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Estudios

Iusphilosophical Paradigms as Theoretical Guides in Law and Justice Discourse

Los paradigmas iusfilosóficos como parámetros teóricos orientadores en el debate derecho – justicia

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Abstract

The Philosophy of Law has delineated its trajectories through debates concerning the very nature of law and its interactions with other normative systems. This has involved addressing the tensions arising from ontological, epistemological, and ethical aspects (Alexy, 2008) throughout the history of law. In the ethical dimension, one of these debates focuses on the relationship between law and justice, a tension that has decisively influenced both the concept and practice of law. This is an attempt to delineate a path regarding the state of the problem and to strengthen students' critical thinking skills and their ability to find a connection between philosophy, law and the paradigm of justice.

Keywords

Philosophy, justice, law, discourse

Resumen

La Filosofía del Derecho ha trazado sus trayectorias en torno a debates sobre la naturaleza misma del derecho y sus interacciones con otros sistemas normativos. Esto ha implicado ocuparse de las tensiones sobre aspectos ontológicos, epistemológicos y éticos (Alexy, 2008), que han surgido a lo largo de la historia del derecho. En la dimensión ética, uno de estos debates se centra en la relación entre el derecho y la justicia, una tensión que ha marcado de manera decisiva tanto el concepto como la práctica del derecho. Este es un artículo que intenta delinear un camino hacia el fortalecimiento del pensamiento crítico de los estudiantes y generar un acercamiento entre la filosofía, el derecho y el paradigma de la justicia.

Palabras clave

Filosofía, justicia, derecho y discurso

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Introduction

This manuscript has been written for our students with the intention of providing a new perspective on the existing paradigms regarding the discourse of Law and Justice. In a form of dialogue situated, in broad terms, from the 5th century BCE within the context of Greek Enlightenment (Welzel, 2011) to the present day, the question of justice has been posed not only in abstract terms, but also in relation to law. This is a normative system of an authoritative and coercive nature, supported by institutional frameworks generally associated with the state.

These debates have been enriched by the incorporation of diverse theoretical approaches that have sought to address the relationship in question, either in support of or in opposition to it. As a result, the conversation has been characterized by tensions and divergences rather than convergences. In this context, the concept of philosophical paradigms becomes relevant.

Iusphilosophical paradigms

In accordance with Kuhn's classical notion of paradigms (Kuhn, 1971), this dissertation defines a jurisprudential paradigm as a shared theoretical structure that encompasses law in its ontological, epistemological, and ethical dimensions. This paradigm, in turn, affects the practice of law itself.

To illustrate, if one considers that law seeks to materialize principles of justice or —as Radbruch (2007) and subsequently Alexy argue— then it follows that an extremely unjust positive law would not qualify as law and thus contains an inherent claim to justice, as Alexy posit from a non-positivist perspective (2016). Therefore the concept of law is inherently intertwined with morality, and the practice of law is thus directed towards achieving this claim.

Conversely, if, as Kelsen argues from a clear positivist position, law is devoid of any claim (Kelsen, 1934), then the very concept of law must forgo any references to material contents or purposes. Therefore, the practice of law should focus on the implementation of legal norms as valid, regardless of their content. When these divergent positivist and non-positivist perspectives are considered alongside the well-established development of Natural Law (Welzel, 2011), it becomes evident that there is not a single paradigm, but rather a multitude of paradigms that have been consolidated within the Philosophy of Law. These paradigms continue to engage in an enduring discourse that seems irresolvable.

In this regard, to engage with the debate concerning the tense relationship between law and justice within the framework of the Philosophy of Law, an analytical diachronic perspective, rather than a mere chronology, would be particularly valuable. This paper aims to outline, within the inherent limitations of a document of this nature, some of the paradigmatic

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iusphilosophical trajectories that have been developed. However, this should not be understood as an exhaustive reconstruction encompassing all debates and trajectories. Instead, it constitutes a form of theoretical cartography, designed to provide a panoramic and contextual view of the discussions surrounding this debate. As a form of cartography, it seeks to situate the reader within the expansive field of the Philosophy of Law, albeit within a specific domain: the debate concerning the relationship between law and justice.

The trajectory outlined for this purpose is centered around a pivotal event considered crucial to understanding the law-justice debate, namely: the argumentative turn in law. This new perspective in legal theory and the Philosophy of Law, which emerged in the context of the post-World War II era, is characterized— as suggested by the term itself—by the centrality that argumentation theories and argumentation itself hold within the legal system. According to Atienza, the argumentative turn in contemporary legal theory gives a several key elements that have the potential to shape a new paradigm in law.

This new paradigm would be characterized by the emphasis placed on principles, alongside rules, within the legal structure; the view of law as a complex social practice that integrates norms, procedures, values, and agents; and the centrality of legal interpretation as a rational process that shapes law rather than merely applying it. Furthermore, Atienza underscores the conceptual connection between law and morality, the weakening of the distinction between descriptive and prescriptive language, and the necessity of rational justification for decisions as an essential feature in democratic societies. Additionally, he highlights that law is not merely a means to achieve social ends but incorporates moral values grounded in rational morality, which relativizes the distinction between positive and critical morality (Atienza, 2017).

The argumentative turn

The argumentative turn, positioned as a central point in the theoretical cartography, facilitates the exploration from a diachronic analytical perspective across all directions of the legal spectrum. This requires an examination of the antecedents of the turn, as well as an investigation into the new legal context that emerges from it. Consequently, it becomes essential to ask: ¿Why does this turn occur, and where is it headed? Atienza provides valuable insights that facilitate the connection of this event with iusphilosophical paradigms, revealing a backward glance at iuspositivism and, further back, natural law. Additionally, new perspectives emerge as alternatives to these traditional approaches, while looking forward.

We will now situate the context in which the argumentative turn emerged. As previously noted, the argumentative turn arises in the post-World War II context, introducing significant theoretical contributions, beginning in the 1950s, from prominent authors such as Viehweg,

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Perelman, Toulmin, McCormick, and, by the 1970s, from Robert Alexy himself (Atienza, 2005). Meanwhile, the discourse on Human Rights was in full emergence, and the phenomenon of the constitutionalization of law had also begun.

Undoubtedly, the end of World War II and the revelation of the legal context surrounding the Nazi Holocaust significantly influenced the shift in the understanding of law. In this context, one of the most prominent legal philosophers was Gustav Radbruch, who cautioned against the dangers of removing the moral foundations of law and articulated his well-known formula, which asserts that extremely unjust positive law does not even qualify as law (Radbruch, 2007).

In turn, the context of the degeneration of law under the National Socialist regime in Germany is well described and analyzed by scholars such as Bernd Rüthers. Rüthers, in general terms, points out that legal theory and legal practice were distorted and manipulated under the Nazi regime in Germany. He argues that law in the Third Reich was "degenerate" in the sense that it was used to legitimize and facilitate the regime's crimes, rather than serving as a tool for justice and the protection of human rights (Rüthers, 2016). Thus, the argumentative turn can also be seen as a response to a conception of law that is devoid of substantive content, excessively legalistic, and hyperformalistic. This constitutes a critique of iuspositivism as it is currently understood.

This critique enables a retrospective examination, which must be understood as a hermeneutic maneuver aimed at comprehending what the turn entailed. In other words, it facilitates the response to the question: ¿Why did this turn occur? It also allows us to move forward to better understand the context that emerged after the turn.

Iuspositivism can be understood as a response to and an overcoming of the natural law paradigm, which had dominated the Philosophy of Law until the 18th century. This natural law paradigm, which was based on metaphysical principles and the notion of a universal and objective law derived from nature or reason, began to be challenged by the political, social, and epistemological transformations that occurred from the Enlightenment onwards. The French Revolution, the codification of law in Europe, and the rise of scientism in the 19th century, with figures such as Auguste Comte, contributed to the decline of natural law and the emergence of legal positivism as a new way of understanding law.

However, legal positivism is not a monolithic movement. Rather, it is a collection of currents and schools that share certain common elements. These include the rejection of metaphysics and the defense of a conception of law as an autonomous and closed normative system, based on the authority of the law and formal validity. This approach rejects the idea that law should be evaluated or corrected by external criteria, such as morality or justice, focusing instead on the description and systematization of legal norms as they are, without regard to their moral content (Botero-Bernal, 2015).

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With Hans Kelsen, legal positivism reached its most consistent and systematic expression as the dominant paradigm in legal theory. Kelsen developed his Pure Theory of Law, in which he proposed a view of law entirely separated from any moral, political, or social influences. In Kelsen's view, the study of law should be approached as a closed normative system. The validity of norms is derived exclusively from their conformity with a higher norm, which in this system is known as "Grundnorm" or basic ground norm. This theory aims for methodological purity, isolating the study of law from other forms of knowledge and evaluation, and focusing solely on the structure and internal logic of the normative system (Kelsen, 1934).

Kelsen posited that the objective of legal science is to describe and analyze the law in its actual state, without prescribing how it should be. This "intrasystemic" approach, which emphasizes the formal validity of norms, disregards questions of legitimacy or effectiveness, focusing exclusively on coherence and normative derivation within the legal system. The Pure Theory of Law thus represented the culmination of legal positivism as a paradigm that, while offering great consistency and analytical clarity, was also criticized for its detachment from ethical concerns and its disconnection from the social reality in which law operates (Kelsen, 1934).

For example, Welzel conceives of legal positivism as a method of reducing reason to its most basic and technical function, focused on interpreting, and making sense of sensory impressions in a manner that directs them towards practical existence. In this context, only those elements that are effectively functioning as law are law, without exception. This rigorous methodology enables judges to circumvent intractable disputes, as it asserts that positive law is the sole foundation upon which legal interpretation can be based, excluding any consideration of rational truths beyond it (Welzel, 2011).

Hans Kelsen's Pure Theory of Law represented not only a decisive break in the relationship between law and morality, as well as between law and justice, but also by focusing on both epistemic and methodological purity, it displaced any attempt to understand law in connection with society. Instead, it concentrated exclusively on normative analysis within the legal system itself. This approach is based on the validity of norms as its primary criterion, setting aside considerations of legitimacy. This emphasis on normative validity led to a fragmentation in the understanding of law.

In this regard, Mejía (2016) notes that the consideration of issues in practical philosophy, where Legal Philosophy is situated, from a monodisciplinary perspective—such as legitimacy viewed from political philosophy, validity from legal theory, and efficacy from legal sociology—has fragmented the close and ontological-social relationship between these categories. This has led to a trifurcation in contemporary practical philosophy, contributing to the blurring of the epistemological profile of Legal Philosophy (Mejía, 2016).

Thus, iuspositivism responded to the natural law paradigm, which had evolved over time through three major stages: ancient, medieval, and modern. In antiquity, it developed

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from two principal approaches: Plato's ideal perspective, which positioned ideas as the basis of law, and Aristotle's teleological perspective, which integrated these ideas with human nature, proposing a natural law grounded in the alignment of idea and nature. During the Middle Ages, natural law was founded on a theocratic vision, primarily represented by Thomas Aquinas, who linked law with Christian values and reason as an expression of natural law. In modern era, natural law became secularized, moving beyond the theocratic and idealistic notions by introducing a contractual and rational perspective, where reason and the individual became the cornerstones of legal construction. This culminated in the establishment of human rights and the foundations of the modern rule of law (Welzel, 2011).

As previously noted, the degeneration of law under the Nazi regime, exposed after World War II through the Nuremberg Trials, represented a pivotal moment for legal theorists. Two prominent figures, Gustav Radbruch and H.L.A. Hart, exemplified the resurgence of the philosophy of law in the postwar era, albeit from opposing perspectives: Radbruch from a neo-iusnaturalist viewpoint and Hart from a revised perspective of legal positivism. Radbruch's neo-iusnaturalism, which emerged in the specific context of the second postwar period, was based on a relativistic view of law, in response to both traditional natural law and Kelsenian positivism, which had been used by the Nazi regime to legally justify its extreme injustice.

Radbruch argued that the theory of relativism emerged as a counterpoint to natural law, claiming that there is no singular, universally applicable concept of just law. In contrast, the content of law is relative and contingent upon empirical realities (Radbruch, 2007). On the other hand, Hart, moving away from Kelsen's pure positivism, promoted an understanding of law, coercion, and morality as distinct but interrelated social phenomena. In this way, he developed his sociological conception of law and the well-known rule of recognition (Hart, 1961).

Following the argumentative turn, alternative currents in the Philosophy of Law emerged, represented by notable figures such as Ronald Dworkin, Robert Alexy, and Jürgen Habermas, among others. Each of these scholars has developed a philosophy of law that is characterized by the integration of a perspective that, while not positivist, cannot be classified as natural law. Some authors, such as Juan Antonio García Amado, have referred to these perspectives as iusmoralists (García Amado, 2023).

Dworkin, building on John Rawls's postulates regarding justice as fairness, argues that principles of justice, originally agreed upon by a well-ordered society, should guide legal decisions (Dworkin, 2008). According to Rawls, these principles are established through a consensus in which individuals select the fundamental rights and duties that will structure their social cooperation and determine the distribution of social benefits (Rawls, 2012).

Robert Alexy, in contrast, addresses law through the interaction between positivist and non-positivist approaches. He puts forth an argumentative theory in which moral principles play an essential role within legal systems. Alexy acknowledges the existence of morally substantive

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principles in law, leading him to propose his theory of fundamental rights as optimization mandates, where a process of balancing rather than mere weighting is undertaken (Alexy, 2008).

Jürgen Habermas, in a similar vein, develops a procedural conception of law aimed at ensuring both private and public autonomy through the democratic process. In his deliberative theory of law, which is partially grounded in Nancy Fraser's work, Habermas emphasizes the importance of deliberation in the public sphere to legitimize judicial decisions, especially in contexts with significant social impact (Habermas, 2010).

As an alternative to Habermas's deliberative model, Axel Honneth offers his proposal. In his well-known debate with Nancy Fraser, both authors highlight the importance of a sociologically rich interpretation of normative claims in contemporary social conflicts (Fraser & Honneth, 2006). Honneth argues that injustice manifests when individuals perceive that their legitimate demands for recognition are ignored, and that critical social theory must take these experiences into account to guide its normative objectives.

Axel Honneth reconstructs Hegel's theory of recognition, expanding its scope beyond identity politics to include phenomena of humiliation and disrespect. His theory of justice, based on Hegelian concepts, focuses on "democratic ethicality," which is defined as the interrelation between ideals of justice and concrete socio-historical conditions. In Honneth's vision, this democratic ethicality offers an alternative to Habermas's deliberative model, providing a framework for assessing judicial decisions based on their ability to adequately reflect the shared values of society (Honneth, 2014).

In the view of Honneth, injustice emerges when individuals experience a social attack on their legitimate demands for recognition. In this context, critical social theory must prioritize the examination of emerging social movements, as these are best positioned to identify the moral goals toward which the theory should be oriented in the long term. Honneth warns that a social theory limited to supporting the normative goals already articulated by these movements risks prematurely reinforcing the prevailing level of political-moral conflict in a society, while ignoring social injustices that have not yet been sufficiently publicly recognized (Honneth, 2014).

In his reinterpretation of Hegel, Honneth conceptualizes social injustice as the frustration or violation of normative expectations that individuals consider justified. This broadening of recognition, extending beyond identity politics, provides an explanatory framework for addressing phenomena of humiliation and disrespect. Honneth's theory of justice, which is grounded in Hegel's philosophy of law, proposes a renewed normative model that is based on four premises: social reproduction is determined by shared values; the concept of justice is intrinsically linked to these values; a theory of justice must normatively reconstruct the institutions and practices that reflect these values; and, finally, it must evaluate the extent to which such institutions and practices adequately represent general values (Honneth, 2014).

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Conclusions

The analysis presented in this article has demonstrated how philosophical paradigms have shaped the debate on the relationship between law and justice throughout history, highlighting their crucial role in the evolution of Legal Philosophy. From the tensions between iusnaturalism and iuspositivism to the emergence of the argumentative turn in the postwar period, it has been revealed that the understanding of law is inextricably linked to its historical, social, and moral context.

The advent of legal positivism marked a significant break from the philosophical tradition that sought a comprehensive understanding of legal phenomena. This shift resulted in the termination of the relationship between law and morality in the construction of legal knowledge. The focus shifted to normative validity from an in-system perspective and any axiological justification was disregarded. Although this approach offered analytical clarity and consistency, it resulted in a restricted conceptualisation of law that failed to encompass the complexity of the social and ethical phenomena that law seeks to regulate.

This shift toward a purely dogmatic view of law had profound consequences. The theoretical rigor in the construction of legal knowledge was reduced to a blind faith in the formality of norms, neglecting the broader paradigmatic frameworks that provide a deeper and more reflective understanding of law. The relegation of Legal Philosophy to a secondary role in legal practices led to a proliferation of opinions lacking a solid conceptual foundation, which ultimately led to the loss of philosophical assumptions in legal research.

The argumentative turn represents central point in this evolution, marking a paradigmatic shift that allowed Legal Philosophy to reestablish the connection between law and morality. This shift placed argumentation and ethical principles at the core of legal analysis. The alternative currents proposed by authors such as Dworkin, Alexy, Habermas, and Honneth have contributed to the reintroduction of discussions on legitimacy and justice in law, proposing models that seek to reconcile law with moral and social values.

These theoretical proposals have been fundamental in addressing contemporary challenges in constitutional adjudication and the legitimacy of judicial decisions, in a world where social conflicts and demands for justice are increasingly complex. In this context, the normative reconstruction and democratic ethicality proposed by Honneth, for example, offer a valuable alternative for guiding the future development of Legal Philosophy, particularly in its practical application within judicial systems such as the Colombian Constitutional Court.

In conclusion, the understanding of law cannot be stripped of its moral and social dimensions. The philosophy of the law must continue to explore and question the paradigms that guide legal practice to ensure that law is not only formally valid but also aligned with principles of justice and recognition, which are fundamental for the construction of a democratic and just society.

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References

Alexy, R. (2008). *The Concept and Nature of Law*. Marcial Pons.

Alexy, R. (2016). *The Dual Nature of Law*. Editorial Trotta.

Atienza, M. (2005). *The Reasons for Law: Theories of Legal Argumentation*. UNAM.

Atienza, M. (2017). *Legal Philosophy and Social Transformation*. Trotta.

Dworkin, R. (2008). *Law's Empire*. Gedisa.

Fraser, N., & Honneth, A. (2006). *Redistribution or Recognition?* Ediciones Morata.

García Amado, J. A. (2023). *Legal Argumentation: Theoretical Foundations and Practical Elements.* Tirant lo Blanch.

Habermas, J. (2010). *Facticity and Validity: On Law and the Democratic State in Terms of Discourse Theory* (6 ed.). (M. Jiménez Redondo, Trans.). Editorial Trotta.

Hart, H. (2012). *The Concept of Law.* (3rd ed.). (G. Carrió, Trans.). Abeledo Perrot.

Honneth, A. (2014). *The Right to Freedom*. Katz Editores.

Kelsen, H. (1934). *Pure Theory of Law*. (1st ed.). Editorial Trotta.

Kuhn, T. (1971). *The Structure of Scientific Revolutions*. Fondo de Cultura Económica.

Mejía Quintana, O. (2016). *Consensual Theory of Law: Law as Public Deliberation*. Universidad Nacional de Colombia.

Radbruch, G. (2007). *Philosophy of Law*. Reus.

Rawls, J. (2012). *A Theory of Justice*. Fondo de Cultura Económica.

Ruthers, B. (2016). *Degenerate Law: Legal Theory and Chamber Jurists in the Third Reich*. Marcial Pons.

Welzel, H. (2011). *Introduction to Legal Philosophy: Natural Law and Justice*. B de F.