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HART AND THE CONCEPT OF LAW I A GREAT METHODOLOGICAL LESSON

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DISCOVERING THE CONCEPT

In the first few lines of *The Concept of Law*, the author already states his intention, as well as determining the path that will be followed and the ends that are intended to be achieved with the intellectual effort put into it.

The proposal is simple, which certainly doesn't make it easy. Starting from this idea common to any sane individual and in balanced use of their mental faculties: the first step to knowing an object is to inquire about its existence and, once this existence has been experienced - verified - to try to identify the specific elements that distinguish this object from all the others. That is, to identify the elements, or attributes, that make one thing itself and not another.

Aware of the distinction between the concept and the definition of an object, Hart sets out to study the legal phenomenon as it presents itself and in the most varied forms, modalities and uses, seeking to analytically break down these elements in order to discover, rather than construct, what makes Law a social phenomenon of its own. It seeks to identify the differentiating elements of law, especially where it comes close to morality and coercion.

It is in this way that Hart's book seeks to lead the reader to discover what the Law is; how this phenomenon, which is easy to perceive but difficult to define, presents itself and is constituted in any time or place, regardless of the historical-temporal specificities or cultural particularities that are the contingent aspects of its own distinct, permanent structure.

It is with this initial proposal presented by Hart as a reading template that it becomes possible to understand the author's theoretical depth and the very dimension that guides the future identification of Law as a system of primary and secondary norms, endowed with an open texture and with specific points of observation, validation and legitimization.

THE PATH OF CLASSICAL DIALECTICAL PURIFICATION

Conceptualizing means identifying the elements and attributes that make up a given object or phenomenon, removing those that are accidental and fixing those that are essential.

The path of discovery is not to be confused with the path of justification. They are complementary, of course, but they deal with different aspects of the intellectual journey of the act of knowing.

Aristotle proposed dialectics as a way of discovering essences, as a specific method of scientific discovery. And what does Aristotelian dialectic consist of?

For Aristotle, the starting point for knowledge should be the opinion of the wise or, as the medievalists used to say, *what all people, at all times, have always thought*. The beginning of knowledge, the gateway to scientific knowledge, lies precisely in the consolidated opinions, established among the main scholars in the field.

Based on the fact that every affirmation brings with it its own negation, in other words, based on the understanding that affirming something is the same as negating its opposite, the dialectical path provides as an initial stage a kind of typological cataloging of the main existing conceptions regarding the subject under study. Once these theoretical or doctrinal positions have been identified, the scholar must carry out mental and intellectual work of constant opposition, of a direct clash between these conceptions. More than that, they must carry out the inevitable test of contrasting the analyzed concept with its own negation. This creates a mechanism of thesis and antithesis, or affirmation and negation, which defines dialectics itself. The systematic clash between various affirmations, added to the permanent clash between an affirmation and its own negation, is what is known as *dialectical purification*.

Note that there is an intellectual ascent: the degree of knowledge of the object inevitably increases with dialectical purification, either to give greater theoretical and rational consistency to the initial conception, or to invalidate it definitively. The greater the degree of awareness of an object, the greater the degree of knowledge. To know an object is, first and foremost, to become aware of what actually constitutes the object, removing everything that is accessory, accidental or contingent.

This is the path proposed and taken by Hart. Right at the start of the book, the author identifies some of the main current conceptions of what the legal phenomenon is, as well as seeking to identify the attributes and components that traditionally have a juridical character.

Taking as his starting point the conception of law as a system of orders supported by threats, the conception of law as a branch of morality and the conception of law as a system of norms, Hart identifies three recurring problems in the theory of law, which characterize these starting conceptions and unfold into three points of analysis of their own: how to Law relates to and distinguishes itself from orders backed by threats; how legal obligation relates to and distinguishes itself from moral duty; and how to understand law as a question of norms. Searching for the full meaning of expressions, colliding them with reality, keeping that which stands up to dialectical opposition and discarding that which proves to be inadequately endowed with juridicity. This was the path taken in the search for the concept of Law.

In all dialectical purification, as a kind of by-product (where *sub* indicates a relationship of logical derivation and sub*ordination* and not a relationship of hierarchical subordination), the concomitant identification of the various attributes that make up the object under analysis is obtained. This means that it is also through dialectical purification that the theoretical elements that systematize a given phenomenon are obtained. At the same time as selecting between what is accidental and what is essential as a descriptive conception of the object, one obtains the theoretical tools necessary to explain the internal organization and mechanism of operation of the object itself.

This is why the initial identification of what makes Law a specific object is followed by the study of the main elements and attributes that make up this object, which has already been duly specified.

THE CONTRIBUTION OF ANALYTICAL PHILOSOPHY

In addition to classical dialectical purification, Hart's analytical skills allow him to break down the object of study and give it a differentiated, precise and in-depth theoretical treatment. This purification gives rise to the permanent, structural attributes and elements that are essential to the legal phenomenon. It is, in turn, through analytical decomposition that the density and adequacy of dialectical theses are verified. The path is no longer one of discovery, but of justification.

With this, Hart manages not only to deal with his own conception of law, but also, through positive or negative purification, to define the meaning and material scope of the main theoretical instruments for applying the law.

Analytical philosophy will provide the necessary steps for scientific demonstration, no longer for scientific discovery. The discursive scale created by Aristotle is also present in Hart, in a balanced path of intellectual conquest that starts from verisimilitude, passes through probability and reaches certainty.

In this way, and for these reasons, Hart achieves and at the same time establishes a minimum level of acceptance and validation for the most diverse theoretical proposals on the legal phenomenon.

Regardless of who the author is, or what conception he or she defends, validity is already conditioned to the minimum rational and argumentative credibility required, it is already conditioned to the dialectical probability obtained through the long road of conceptual purification.

Once the necessary theoretical requirements have been met and a dialectically exhaustively debugged premise is in place, analytical decomposition can then be sought, in a rigorous syllogistic relationship, demonstrating doctrinal correctness and conceptual adequacy.

The path of dialectical discovery, added to the demonstrative effort of analytics, constitutes one of the marvels of Greek wisdom that finds in Hart a worthy executor.

LAW AS A NORMATIVE SYSTEM

HART'S PRESUPPOSED CONCEPTION OF SYSTEM

When dealing with the three recurring ideas about the nature of the legal phenomenon and, later on, when dealing with the specificities of Law in relation to the other normative and coercive phenomena of human society, Hart brings with him an assumption that it is important to explain and comment on briefly.

Hart's entire study presupposes the conception of law as a *systematic structure* made up of normative elements, which acts on the basis of a specific type of power and for its own purposes. It is important to point out that the legal phenomenon presents itself as a system, as this idea has serious repercussions on the theory of law.

To say that something is a system means to find in it the sum of several elements. The sum of several distinct elements is called a whole. Every whole becomes a system when the elements that make it up are distributed in an organized and coherent way. Organization and coherence are therefore essential attributes of a systematic whole. What's more, any set of elements can only be coherently organized and arranged by adopting some identification criterion that allows the initial set to be systematized. This criterion, by definition, is always arbitrary. It depends on a number of factors, but in the end it can be summed up as the exercise of discretion as an element of differentiation. Note that the differentiation itself is not arbitrary, only the choice of criterion that makes this distinction.[1]

To say that law is a system means that the elements that make it up are arranged in a coherent and structurally organized way. How this organization works, and how coherence is achieved, is the result of the first identification of the legal system's own element: the rule.

THE *NORM* AS AN ELEMENT OF THE LEGAL SYSTEM

Every legal system is made up of its own element that identifies and distinguishes it. The legal rule is the element that gives life to the system, it is the body of which the theory of law represents the structure.

It is important to realize that the identification of the norm as the defining element of the legal phenomenon is not Hart's creation or innovation. It is above all, as the author himself points out, one of the primary observations of any individual who participates in any social organization.

The legal norm is the ideal object responsible for the deontic link between value and fact, between the content of the Law and concrete human action, between *sein* and *sollen*. It is from the idea of the legal norm that the expression *order*, the set of norms, is legitimized.

1. There is nothing arbitrary about the distinction between men and women, for example. It is the choice of the criterion that differentiates them that is arbitrary. Men and women can be differentiated by their genetic component, their physical appearance, their psychological make-up or their external genitalia, *for example.*

Of course, to grasp this primordial perception, you don't need a great deal of cunning or intellectual preparation. It is so present in human reality and so easy to grasp that it can even be assumed to be known by everyone.

This is the main reason, along with some others that only reinforce it, to understand why Hart distinguishes in the legal phenomenon the union between primary *norms* and secondary norms, and not the union of primary and secondary *rules*. Here we have a point which, although it may seem a mere terminological issue, is intimately intertwined with the very content of Hart's proposal.

The initial confusion can be attributed to the English word *rule*, used by Hart to deal with the elements that make up the Law and form a specialized system. The term *rule*, in English, means what in Portuguese is designated by two very distinct terms, *norma* and *regra*. This happens in the same way that in Portuguese the term *justice* means everything that in English is expressed in the terms *justice*, *equity* and *fairness*. Just as nobody confuses the use of the term "regra" in Portuguese to designate the set of provisions that regulate the game of chess or etiquette, for example, nobody should confuse the use of the term *rule* in English when referring to the norm or the rule.

Any legal text written in English uses the term *rule* to refer to what in Portuguese is called a *norm*. This is proven by consulting the texts of Hart's own commentators who, when writing shortly after the publication of *The Concept of Law*, always referred to the term *norm* and not *rule* in their native languages. See, for example, the following texts taken from the catalog prepared by Hart himself, such as: Gavazzi, *Norme primarie e norme secondarie*, Turin, 1969. Bobbio, "Nouvelles Réflexions sur lês normes primaires et secondaires", in *La Régle de Droit*, ed. Perelman, Brussels (1971), p. 104. Bobbio, "Ancora delle norme primarie e secondarie", in *Rivista di Filosofia*, n° 59 (1968), p. 35.

This linguistic position is easier to prove when we analyze Hart's own text, which, when referring to Kelsen, deals with the inevitable comparison between Kelsen's fundamental norm and the latter's norm of recognition. Throughout Hart's text, whenever he refers to Kelsen's *fundamental norm*, he does so using the expression *basic rule*, not *basic norm*. What doubt persists or what purpose motivates the Brazilian legal theorist to treat the same reality with different names when the author himself does not?

Thus, in the book presented here, the translation of *rule* as *norm* and not *rule* was correctly used. The theoretical implications of this will be explained below. The reasons that led to the confusion and the adoption of a translation that is clearly misleading will be left for another time, in a more appropriate space, as there is no desire here to discuss any misfortunes, misunderstandings or misuse of Hart's ideas by anyone. The book itself is a sufficient demonstration of the correctness of the English professor's reasoning.

LAW AS A UNION OF PRIMARY AND SECONDARY NORMS

This legal system, made up of legal norms, is divided, according to Hart's great contribution, into two specific normative types: *primary norms* and *secondary norms*.

Primary norms are responsible for the direct regulation of human conduct, represented by the deontic modals of prohibition, obligation and permission. They are based on a general threat and the potential use of force to enforce the normative command.

However, since any norm that regulates human conduct - that disciplines it with commands that prohibit, oblige or permit certain actions - is necessarily based on some presuppositions that cannot be sustained by itself, Hart perceives a second category of legal norms.

This second category is made up of norms that regulate the stages of validation, organization and application of primary norms. The guarantee and effectiveness of the primary norms depends directly on the existence of other norms that do not have the purpose of regulating the human conduct, but which are directed at the norm itself and the system, informing the paths of legitimate and lawful action.

In order for the legal system to be characterized, there must be norms responsible for saying how other norms will be made and applied and which norms will be considered valid for application.

In every legal system, Hart rightly says, there are secondary norms responsible for recognizing the legal system, changing or modifying other norms and applying them to reality in concrete cases. In these three large groups, Hart discusses the *norm of recognition*, the *norm of modification* and the *norm of judgment*.

The existence of these secondary norms would be one of the distinctive attributes of the legal phenomenon in relation to other normative and cultural phenomena. Norms about norms, or second-degree norms, are responsible for the existence of the system itself, proving once again the idea that identifying the attributes that distinguish objects is the most correct way to conceptualize an object, to say what makes it what we know it to be.

Once this core idea has been distinguished, Hart moves on to identify the theoretical and instrumental categories of the legal system, in other words, the categories that are part of the system, that organize it and discipline its application.

HART AND THE COROLLARIES OF LEGAL THEORY

THE OPEN TEXTURE OF LEGAL NORMS

Every linguistic expression or, in an even more precise sense, all language, as a creative and not merely relational phenomenon, intrinsically possesses two vices: ambiguity and vagueness.

The linguistic expression that supports normative construction, the work of the interpreter of the law and, ultimately, the function par excellence of the applicator, carries with it a constitutive degree of indeterminacy, a *penumbra*, as Hart prefers, which gives every legal norm an *open-textured* characteristic. This means that, even with content limits clearly established by the normative source, legal or jurisprudential, legislation or precedent, the norm is always endowed with a zone of indeterminacy of specific content, an intermediate space between the positive limits established by the primary source. This gives the interpreter a much more serious and responsible role than simply discovering the legal meaning, the normative content to be extracted from the support/source. It is up to it to establish the definitive content of the norm to be applied in a given case, resolving the natural openness of legal meaning and establishing the norm's own content for the specific case.

The open texture of the Law, better defined as the open texture of the legal norm, is responsible for a discussion that is extremely topical and of great relevance to the theory of the Law: the interpretative discretion of the judge, or rather, the possible possibility of creating the Law in judicial activity.

The open texture is also responsible for the openness of the system, for the constant possibility of updating the legal content - updating used here in the Aristotelian sense of the distinction between act and potency. The open

texture allows what was latent and in potency in the normative support of the Law to be actualized, to be realized in all its possibilities. By dedicating an entire chapter to describing and explaining the open texture of legal norms, Hart anticipates the answer to some questions elaborated under predominantly formal characters, especially the future criticism of R. Dworkin who, seeing a rigid application regime - *all or nothing* - in the legal norm described by Hart, will propose a path of political and ideological justification for a legal and theoretical aspect of law.

In a few paragraphs, in the afterword to the second edition of his book, Hart recaps the extent of his description of the naturally open texture of legal norms, as well as their necessary function of making the system more flexible and adapting normative content to factual requirements.

THE INTRINSIC PREVALENCE OF THE LEGAL RELATIONSHIP. THE BILATERAL NATURE OF LAW

Another relevant point that emerges as a corollary of the theory of Law, and which was recognized by Hart in his quest to identify the essential elements that make up this concept, is the *relational* constitutivity of Law, as opposed to its static perception.

There is no way of identifying, except under the cloak of typological intellectual creation, the central element of the legal phenomenon in a single legal action or act. Law is always presented in relation; it is constituted, by nature and definition, in a legal relationship.

This relationship, which is easy to perceive in legal theory under the name of bilaterality, has a much greater scope and importance than is usually attributed to it. The bilateral nature of the legal relationship means the intrinsic need for two poles to exist in order for any relationship relevant to the law to be formed. Or, to put it another way, it is not possible to establish the existence of a right without the corresponding identification of the legal duty bilaterally related to that right. By definition, the holder of a right who has no duty to respect that right has no right at all. What you wrongly call a right is nothing more than an aspiration, an exercise of the individual's autonomous will, the result of some kind of political claim, an arbitrary imposition of behavior. None of this has a legal nature. Incidentally, it is precisely to prevent this type of human conduct that the law exists. Legal relations are established to discipline the inevitable clash of selfish and unjust desires.

The identification of the holder of the legal duty is the first step in establishing a legal relationship, and it is only after the relationship has been established we can talk about non--compliance. Non-compliance with a legal relationship always occurs in the sphere of the legal duty, so the illicit is only the negative, contrary aspect of the duty. Herein lies a superior aspect of Hart's description of the legal phenomenon over Kelsen's description, who saw the unlawful as the central figure of legal theory. For unlawfulness to be this central aspect, the judiciary must first be confused with the law itself. The latter was created to regulate human conduct, while the former is responsible for the legitimate monopoly on the use of force in the event of non-compliance with the legal relationship. Law is the legal relationship, and not just the jurisdictional way of restoring the relationship when it is not complied with.

VALIDITY AND LEGITIMACY. HOW TO *RECOGNIZE* A LEGAL SYSTEM?

Another element that emerges from every theory of law is the aspect of validation of the final result produced by the system, in other words, the element that ultimately validates the standardized legal content.

From the internal point of view, of the system itself, the organization of the set of rules inevitably takes place hierarchically and, in a system of primary and secondary rules, it takes place according to the rules that establish the paths of legislative creation, legislative amendment and legal application. In this respect, the system for validating the normative content and the judicial decision is ultimately established beforehand by the very structure of the system or, as we prefer to say nowadays, it is already defined by the Constitution of the legal system.[2]

However, validation is not restricted to the singular aspects of the legal system. The whole system must also be endowed with the attribute of validity. For this analysis, Hart identifies the norm of recognition: the norm that verifies acceptance, as voluntary and agreed adherence, of the legal system in force at a given time.

In this respect, the idea of Hart's norm of recognition and the minimum effectiveness of the legal order that H. Kelsen proposed in his revised pure theory of law are very similar.

Hart's idea that the whole system is validated in a norm of recognition, devoid of specific content and therefore immune to the unfounded criticism leveled at it by R. Dworkin, is also fundamental. Dworkin, but endowed with the very purpose of validating the entire system, in its set of secondary norms and, by derivation, primary norms.

THE EXTERNAL POINT OF VIEW

Hart also distinguishes, as an inevitable corollary of legal theory, the two distinct points observation that make up the legal system.

From the internal point of view, of the *user of* the system, so to speak, the legal phenomenon is nothing more than a system of primary and secondary norms, all of which have an open texture and their own purpose of regulating human conduct, under specific evaluative aspects related to morality and the objectives of justice in the solution of conflicting relationships.

However, any legal system can also be observed from an external point of view, i.e. from the outside, without inserting the system's normative commands. The external point of view allows for a proper analysis of the legitimacy of a system, the development and appropriate content of each set of rules.

It is important to emphasize that the discussion of the limits of validity and legitimacy will be much better understood, as will the potential action of the secondary norm of recognition.

TOWARDS A NEW INTERPRETATION OF HART

THE PATH OF LEGAL INTERPRETATION

Like any cultural object, as defined by Aristotelian and phenomenological legal culturalism, law is the result of human action, as a social action with a potential reflection on others and endowed with finalist human rationality.

The structure of cultural objects, by its very definition, requires human intervention to create something. As the creation of something cannot start from nothing, all cultural

2. It is to this aspect of the constitutional validation of the legal system that the orbital metaphor, which explains the Constitution as the unit of reference and meaning of the legal system, refers much more aptly than the pyramidal metaphor, which is limited to the hierarchical aspect of the legislative provision. One metaphor refers to the Constitution as a norm and the other to the Constitution as a law.

objects will be created on objects that exist without rational human interference. These already existing objects (which can be natural objects, ideals or values) are said to act as a *support* for the cultural object. It is on this support that, through rational intervention, human beings assign *meaning*, creating a new object, called cultural.

This structure of support and meaning do[3] is present in all legal phenomena, which are made up of factual, natural, psychological, ideal and evaluative support elements.

This description becomes all the more relevant when you realize that *interpreting* is nothing more than *attributing a meaning to something*, in other words: in a legal object, attributing a legal meaning to the support, which in legal theory is called the *source of law*. Under no circumstances should the source of the Law be confused with the Law itself, in other words, the law, the source of the Law, should not be confused with the norm, the object of the Law. The rule is the result of the process of legal signification, of discovering and attributing meaning, content, to the source of law, be it law or precedent.

It is therefore easy to see the difference between legislative creation and judicial creation. While the legislative function is concerned with the systematized set of legally relevant sources and setting the limits of legally valid interpretation, the jurisdictional function is structured in the sense of developing specific techniques for interpreting and applying the law, as well as establishing the mechanisms of normative meaning.

The role of the interpreter is not only extremely important, it is also absolutely necessary in order to establish the normative content, since it is the result of legally valid interpretation that will lead to a concrete legal norm.

It is on this same basis that the general principle of the non-retroactivity of laws is identified, which cannot be mistakenly confused as if it were a principle of the non-retroactivity of legal norms. Norms, by definition, are the result of a complex interpretative act; they are the legal meaning validly attributed to a previously established legislative framework.

The open texture of law, as described by Hart, demonstrates the essential openness of all normative content, identifying the preponderant role of the interpreter, as well as demanding rigid criteria for validating the final result, the decision rule, or the specific case.

The system for applying legal norms is given, from their very definition, by the internal structure of the norms and by the open and updatable texture of the legal content, implying a creative activity on the part of the interpreter and the judge.

It is up to legislative activity, or judicial precedents themselves, to establish the maximum limits of legal validation. In the very definition of open texture, Hart specifies that the original contents of the linguistic expressions endowed with their own legal normativity - legislation and precedent - already set the limits of legally valid interpretation. The specific definition of the normative content, the *fallnorm*, will effectively be the result of an interpretative process of discovery and creation, endowing the interpreter and the judge with a certain amount of discretion.

WHY READ HART?

Hart proposes a theory of law whose founding value is human freedom. Freedom, which is well known and defined as the human capacity to do what one's will determines, as long as it is related, under the bond of responsibility, to the result obtained from freely executed actions.

3. Just as the canvas is the natural support for the cultural object painting (a work of art endowed with its own meaning), or paper is the natural support for the cultural object check (a credit instrument with a demand for payment).

Hart understands the intimate connection between freedom and justice and, even more so, between law and morality. Freedom makes individuals human beings and reality the stage for free actions and responsible results.

Understanding the internal structure of the legal phenomenon, its particularities and how it works, provides society with a way of acting, controlling and realizing the ends it assigns to law. Whether it's justice, peace, security or dignity, the pursuit of the end is necessarily linked to the choice of means.

Hart, first and foremost, is a defender of freedom and knowledge, which is why he should be read. With Hart you have a shield to defend yourself against the theoretical and political tricks and mischief that seek to turn the law into yet another stage for human arbitrariness. With Hart, freedom is won and the camouflaged discretion of behavioral engineers disguised as judges and doctrinaires, who base their decisions and theories on an unattainable and unenforceable future ideal, is prevented. They base a restriction on a promise.

They trust and favor what is to come and not what has already come. With Hart you learn what law is and not how politics is done. With Hart you get a path to Justice and not a strategy for Power.