the level of the different forms of positive knowledge of Law, whose concepts and logical forms it aims to determine in a global and systematic way.

Its conclusions, according to Reale (1988),

are not restricted to the Science of Law, but must also be applicable to Legal Sociology, History of Law, etc. The General Theory of Law also elaborates its principles, but as conceptual generalizations, based on the observation of facts, according to the practical requirements posed by the systematic unity of the rules.

Although the jurist is not always aware of this, those general principles, of empirical origin, intended to discipline concrete behaviors, are conditioned by the transcendental principles that Legal Philosophy considers (REALE, 1988).

FINAL CONSIDERATIONS

The examination of the strictly descriptive and factual understanding of scientific knowledge, essentially of Legal Science, must be thoroughly discussed. The idea of scientific legitimacy is coherent, since scientific knowledge is not inherently exact, being the result of a pact of methods and ideas that teaches a certain scientific group, considered a set of beliefs like any other, when it is a cultural result.

At the moment, what leads to a "constructivist" understanding, in the study of the frontiers of knowledge, validating it, forming scientific knowledge in a social and realistic collective construction, is the so-called "post-analytic philosophy" or "post-positivist". Even presenting various types of thoughts performs this orientation.

From the point of view of some authors who rambled on about the studies of law, they created the expression "philosophy of law" coupled with metaphysical ideas about natural law. The question "philosophy of law or theory of law" continues to depend on the meaning given to it and the context in which it is inserted.

It is observed that there is in fact a current reducing the expression "theory of law" to absolute ideals and the systematization of legal knowledge, to a simple explanation of the positive legal system. Demonstrating where a legal philosophy is, with the task of inquiring evaluatively and politically the bases of law.

In the work "Studies in the Philosophy of Law", Montoro calls for a humanist legal framework, stating that the law needs interpretations and results of a humanist type, which overcome formal-positivism. It appears that in the context of building the foundations of a society's activities, common agreement with the culture of rights is prioritized.

In the author's legal theory, values are primarily on top of each other, just by observing his attention to the legal propaedeutics in his work "Introduction to the Science of Law".

For the author, humanism praises the human being, valuing him in history and in nature. Humanism leads human beings to expand their abilities, creativity and rational life, performing their tasks and making the energy of the physical world a mechanism for their independence. Through this motivating way of the human interior, humanist culture becomes inseparable from any concept of civilization, therefore, it becomes the translation of the law contained in Montoro.

As an activity of the person in charge of law, the task of systematizing a series of legal norms is presented, which will not result in a closed system, with pending desires to solve, by means of simple and logical instruments, all the proposed challenges.

The purpose of law is to coordinate society in every way, leading the posture of its members and the action of its institutions. To this end, it defines rules and seeks to ensure the efficiency of these rules, giving positive results to their implementation and negative or punitive results to their violation or non-compliance. To note in the law only the orderer of punitive sanctions is to reduce the right of such inferiority.

The author's current thinking is based on inclusion in a philosophical current that benefits the legal context encompassing the vision of pluralist democracy, humanism and not far from communitarianism.

Despite first stating that there are certain universal values in which societies can organize themselves eternally, harmonizing the disparity that coexists in the same environment.

There are certain foundations of values that are similar, and are accepted even by some supporters of American legal liberalism such as John Rawls. The support of this argument is found in the individual non-transferable value, considered as a community being by Montoro.

The typical of each group is valued by Montoro without excluding the universal that each being contains, however, it is contrary to the ideas of individualist definitions that end in individual and collective isolation, causing solitary speech.

The author approaches the community flank, by highlighting the collective mechanism within democratic norms. Affirming that the need for collaboration naturally provides the theme "community", which is part of the bases of a humanitarian policy.

There is in the author's thinking a certain similarity with the postulates of communitarianism, which causes an approximation of the civic political culture to social participation, which will result in his approach to justice being very similar to the communitarian approach.

In both cases, a certain influence of Aristotelian moral thought can be seen in his Ethics and Nicomachean. He stated that the ideal of justice is what serves as a cohesive factor in societies. This is the factor that naturally lies at the foundation of the social state and that it recognizes as a legatee of the state of nature.

The ideal of raising people's awareness to seek a positive attitude that enables integration into the internal life of the community in which one lives or works. This ideal is defined by Montoro de Justiça Participativa, which aims to emphasize the duty of each one to collaborate freely and consciously, causing an interaction in the life of the community to which they belong.

The ethical understanding of justice emphasized by the author does not find in the composition of the just a challenge between private interest and that of justice. The two form a single essence, because when separating one from the other, there are no forces to justify the values of a society.

Justice depends on the activity concerned, but not only concerned, it must also be fair. Righteous acts are necessary for a critical life and good living, being at least merely just.

Montoro establishes a relationship between the concept of democracy and the concept of justice as he considers justice dependent on the act and intervention of the citizen, giving the rule of law all its validity including that of justice.

In the concept of democracy related to the concept of political participation, he defends the theme arguing that the economically disadvantaged populations of poor countries owe most of their poverty to the lack of participation and the reduced political power they enjoy.

A conclusion can be drawn based on Montoro's statement, where participatory justice and citizenship come to an end, a point of view where his particular understanding of politics is also evident.

And it ends like this:

> "(...) it is necessary, in short, to assure every man the right not to be a mere 'object' of protection and assistance measures, but to guarantee him the right, as a 'person, conscious and responsible', to participate

actively in the task of their development and that of their community.

Millions of people from all continents, placed, even today, on the margins of the benefits of civilization and culture, have the right to expect that those who know more directly about their problems will assume, before the responsible bodies, the historic role of speaking for those who have no voice and open the paths of justice so that all men can walk (...) (MONTORO, 1988, p.193) "

REFERENCES

LESSA, Pedro. **Estudos de filosofia do direito.**Campinas: Bookseller, 2002.

MENEZES, Djacir. **Tratado de filosofia do direito.** São Paulo: Atlas, 1980.

MONTORO, André Franco. **Estudos de filosofia do direito.** São Paulo: Editora Revista dos Tribunais, 1981.

MONTORO, André Franco. **Introduçãoà ciência dodireito**. 25. ed. São Paulo: Revista dos Tribunais, 1999.

REALE, Miguel. **Lições preliminares de direito.** São Paulo: Saraiva, 1988.

SALDANHA, Nelson. **Filosofia do direito.** Rio de Janeiro: Renovar, 1998.