DIFFERENT TYPES OF LEGAL POST-POSITIVISM APPLIED TO BRAZILIAN CRIMINAL LAW.

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Abstract

Nowadays, there is a jurisprudence called legal post-positivism which is probably the most accepted in Brazil, even in criminal field. It has been researched not only by criminal law professors, but also by constitutionalists, who have been presenting relevant different characteristics in it. Our intention, then, is researching the main content of both, including a brief approach to a decision made by the Brazilian Supreme Court.

Keywords

Legal post-positivism. Constitutionalism. Criminal Law. Brazilian Supreme Court.

Summary

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1. Introduction: changes in legal positivism along the time

Between the end of the 18th century and the beginning of the 19th, the period of scientific positivism arose. As soon as the French Revolution finished, the codification movement started in civil law countries for some different reasons. In France, in addition to the famous Napoleon Civil Code, people also had a Criminal Code around the same decade.[2] That time, the exegetical school was dominant in France. It suggested that legal texts were clear and that was why judges could only apply the statutory law, instead of interpreting it.

As we said in another research,[3] in 1801, although Portalis knew that statutory law could not foresee everything, it represented the mark of places where individuals had rights. He also affirmed that in all despotic states there were more judges and enforcers than statutes.[4]

Throughout the 19th century this legalism was prevailing in civil law, despite some variation according to different thinkers, especially from France and Germany. In criminal law it was not different, of course. Being more conservative, or a little less, main criminal jurist supported legal positivism, like Karl Binding and Franz von Liszt.[5]

However, in the Unites States, a common law country, logical syllogism, characteristic of that traditional legal positivism, lost ground during the

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[2] Decades ago, Cesare Beccaria already asserted that statutory law should be clear, especially because judges could not interpret criminal law, since they were not Congress men (BECCARIA 2009, 36 and 40).

[3] MENDONÇA 2020, 222-223.

[4] PORTALIS 1801, 16-17.

[5] According to Liszt, who was less formalist than Binding, the protection that a legal order grants to interests of people is protection according to rules (LISZT 2003, 141).

second half of the 19th century, because of the philosophical and legal pragmatism. Conforming with Oliver Wendel Holmes Jr., for instance, the notion that logic is the only force at work in the development of the law is a fallacy, because certainty generally is illusion.[6] Nevertheless, in addition to differentiating morality and law,[7] he also wrote against natural law, asserting that jurists who believe in it seem to be in a naive state of mind.[8]

Entering the 20th century, still before World War II, even in civil law, legal positivism started to change more. Hans Kelsen, influenced by the Neo-Kantianism, suggested that statutory law was uncertain, for different reasons. Because of this, he affirmed that there was not only one correct interpretation for each case, asserting that judges had discretionary power, also making law. On the contrary, jurists were not allowed to do the same, since they should only indicate the options according to legal text, for one to be chosen by the judge. Otherwise, they would not be scientists.[9]

Since the end of World War II, legal positivism has been changing especially in common law countries, where it follows distinct ways, although always making difference among morality and law. We do not have enough space here to explain it, but it is important to say, at least, that nowadays it can be separated in soft positivism, hard positivism, and normative positivism.

In Brazil, in contrast, some law professors claim that legal positivism declined after World War II. Without confronting that "new positivism", the old one has been associated with Fascism in Italy, and Nazism in Germany, regimes that promoted atrocities under the protection of

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[6] HOLMES Jr. 1897, 8.

[7] HOLMES Jr. 1897, 2.

[8] HOLMES Jr 1917, 41.

[9] KELSEN 2006, 387-397. Neo-Kantianism, making again some link between law and values, also brought influence on criminal law, someway mitigating the formal positivism. During the first decades of the 20th century, jurists like Reinhart Frank, Mayer, Edmund Mezger, among others, made changes in German theory of crime, although they still keept its main framework.

legality.[10] Then, they look for another way of thinking the law, inventing what they call legal post-positivism. But what is legal post-positivism, mainly in criminal law? And how the Brazilian Supreme Court thinks about the question?

2. Legal post-positivism according to criminal scholars

When World War II finished, the importance of natural law has grown again in civil law countries like Brazil. But it was a new natural law, which would be linked to constitutional principles.[11]

In Germany, the theory of crime changed that time. Between 1945 and 1965 the main idea there suggested that human intent was the main element for the solution of criminal problems.[12] The criminal mind was generally required, it was independent from any value judgment, it was the eternal truth, and it came before any rule. In other words, it was a kind of natural law.[13] This thinking made a huge influence on Brazil, where it still seems to be applied by lots of professors and by criminal courts.[14]

Notwithstanding the thought has changed in Germany since the last three decades of 20th century, it is hard to assert if a new positivism is prevalent in its criminal field, especially because of many different ideas about the matter. Indeed, lots of well-known professors support the idea that relates philosophy and criminal rules made by the Legislative Branch. They say that a political aspect of criminal law can sometimes invalidate those rules.[15] Despite a great scholar controversy surrounding the issue, they suggest a limit to the legislator, who could not make a behavior become a crime

[10] BARROSO 2005, 4.
[11] ABBOUD; CARNIO; OLIVEIRA 2019, 327.
[12] ROXIN 2014, 101 and 103.
[13] ROXIN 2014, 118.
[14] Superior Justice Court 2018.
[15] ROXIN 2014, 90 and 91.

against some philosophical reasonings. Otherwise, it should be invalidated by the Judiciary Branch.[16]

In Brazil, criminal law professors usually have a similar point of view. Freitas claims that customs, for instance, are able not only to help the criminal law interpretation, but sometimes, depending on specific situations, are also above the statutes, playing an important role linked to criminal policy, although only in favor of individual liberty, as a criminal guarantee.[17]

Greco, a Brazilian professor who has been living and teaching in Germany for many years, seems to think alike. Criticizing a decision made by the German Constitutional Court, he asserted that it should have invalidated the statutory rule which still criminalizes incest in that country. According to him, the court should have separated immoral conduct and criminal behavior, because not to know the difference is forgetting the liberty principle in criminal law.[18]

Brandão, similarly, points out that, in addition to its interpretative side, criminal law has also a political feature, a political meaning. This aspect, according to him, brings limits to the legislative task of criminalizing behaviors, and allows some cases to be solved even against the statutory rule, according to specific facts. On the other hand, interpreters cannot disobey, among others, the principle of legality, which means that they are not allowed to create crimes. He named this theory post-positivism.[19]

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[16] We do not have space enough to explain all this problem, but important German jurists who think this way, like Hassemer, Schünemann and Roxin, are quoted by Greco in a brief presentation of a book written by them and others to discuss the topic (GRECO 2016, 4).
[17] FREITAS 2020, 127 and 146.
[18] GRECO 2010, 182.
[19] BRANDÃO 2006, 195, 200, 202, 204, 206, 207 and 209.

Therefore, even if the post-positivism expression is not often used in Brazilian criminal field, we can state that this theory, when studied by criminal law scholars, is always liberal, only being able to restrict the government power to punish.

3. Legal post-positivism in criminal law according to constitutionalists

In addition to the criminal post-positivism briefly explained before, In Brazil there is another legal post-positivism, which has been taught mainly by constitutionalists or legal hermeneutic professors. Barroso informs that it is the philosophical basis of the new constitutionalism, explaining, in criminal law as well, some of its features. First, it is related to constitutional rights, and to the restrictions on statutory criminalization and punishment, which is imposed by new constitutional values and customs changes. That is very close to the theory explained in the former topic. Nevertheless, it also embraces an obligation to criminalize some behaviors, suggesting that legislator cannot do less than necessary, because it would be against the Constitution.[20] We fell that he means, in other words, that this post-positivism is able not only to restrict the criminalization, but also to broaden it, and probably in contrast to the legislative choice.

One path of this legal post-positivism argues that it is especially based on Ronald Dworkin, Friedrich Müller and Hans-Georg Gadamer. It informs that the language used by statutory law cannot be totally clear, and that the methods of legal interpretation are not able to reach the right answer. Nonetheless, getting the right answer is possible, since interpreters apply legal principles that connect morality and law, even against the statutes.[21]

[20] BARROSO 2005, 4 and 33-35.

[21] Again, we have space here neither to explain other aspects of this theory nor to quote those important scholars who are indicated as its supporters.

Probably thinking about this theory, the Italian Luigi Ferrajoli calls it as natural law constitutionalism. He informs that it mixes the validity of statutes and its justice, denying the law as only a system of rules. It also stresses the role of legal reasoning according to constitutional principles applied in practical situations, as the way of solving what they understand as a crisis of legal positivism.[22]

Streck, a well-known Brazilian jurist, seems to follow this way. Applying his legal post-positivism to criminal law, he has had the opportunity to support the idea, for example, that a statute that decriminalizes some behaviors, like corruption, money laundry, tax evasion, among others, is not valid, suggesting that the principle of legality is not enough to an opposite conclusion.[23]

We cannot affirm that the Brazilian Supreme Court mostly decides this way, because it is not our intent to make quantitative research here. Anyway, we feel that sometimes it happened, maybe because there is no justice working there who is a criminal professor. For example, in 2019 the court decided to criminalize the homophobia and transphobia, presenting a good moral reasoning against prejudice, and asserting that it was not making analogy. However, the justices admitted that Congress had not managed to create the crimes until that moment, although legislators had been studying the question for a long time. In other words, the court recognized that there was a gap in the statutory law and said that another statute, that criminalizes racism, is also good to those behaviors until the Legislative Branch enacts a

[22] FERRAJOLI 2012. On the other side, he says, we find the constitutional positivism as a new kind of the positivist philosophy of law. Of course, it emphasizes the Constitution and the substantive democracy as well, but the principle of legality as well. Then, it does not admit the connection between law and morality.
[23] STRECK 2004, 310 and 311.

specific statute.[24] We think it is analogy, used for good moral reason, but against the principle of legality in criminal law.

4. Final note

The constitutional Brazilian post-positivism applied to criminal law can bring good moral ideas to support the result found for specific cases. On the other hand, sometimes it can get different solutions, based on similar vague principles. Barroso, for instance, working as a justice in our Supreme Court, made his opinion admitting the immediate enforcement of the sentencing from the jury.[25] In contrast, Streck criticized his opinion in an academic commentary.[26] Although the divergence is related to criminal procedure, the same thing obviously can happen in criminal law.

In fact, as we usually repeat, we will agree with the connection between law and morality on the day when justice becomes an evident truth, or at least when it is demonstrable as a mathematical truth.[27] By the way, it is not accepted by the current scientific post-positivism.

Nonetheless, it is not the worse.

We do not think Brazilian post-positivism taught by constitutionalists and legal hermeneutic professors is neither well separated in different paths nor organized in a way to explain internal divergences. In addition, when it broadens the government power to punish, without statutes, it seems very

[24] STF, ADO 26/DF and MI 4733/DF.
[25] STF, RE 1.235.340/SC.
[26] STRECK 2023.
[27] BOBBIO 2008, 56.

diverse from the theory followed by criminal scholars. Probably this is a bigger problem.

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