THE PARTIALITY AS A DEMAND TO A HERMENEUTIC OF HUMAN RIGHTS AND ITS RELATION WITH LAW AS A DESIRING INSTITUTION

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This work develops the concept of Law based on the lacanian theory over desire, associating it to the necessary posture of partiality regarding Human Rights, which act as conduit of the society desiring influx towards instauration of freedom, equality and fraternity precepts. For this purpose, we initially discuss Law as the institute of lacanian desire, referencing mostly Slavoj Žižek's concepts. Hereupon, we introduce the normative jus-humanism theory and how Human Rights fit as essential source of judicial decisions in concrete cases. Finally, we conclude that, Law has no direct connection with any object from the phenomenal world, but with the interpersonal relation, that leads to desire confrontations and that it deserves to be observed, judicially, according to the singularity of the situation, for a partial decision on behalf of the emancipation and dignity of the human person.

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INTRODUCTION

We propose with this paper to bring a philosophical approach, starting from the theory formulated by Jacques Derrida based on Walter Benjamin's texts that, justice is based on the singularity of the situation and, therefore, attached to a compromised project of personal engagement and a particular notion of justice. Moreover, there's no way to disagree about the prevailing separation between responsibly assumed morality and the idea of

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unconditional duty. Whence, Law must lean to be an instrument of reflexivity about interpersonal actions, positively promoting human dignity. This will only be possible if we filter out violence through a discourse, that welcome the intention of the possibility of justice with the possibility of orality, reflexivity and a more extent domain of the conflict spheres within the interpersonal behaviors, by an engaged solution like presented by Slavoj Zizek.

I. THE HUMAN RIGHTS AND THE LAW AS A DESIRING INSTITUTE

In this sense, we realize there is a desiring flow of the Law that resorts to a fiction that provides foundation to the possibility of language itself. Zizek, in his words, says that, “to desire action is to desire limitation”¹. Thus, to be more precise, the Law’s foundation, we argue, is allocated in the human desire. Law, as a result of human desire, is no stranger to the conservative process to reach the lacanian “death drive”, the last as “we stay locked in a closed and self-impelled circuit of repetition of the same gesture and of satisfaction achievement on this”², explains Zizek. The desire is converted in “drive” when the permanent search of the lacanian “object *a*” becomes assumption of the impossible as impossible and the repetition becomes the rule. In Law, would be like the prolongation of obtaining procedures of your higher objectives, like justice, in a certain way, that the contingency is no longer as it is, leaving only the certainty of failure. The “drive”, therefore, would be the satisfaction in failure and its constant repeating.

We identify this as an internal parallax of the Law: the differential gap between desire and “drive”, the boundary line that establish the passage from one to another.

Zizek, still, will establish a relation between the lacanian “drive” and Hegel’s concept of self-consciousness, the last as “a purely not psychological self-reflexive plot that score (re-score) itself position, to reflexively ‘take into account’ what you are doing”³. That is, Zizek will identify a positive perspective of the lacanian “death drive”, which is, of the disenchantment with the object and the perception of our own road traveled, reflexive of our own condition.

We share the Zizek’s idea, as we understand it, that the particular identification with certain political engagement, which is necessarily public

¹ Zizek Slavoj, *A VISÃO EM PARALAXE* (São Paulo: Boitempo 2008). E-book.

² Zizek Slavoj, *A VISÃO EM PARALAXE* (São Paulo: Boitempo 2008). E-book.

³ Zizek Slavoj, *A VISÃO EM PARALAXE* (São Paulo: Boitempo 2008). E-book.

and even part-time, is what fits in the sense of universal rights. A critical capability on what shapes and conforms you, and the concept of “critical” like: implying the decision in the form of judgment and the issue of the right to judge.

It is up to legal practitioners, therefore, to demystify the concept of neutrality widely spread as the judgement ideal. And that is due to the fact that, the hermeneutic act in lieu of interpersonal relation and the enunciate is made through abstraction by the responsible for the decision, which is full of dogmas and absolutely personal perspectives, over which the judgement will be put to rest on.

What matters, in that sense, is the reflexive act of constant (re)questioning of such dogmas, in order to reconcile them with a judicial proposition—always lacking neutrality, it must be highlighted—fomented by human rights as means to dynamically reconsider the reasoning of the death drive, towards the real attempt to consolidate the inherent aspirations of the Law. Freedom, as so proclaimed by liberalism, by itself, as pointed out by Paul Verhaeghe, makes us be “freer than before in the sense that, we can criticize religion, enjoy the new *laissez-faire* attitude towards sex and support any political movement we want”⁴. In face of such attitude, that relegates us matters and situations in a merely formal equity, we are incapable of determining policies and base values which are shared and give us semantic sustenance to life. That way, adds Verhaeghe, “we can do all those things because those have no importance anymore—a freedom like that is moved by indifference. On the other hand, our daily lives transformed into constant battles against bureaucracy that would make Kafka tremble”⁵. Bureaucracy comes to supersede society base values, not stemmed in axiological criteria.

There is, however, an important component, which is the existence, even if subjacent, of values and principles. In such sense, material equity, differently from liberalism, demands from the jurist a pro-active attitude, in the way of demanding him/herself to engage to achieve real concretization of the commitment to social redistribution. Yet, it provokes the freedom described beforehand, so it can be understood as shared with the other freedoms, pointing to the urgency of reciprocate responsibility. And, along its way, also heads towards the fraternal dimension of human rights,

⁴ Verhaeghe P., *Como se Desperta o Pior Que há em nós*, OUTRAS PALAVRAS (Oct. 2014). Available at <http://outraspalavras.net/posts/como-se-desperta-o-pior-que-ha-em-nos/> (last visited January 05, 2015).

⁵ Verhaeghe P., *Como se Desperta o Pior Que há em nós*, OUTRAS PALAVRAS (Oct. 2014). Available at <http://outraspalavras.net/posts/como-se-desperta-o-pior-que-ha-em-nos/> (last visited January 05, 2015).

corresponding to a compassionating and combative ethical notion, which demands constantly recurring to the object of desire, this time instituted in the other, therefore symbolic.

So, we agree with Willis Santiago Guerra Filho when he states that, “the construction of new bases presumes a recovery of our creative capacity of justifying fiction of existence and co-existence, as, concurrently, being aware of its fictional character, which result is the affirmation of values”⁶.

And the role of Law is exactly in solidifying this affirmation of values, deontically, imposing it, even as manner to harmonize interpersonal relations. For such, adds the author, “it is necessary, then, to implicate the person responsible for the interpretation and enforcement of the rules throughout the process even more, going through the experience of the drama that is presented in front of him/her”⁷.

That means, the affirmation of values is prerogative necessary to avoid the cyclical bureaucratic compromise of the death drive in Law, in which direct confrontation with presuppositions that go beyond a supposed neutrality is avoided, a confrontation with the human rights utopia of guaranteed dignified existence to all.

Political and normative programmes that head effectively toward this way, therefore, can only be realized the moment all three dimensions of human rights are being observed. In the sense hereby proposed, freedom as promoter of the expression of thought and as giving us the permission to constantly question our dogmatic parameters adopted to the etching and application of public policies, be those ways to leave the State absent, to warrant a necessary *laissez-faire* space, or be it to allow the multiple coexistence of individual freedoms; equity, on the other hand, as a promoter of distributive justice, in a way to promote the possibility of social emancipation and autonomous thinking, upon the presumption of the public role of warranting the minimum necessary for existence (education, health, culture); and fraternity, on the commitment of space to associativism, cooperation and promotion of conflict resolution that take the community sphere as participant of decision construction process, as through restorative justice mechanisms already applied in many parts of the world.

We are aware that, the Law is inherent to the force, which appears more vehemently in the application of the sanction correlated to the non fulfilment of the normative rule. But it does not relegate the idea that, the source of the Law is the desire, quite the contrary, it reinforces it. That is because desire, in the lacanian sense, outlined here, is not linked to a specific object, but to an

⁶ Guerra Filho, & W. S. Lei, *Ordem e Violência*, 6(3) SAPERE AUDE 8 (Jan. 2015).

⁷ Guerra Filho, & W. S. Lei, *Ordem e Violência*, 6(3) SAPERE AUDE 8 (Jan. 2015).

originary absence in the being ontology itself. So, ultimately, we are led to understand this desire would lead to indifference towards the object.

However, the moment the norm is a public space creation and autonomous of coexistence, backed by Human Rights, it becomes the signified which correlate signifier is the desire within the community itself, community in which such morality starts being responsibly taken. As Vladmir Safatle points out, “Lacan tried to show that, naming a desire, at heart, corresponded to formalizing the non-identity between desire and the objects of the phenomenal world. Advancing in this line of thought, we soon realize that, your desire and the other’s desire, in a nihilistic outlook, must be comprehended through Law, and be a reflex of it. The formalized Law, as a set of prescriptive statements, is semantically open to the historical dynamic mutation of Human Rights, in turn, opening the possibility of being a way towards autonomy of the person in lieu of the dogmas effectively etched in interpersonal relations.

As such, Human Rights are those that inscribe the desire into the legal order, requiring, for such, the desire to be percolated by humanist precepts, according to the hermeneutic constructions under its aforementioned three dimensions.

II. HUMAN RIGHTS AND NORMATIVE JUS-HUMANISM

We work, then, with a notion of Human Rights that regards a critical and dialog-oriented process with social, political, economical and cultural basis, just as it serves as warranty to the constant enunciation of a humanist legal order that understands the most human values of freedom, equality and fraternity concurrently to the positive Law and judicial realism, according to the proportionality principle, proclaiming, then, the theory defended by, among others, Thiago Lopes Matsushita, Túlio Augusto Tayano Afonso and Lauro Ishikawa, which is, the normative jus-humanism.

Therefore, Matsushita teaches that:

The great news from the jus-humanist school is not to exclude but, instead, aggregate the good aspects evoked from jus-naturalism, classic jus-naturalism and its current model under the banner of Human Rights within, the positivism, comprising classic positivism and neopositivism, as well as realism, with classic realism and neorealism, i.e., to go beyond, recognizing a multidimensionality that must be taken in consideration when consolidating the Law. It is about applying the new formula: Law = text (positivism) + metatext (realism) + intratext (Human Rights).⁸

⁸ Matsushita Thiago L., *O Jus-Humanismo Normativo—Expressão Do Princípio Absoluto da Proporcionalidade*, 206 f. Tese (Doutorado em Direito), 25 (São Paulo: Pontifícia Universidade Católica de São Paulo 2012).

In the same line of thought, we attest that, “to speak the Law” is a result of the realization of hermeneutic work and the construction of legal fundamentals based only in the positive norm and judicial reality (fitting, here, according to Matsushita’s teaching, both the jurisprudence as the principles), soon all advancement made up until the present will be gone by the drain, mostly concerning international Law, in regards to the construction of axiological-judicial assumptions, therefore also deontological, for the protection of the global community in lieu of dictatorial governments and possible threats to security, health and education, i.e., to all subjective rights corresponding to the unalienable objective rights to human dignity. In Carlos Mário da Silva Velloso’s lecture, in the same veins as Celso Lafer, emphasizes that “we live the era of declared rights less and live much more the era of warranted rights”⁹.

And so, as Flávia Piovesan points out,

In lieu of the rule of terror, in which the logic of destruction prevailed and people were considered disposable, i.e., in face of the scourge of World War II, the need to reconstruct the worth of Human Rights emerges, as paradigm and ethical reference to orient international order. The “International Right to Human Rights” is then born, in the middle of the 20th century, as a result of World War II and its development can be attributed to monstrous violations of Human Rights from the Hitler period and to the belief that part of those violations could be prevented if an effective international system of Human Rights protection existed.¹⁰

The World War II nazi-fascist regimes hence were some of the great mottoes for the legal consolidation of Human Rights that, henceforth, started to be validated throughout the globe without the necessary positivation or even the ratification of the international Treaties of those rights by the countries. It happens as such because they constitute a range of rights of indisputable importance, even contrary to the negative nitro mission of the positivized Law, to the protection and safeguard of dignity. It is still valid the definition by Ingo Wolfgang Sarlet of human dignity, as being:

The intrinsic and distinctive quality of each human being that makes him/her deserve the same respect and consideration from the State and the community, implicating, that way, into a complex of rights and fundamental duty that protects

⁹ Velloso, Carlos Mário da S., *Os Direitos Humanos e os Mecanismos Constitucionais de Sua Defesa*, TRATADO LUSO-BRASILEIRO DA DIGNIDADE HUMANA 353 (Miranda Jorge, Silva Marco Antonio M. da., eds., São Paulo: Quartier Latin 2008).

¹⁰ Piovesan Flávia, *Tratados Internacionais de Proteção dos Direitos Humanos: Jurisprudência do STF*. Available at http://www.dhnet.org.br/direitos/militantes/flaviapiovesan/piovesan_tratados_sip_stf.pdf (last visited January 05, 2015).

the person from every and any act of degrading and inhuman imprint, as to warrant also warrant minimal existential conditions for a healthy life, besides providing and promoting his/her active participation and co-responsibility of the destinies of existence itself and the life alongside the other human beings¹¹

But such positioning does not come without criticism, from which we see as more relevant to the debate those focused on the imperialism of non positivated parameters, but still deontological, about the positive Law. Such argument brings forth a legitimate concern with the dominant ideology dictatorship that are not necessarily shared but can axiologically implicate in the interpretative sphere of what those rights would be, providing them of certain values and utilizing them as instruments for political and economical control—more strongly by countries of higher power—to dictate the international rules. Or even, within domestic environment, asserting the existence of such rights as non positivated could elevate the countries Courts and Tribunals to the condition of institutions of exceedingly broad power, as they would be legitimated to dictate the rules based in normatives of tacit content, liable of great discretionality.

Nevertheless, as has been said up until this point, it is clear our disagreement regarding those arguments. We understand the relevance of such criticism because it matters exactly in its focus with legal safety and, consequently, with the clarity of the rules conditions in which citizens and public institutions—including the State and the international organizations—find themselves subordinated, facts of great importance to be considered specially regarding the globalized world of high information influx in which we live.

But this argument has no safeguard due to two reasons:

(i) as exposed so far, we consider a critically do partial view on Human a Rights content extremely important. For such, however, even if it seems paradoxical, it is essential for those be open content. It is paramount the three dimensions are observed in strengthening chain, i.e., according to the absolute proportionality principle¹². Moreover, there is a humanly shared

¹¹ Velloso Carlos Mário da S., *Os Direitos Humanos e os Mecanismos Constitucionais de sua Defesa. TRATADO LUSO-BRASILEIRO DA DIGNIDADE HUMANA* 352 (Miranda, Jorge; Silva, Marco Antonio M. da. eds., São Paulo: Quartier Latin 2008).

¹² We say “absolute” because we base it on the teaching by Matsushita, who says “the proportionality has its own characteristics that do not allow the suppression of any right in the conflict of norms, but it allows its grouping, compression, without any exclusion”. Besides, he attests that, “the absolutism defended contains, in its core, the idea that no Law will prevail over other, but its alinging with preservation, even if it is in a very small parte, of all the involved rights, because defense is for the absoluteness, but the absoluteness of proportionality”. Matsushita Thiago L., *O Jus-Humanismo Normativo—Expressão Do princípio Absoluto da Proporcionalidade*, 206 f. Tese (Doutorado em Direito) 190-3 (São Paulo: Pontifícia Universidade Católica de São Paulo 2012).

base sense of what those dimensions would be: the freedom must be restricted to the limits of equality that, in its materiality, balances itself face the fraternity observance, which in turn must observe freedom as means to ensure the autonomous emancipation of the being, and always as required by his/her dignity. This entanglement is of extreme importance to the comprehension of Human Rights, in the specificity of what has been laid out in this work so far. And it is configured as such because Human Rights can only be built upon concrete cases. The criticism and the partiality, then, is bound to be inherent to the struggle. Nevertheless, a struggle also with basis on Human Rights, whichever it is, a struggle that truly aims for a harmonizing solution, and not for the preference of a right over another. To that end, as already pinpointed, it is imperative questioning over the dogmatic basis of life, as such questioning leads to openness to dialog subject to the resolution of the concrete case. We must, then, treat all “as adults responsible for their beliefs”¹³. As stated by Slavoj Zizek:

Respect for other’s beliefs as the highest value can mean only one of two things: Either we treat the other in a patronizing way and avoid hurting him in order not to ruin his illusions, or we adopt the relativist stance of multiple “regimes of truth”, disqualifying as violent imposition any clear insistence on truth.¹⁴

As a result, Human Rights should not function as impositions of any kind of truth about the world, unless, exclusively, as the historical and cultural deontologic instauration of co-responsibility dictates, according to the proportionality principle, of human emancipation.

(ii) The second reason that criticism is abstained from fundament amounts to the instauration on legitimacy itself by the positivated dispositions, domestically and internationally. Just like Human Rights, that do not require positivation to be applied, they demand a hermeneutic work according to the concrete case, just as the positive Law prescriptive wording does. Therefore, regardless if positivated or not, the work of semantic appropriation on the application of the norm will be done, and the exegete must, in all cases, at least theoretically, tend towards the perspective that complies the most with the aggregation of legal realism, positive Law and Human Rights, three sources of Law that, split, each can possess its own

¹³ Zizek S., *Atheism is a Legacy Worth Fighting for*, THE NEW YORK TIMES. Available at http://www.nytimes.com/2006/03/13/opinion/13iht-edzizek.html?_r=2& (last visited January 05, 2015).

¹⁴ Zizek S., *Atheism is a Legacy Worth Fighting for*, THE NEW YORK TIMES. Available at http://www.nytimes.com/2006/03/13/opinion/13iht-edzizek.html?_r=2& (last visited January 05, 2015).

more appropriate solution but, together, harmonize into the most coherent decision regarding the legal order integrally admitted in the concrete case. As Friedrich Müller emphasizes:

The positivist paradigm has not even consciously formulated this fundamental question, as the “Law” is to positivism still dominantly something unquestionably given: the characters of the letter of the Law. The positivism that characterizes the legal universe of developed countries since mid-XIX century confounds the legal norm with the norm text on the legal code. For that reason, it pretends to “apply” the legal norm conclusively in the legal case—in a way more or less according to the formal logic, more or less hermeneutic, more or less sociological or critical.¹⁵

Hence, the criticism to positivism is in lieu of its proposition of considering simply the letter of the Law, contradicting all legal evolution, mainly in the XX century, in order to avoid disasters like World War II and its extreme view of positive Law, which allowed the institution of imprudent States, to say the least.

CONCLUSION

Human Rights, as a consequence of desire, struggle, when a lacanian line of thought is considered, against the reification of the human being, and, moreover, in favor of interpersonal conflict resolution correlating individual desires not in relation to any object per se, as this is not the producer of the desiring relation, but human emancipation itself and co-responsibility over him/herself and all the others, in the frame of the human dignity.

The three dimensions of Law are correlated and interdependent, and must be observed in their intensification form, under the proportionality principle. Furthermore, it is necessary to investigate, through normative jus-humanism, decisions guided on the singularity of the judicially instated situation, on the commitment to adopt, through minucious examination of the concrete case with its specific context and nuances, partiality on behalf of the human being, of the autonomous existence of the human being and of his/her responsabilization, to the extent of compassion, for him/herself, the other and for all the community.

¹⁵ Matsushita Thiago L., *O Jus-Humanismo Normativo—Expressão Do Princípio Absoluto da Proporcionalidade*, 206 f. Tese (Doutorado em Direito), 59 (São Paulo: Pontifícia Universidade Católica de São Paulo 2012).