
CONSONANCES AND DISSONANCES BETWEEN LEGAL REALISMS:

*a comparative study of the Theory of Law*¹

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ABSTRACT

This *paper* is a *comparative reflection* of the models of *Legal Realism* in the *Theory of Law*, considering North-American Legal Realism, Scandinavian Legal Realism and Brazilian Legal Realism. This article presents the *Theory of Realistic Humanism* (TRH) within *Legal Realism* with the *Critical Theory of Law*.

KEYWORDS

Theory of Law; Legal Realism; Theory of the Humanistic Realism.

SUMMARY:

Introduction;

1. The *School of Uppsala*: Scandinavian legal realism;
2. The *Critical Legal Studies*: North-American legal realism;
3. The *Theory of Realistic Humanism*: Brazilian legal realism;
4. Comparative Study of the *Theory of Law*;

Conclusions.

References.

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Introduction

The search for *correctness* has been one of the most important fronts of work of the *Theory of Law*, in recent decades. The issue of *correctness* directly concerns judicial activity, which is the responsibility of the judge, and has little to do with the issue of *political correctness*, which is the responsibility of the legislator and the world of politics. This is a great challenge for the Law, because it challenges the *Theory of Law* to think about the control of judicial decisions and the role of reason in the exercise of jurisdiction. The *justification* of legal decisions implies a concern for the *power of decision* that is established, at the boundary of legal activity, as an activity of concretisation, application and the accuracy of Law, as Oliver W. Holmes has already detected.³ Although the issues of *correctness*, *predictability* and *justification* of the field of *practical reasoning* are not assumed here as identical categories from the theoretical-conceptual point of view, it is important to draw attention to the idea that the issues that occupied the attention of the *Theory of Law* in the past, now, re-emerge under another guise, through the requirements contained in the most current debates of the *Theory of Law*.⁴

However, if the *Theory of Law* contemporaneously leans towards this discussion, it is not that it has not known other previous attempts to discuss and think about the limits of legal action. Thus, the search for *correctness* echoes an older search for Law, historically precedent, for *exactness* and *predictability*, as can be seen in the landmark study by Jerome Frank.⁵ It is here that a study of the varied theoretical perspectives of *Legal Realism*, and its internal nuances, finds its place. And this is because the entire effort of the theoretical currents of *Legal Realism* tilted Law towards the discussion of the role of judges and legal decisions,⁶ shifting the axis previously fixed by

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³ "The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts" (Holmes Junior 1897, 01).

⁴ *Vide* Linhares (2020).

⁵ "Only a limited degree of legal certainty can be attained. The current demand for exactness and predictability in law is incapable of satisfaction because a greater degree of legal finality is sought than is procurable, desirable or necessary" (Frank 2009, 12).

⁶ "The Law can easily be made to play an important part in the attempted rediscovery of the father. For,

the tradition of *Legal Positivism*, the universe of the legislator and legality. Therefore, what we want to highlight in this paper is precisely this, that is, the importance of advances promoted by the tradition of *Legal Realism* in the face of *Legal Positivism*, with the introduction and deepening of the debates regarding the field of *practical rationality* in Law.

In this sense, in a current environment of discussion that *re-thinks* the value of jurisprudence, it is wise to ask, again, if the stock of concepts of *Legal Realism* does not keep a certain degree of relevance. The psychology of decision, the power of the decision and the ideology of the decision are issues that are present and dormant. It is also important, to verify whether or not *Legal Realism* has been renewed, and, hence, ascertain whether the exhaustion of its first manifestations has represented, for our days, the exhaustion of the potential of all its conceptions.⁷ Even - although the limits of this article do not allow for the development of this topic -, attention should be drawn to the fact that, beyond the consecrated and longer-lasting views of *Legal Realism*, there are new perspectives of *Legal Realism*,⁸ emerging and gaining theoretical ground in our times.⁹ Now, this is what justifies that, in *Special Volume (I)* of the *Coimbra Journal of Legal Studies*, one of the topics addressed is precisely the philosophical reflection around *Legal Realism*, its theoretical currents, historical stimuli, opponents, academic environments, challenges and timeliness.

Thus, one of the first findings to be made, in this respect, is that the conceptions, which the currents of *Legal Realism* have concerning Law, are not dead. Quite the contrary, this study will try to show that there are new perspectives of *Legal Realism*, that they vary and complement each other, especially considering the perspectives that emerge from Latin American approaches. Various currents of *Legal Realism* are known and well consecrated, such as (i) *Scandinavian Legal Realism* (Axel Hägerström; Anders Sandöe Örsted; Karl Olivecrona; Wilhelm Lundstedt; Alf Ross); (ii) *American Legal Realism* (Karl N. Llewellyn; Jerome Frank; Carl Sustain; H. Oliphant; R. M.

functionally, the law apparently resembles the Father-as-Judge" (Frank 2009, 21).

⁷ "Thus, *Critical Legal Studies* and feminist theory, on the one hand, and the economic analysis of law on the other, are keeping alive, in the contemporary debate, the dialectic existing between a more radical wing and a more moderate one; both wings owe much to legal realism (...)" (Faralli 2005, 81).

⁸ *Vide* Dagan (2017).

⁹ "My realistic perspective is informed by the classical pragmatism of William James, John Dewey, Charles Sandes Peirce, and George Herbert Mead" (Tamanaha 2017, 02).

Unger); (iii) *Genovese Legal Realism* (Giovanni Tarello; Ricardo Guastini); (iv) *French Legal Realism* (Michel Troper) (Guastini 2005, 107-128).

In this regard, there is little to add, and it would be unproductive to attempt to take up these quadrants again, since this acquisition is considered already obtained through many papers previously published in this respect.¹⁰ For this reason, this paper will focus on considering only three (3) of these models, and examine the *consonances* and *dissonances* between them, seeking to verify how *The Theory of Realistic Humanism* is placed among these trends and conceptions, whether considering the local historical development, or considering the great traditions of *Legal Realism* developed to date. Thus, it is not a paper that evokes the memory of *Legal Realism*, but rather emphasises the distinction between its currents, to direct the reader towards the field of problematization, differentiation and criticism between its conceptual options and theoretical fields. Hence, the title *Consonances and Dissonances between the legal realisms, Scandinavian, American and Brazilian: a comparative study of the Theory of Law*.

Each of these versions of *Legal Realism* will be studied separately, in the items below, but what matters first is examining what the different versions have in common: i) criticism of *Natural Law Theory* and of the *Legal Positivism*; ii) the empirical treatment of juridical problems; iii) criticism of the *Legal Doctrine* and its methods; iv) criticism of abstraction in the definition and conceptualisation of Law; v) the role of the *Science of Law*; vi) the idea that Law is undetermined by its language¹¹ and defeasibility may permeate the condition of the practical treatment of the rights (Regla 2014, 130-131).

1. The School of Uppsala: Scandinavian legal realism

The *School of Uppsala* is developed through numerous contributions and are influential precedents for the thinking of Alf Ross, *English Realism* by John Austin and Oliver Wendell Holmes, in addition to *Scandinavian Realism* by Anders Sandöe Örsted, Axel Hägerström, Karl Olivecrona and Wilhelm Lundstedt. But the *Realism* which will develop because of Alf Ross will be a *moderate Realism*, if we closely follow the interpretation of Carlos Santiago

¹⁰ Vide Aarnio (2010); Vide Tusseau (2014); Vide Vaquero (2012).

¹¹ These observations were established by A. N. Vaquero (2012, 725).

Nino (2015, 56) in this respect, in that it is more directly influenced, on one hand, by Axel Högerström and Karl Olivecrona, and, on the other hand, by Hans Kelsen.¹² Despite the wide scope of *Scandinavian Legal Realism*, and its impact on the world, it is important to leave a clear warning that its scope is limited in Latin countries, especially in France, Spain and Latin America, as the study by Carla Faralli warns (2000, 427). Even today, the example of Brazil, *Scandinavian Legal Realism* has a limited number of supporters and specialised studies.

The main work by Alf Ross, *On Law and Justice* (*Om ret og retfaerdighed* 1953; *On Law and Justice* 1958), contains the purpose of leading the principles of empiricism to the determinant conclusions for the understanding and description of Law.¹³ The context of the emergence of the work is at the beginning of the 20th century, under the strong influence of the emerging conception of *Legal Logic* and the *Modern Science of Law*. Therefore, the epistemological perspective from which the model of *realism* of Alf Ross is, according to which can only be said of Science, when faced with Law, to the extent that an *Empirical Science* develops, since empiricism is a quality of the *Modern Science of Law*.¹⁴

For no other reason, the object of the *Theory of Law* is the scientific language of Law, and its imposing assertiveness, given that the method of the *Theory of Law* is scientific empiricism.¹⁵ The strangeness provoked by the *Theory*, in its role, is to demonstrate that the Law is not pure logical-mental activity, in the sense of being a conceptual and rational activity. Therefore, A. Ross's conception cannot agree with the universal deductivism of the opposing conception of natural Law, or even with the dualism that correlates *Sein* and *Sollen* with positivist conception of Hans Kelsen.

Realism is, within the limits of scientific empiricism, a descriptive explanation of the real and concrete functioning of the juridical system as a

¹² Vide Guastini (2005, 109).

¹³ In the words of A. Ross: "The main idea of this piece of work is to consider the principles of empiricism in the right field to his last conclusions. From this idea emerges the methodological need for the study of law to follow the traditional patterns of observation and assessment which encourage all empirical modern science, and the analytical need of fundamental legal ideas to be interpreted obligatorily as ideas of social reality, behaviour of man in society and nothing more" (Ross 2000, 19).

¹⁴ Within these presumptions of empiricism, follows the explanation of E. Pattaro: "Il movente del comportamento, come abbiamo appena visto, sono realtà *intrapsichiche* o, addirittura, nel caso dei bisogni fisiologici, sono realtà *biochimiche*. Di essi possiamo parlare e scrivere: per esempio, esprimiamo bisogni, interessi, valori e norme in espressioni linguistiche" (Pattaro 2011, 29).

¹⁵ Vide Aarnio (2010, 456).

command system that generates *psychological effects* and, and from then on, generates effective commands on the conduct of citizens in society, and whose main task is to make predictions for the future, as R. Guastini points out (2005, 125). There is no compromise, because of this, for the *Theory of Law* to have abstract ideas, but with decision-making predictability.¹⁶

Law is seen as a system of standards and directives of conduct,¹⁷ but it is significantly much more what judges practise in Court,¹⁸ and its validity is only measurable in judicial practice (Nino 2015, 57). The empirical assessment of valid law is about the prediction of what judges have in mind when it comes to making legal decisions.¹⁹ If judicial practice is so fundamental for realism, it is because A. Ross has shifted the whole exercise of Law in the power of the Courts. There is, in this sense, an identification of Law and Power, as a manifestation of the power to impose conduct that the Courts have, as A. Aarnio analyses.²⁰ Consequently, *legal decisions* are more important than *legal rules*, which have been predicted by the legislator, since the power that emanates from the Courts through their uses, practices and interpretation of Law is what in fact ends up determining the results of the effective application of Law.²¹ Thus, steering the service of the legislator towards the service of judging, where the expressions of power are clearly with the exercise of power of imposition of the Modern State.

The main consequence of this view is that the concept of validity of Law is conditioned to what judges think in fact the Law applicable in legal decisions. For this reason, what supports the concrete existence of Law is the legal decision, and nothing more. Following this closely, R. Guastini's observation (2005, 125), *validity* and *duration* are concepts that end up being

¹⁶ In the words of Vaquero: "Por tanto, los realistas se encuentran comprometidos teóricamente con ofrecer predicciones sobre como decidirán los jueces" (Vaquero 2012, 739).

¹⁷ "C'est pourquoi un système juridique national peut se définir comme l'ensemble des normes qui, étant ressenties comme obligatoires, opèrent effectivement dans l'esprit des juges" (Tusseau 2014, 03-04).

¹⁸ The study by Gaudêncio stops vertically to observe the meaning of CLS. Because of this, his comments and analysis are added here: "Understand law more as a set of legal decisions than a standard" (Gaudêncio 2013, 17).

¹⁹ In the definition presented by Alf Ross: "...a national legal order, considered as a valid system of norms, can be defined as a set of norms which effectively operate in the mind of a judge because he feels socially responsible and thus abides by them" (2000, 59).

²⁰ In the comments by Aulis Aarnio: "En términos rossianos, derecho, coerción y aplicación forman el núcleo del Derecho válido" (2010, 457).

²¹ "Law only allows you to foresee how the tribunals will behave, not which are their duties or possibilities" (Nino 2015, 53).

confused,²² within Ross's theory, in that the view of the theory points to the idea that the effectiveness of Law is given by legal application.

Faced with such a conception of Law, the idea of justice is seen as an emotional and abstract concept,²³ even metaphysical, and, thus, at this point, a target of the theoretical rejection by A. Ross. This division between "Law" and "Justice", within A. Ross's theory, leads to equating *realism* to *positivism*, as well pointed out by M. Barberis's analysis (2014, 26-27), in the measure of empirical scepticism before the concept of justice. In the realistic conception, the concept of "justice" ends up being confused with the correct application and interpretation of Law within a legal tradition, and the concept of "justice" ends up being formalised as the result of the practical activity of the courts. Therefore, "justice" is the result of judicious activity, and nothing more.²⁴

It is no exaggeration to say that A. Ross gave little importance to the validity of legal norms, as a formal and legal provision of a part of Law, because he intended to shift the attention given to legal norms by H. Kelsen. But, in doing so, he goes to the other extreme, namely, moving towards the *mental attitude* of judges and his convictions about them, as A. Aarnio²⁵ rightly points out.

This conception, in all its empiricism, ends up being exhausted in a *juridical conductivism*.²⁶ This allows Ross to escape from the *conceptual abstraction*, from the *purely logical* nature of Law, but paradoxically falls into an *idealistic* view, as noted in A. Aarnio's²⁷ criticism. The *Theory of Law* is also reduced in its task, considering that its role closely touches *judicial psychologism*.²⁸

There is no *radical predictability* in A. Ross's work, but judicial empiricism points towards the importance of verifying the way in which Courts have made sense of legal norms, and therefore, the prediction that is the usefulness

²² "The *validity* of law is so defined by the effectiveness of its application, that is to say, by its efficiency" (Billier, Maryioli 2005, 285).

²³ In the very words of A. Ross: "Asserting justice is like banging your fist on the table" (2000, 320).

²⁴ In the words A. Ross: "The decision is objective (just in the meaning of objective) when the principles of interpretation or valuation which are trends in practice, all fit within" (2000, 331).

²⁵ In the comments of Aulis Aarnio: "Como realista jurídico, A. Ross consideró que el Derecho producido por vía legislativa no era válido (*gültig*, en alemán) sino en un sentido *formal*" (2010, 457).

²⁶ In the comments of Vaquero: "En este sentido, el modelo de ciencia jurídica de Ross termina haciéndose indistinguible del conductivismo holmesiano pues son sólo normas (o las disposiciones) aplicadas por los jueces las que constituyen objeto de la ciencia jurídica realista" (Vaquero 2012, 730).

²⁷ In the critic by A. Aarnio: "La teoría de Ross es tanto conductista como *idealista*" (Aarnio 2010, 467).

²⁸ "A. Ross analyse alors la validité comme la rationalisation et l'objectivation d'impulsions psychologiques" (Tusseau 2014, 03).

of the *Theory of Law*, can give rise to the predictability that the *Theory* is able to provide to the interpreters of the legal system, aiming to allocate even more legal certainty to Law.²⁹ It can even be said that scepticism regarding legal rules leads to the recognition of a certain level of *rhetorical emotivism* and, therefore, to a certain degree of *irrationality* in the way Law is practised, in the work of M. Atienza (2014, 50).

2. **Critical Legal Studies: North-American legal realism**

The debt of *Critical Legal Studies* (CLS) to *North-American Legal Realism* of the 1920s-1930s is huge.³⁰ This is due to the fact the confrontation provoked by *Legal Realism* has opened cracks in the project of *Legal Positivism*, which were never re-established. *Formalism*, *abstractionism*, *objectivism* are features of the *Traditional Theory of Law* already frontally challenged by the *empirical*, *critical* and *interdisciplinary* efforts of *North-American Legal Realism* in the 1920s-1930s (Felix S. Cohen, Jerome Frank, Karl N. Llewellyn, Herman Oliphant),³¹ and will be revisited by *Critical Legal Studies* (CLS). Here, there is a theoretical effort to continue the initial studies made by the realism in 1920s-1930s,³² radicalizing some of its premises, such as that Law can be *predictable*.³³ But, even though CLS arose from these influences, at various points, it will gain its originality, and in this it will overcome its relationship with the tradition of *North-American Legal Realism*.

Dealing with *Critical Legal Studies* is, however, a complex task, in that through this perspective, one can discuss what is method, what is project and what is movement within it.³⁴ Even so, it can be said that *Critical Legal Studies* is a theoretical movement developed in the U.S., between 1970 and 1980, well towards the end of the 20th century, in a *Zeitgeist* inspired by a

²⁹ "Por consiguiente, una predicción se refiere a la probabilidad de una cierta norma perteneciente a la ideología judicial formada por las fuentes del Derecho" (Aarnio 2010, 462).

³⁰ "The debt owed to realism is acknowledged from within critical legal studies (...)" (Faralli 2005, 78).

³¹ Tarello (2017, 48-49).

³² "Mais dans la mesure où les *Critical Legal Studies* se sont intéressées explicitement à ces questions, on peut considérer la plupart de ces chercheurs comme continuant le programme réaliste" (Schauer 2018, 149-150).

³³ "We revert to our thesis: The essence of the basic legal myth or illusion is that law can be entirely predictable. Back of this illusion is the childish desire to have a fixed father-controlled universe, free of chance and error due to human fallibility" (Frank 2009, 37).

³⁴ Vide Gaudêncio (2013, 04).

context marked by the presence of *May of 68*, the movement for black *civil rights* and the emergence of *feminism*. Considering that the CLS can be divided into generations, one must consider the huge influence received from post-modern studies and philosophical deconstructivism, all placed at the service of the dilution of the categories of objectivity and truth of Law, which identify the view of liberalism and formalism.³⁵

Although it forms a movement, with no monolithic view inside - bearing in mind the diversity of proposals and ideas -,³⁶ it was marked by notable differences between currents and theoretical conceptions, ranging from the most radical to the most moderate. The CLS is put together by many authors and authoresses (Elisabeth Mensch; Morton Horwitz; Mark Tushnet; Duncan Kennedy; Roberto Mangabeira Unger), and, in depth, discusses in truth *Law and Society*,³⁷ having also been marked by strong influences stemming from the pragmatic North-American method (Charles Sanders Peirce; John Dewey), from the very tradition from the debate between *Legal Realism* in the 1920s-1930s (Roscoe Pound; Oliver Wendell Holmes; Karl Lewellyn; John Chipman Gray; Felix Cohen; Thrumond Arnold; Jerome Frank) as opposed to *Scientific Jurisprudence*, and, even, from the first generation of the *Frankfurt School* (Theodor Adorno; Max Horkheimer; Herbert Marcuse).

In this line of understanding, the *Theory of Law* leads to developing a role that dissolves the specialised, technical and dogmatic nature of Law. The influence received from the theoretical Marxism of the *Frankfurt School*,³⁸ in its deconstructive nature, enables the *Theory of Law* to demystify the scientific and analytical nature of Law, being able to deepen the problematization of the relationship between *Law and Society*. This is the reason for the proximity and the complementarity between the *Science of Law* and *Social Sciences*.³⁹ From there, the path of no return is established, in the identification of

³⁵ Vide Gaudêncio (2013, 06-07).

³⁶ Clarity comes from within *Critical Legal Movement*, in the words of Fischl: "First, CLS is not a monolith" (1987, 507).

³⁷ Vide Godoy (2007, 49-63).

³⁸ In the comments and explanations of Gaudêncio: "The Critical Theory of Frankfurt School accepts Marxism, and projects in *Legal Studies*, in its categories of main intelligibility - ideology, alienation, emancipation - and some of its fundamental concepts - domination, rectification, internal critic" (Gaudêncio 2013, 23, translated).

³⁹ "The Realists' orientation towards policy-choice made them receptive to the claim of social science, for, they thought, if they were concerned about the actual implementation of policy in the 'real world', they had to understand how the 'real world' actually worked. Social Science promised to inform them about that" (Tushnet 2011, 296).

the objective of the *democratic remaking of social life*.⁴⁰ *Theory of Law* now has the role of accusing the indetermination of Law as a point of support for the dissolution of the ideas of *certainty*, *rationality* and *consistency* of Law, as traditionally addressed. The CLS ends, therefore, starting from the previous *realistic tradition* to deepen the *scepticism* and denial of the value of certainty of the legal norms⁴¹ derived from the *Traditional Theory of Law*, and, so revealing how much *Law is Politics*.⁴²

In the field of legal decision, *American Realism* in the 1920s-1930s tradition had already disbanded important taboos within the *Theory of Law*, maintaining a vision in which all the idealisation of the legal rules whilst capable of creating legal certainty becomes a questionable theoretical stand. To this extent, *Legal Realism*, produces *tabula rasa* of legal rules, reduced to mere patterns of judgement, to the extent that the texts of law are seen as containing significant *ambiguity* and *indetermination*,⁴³ which results in leading to a legal psychologism, as well as taking the *Theory of Law* to the field of an anti-conceptualism which makes the concepts less important for Law, whilst all research is drawn to the area of legal decisions.⁴⁴ A good example of this is the difference made by K. Llewellyn, between *real rules* and *written rules*.⁴⁵

The CLS will radicalise this attitude stemming from *Legal Realism*, as M. Tushnet evaluates.⁴⁶ It is this, then, understood that if a legal activity is not subsunitive but free and creative, and therefore, it is able of leading to the political exercise of jurisdiction, not being predetermined by absolute legal rules.⁴⁷ Legal reasoning, therefore, is not merely formal and logical, nor an

⁴⁰ In the words of R. M. Unger: "The first area of our transformative activity is the contribution of our substantive ideas to the democratic remaking of social life" (Unger 2015, 199).

⁴¹ "The principal legacy of *Legal Realism* for mainstream legal thought is the introduction of 'social policy' analysis as an acceptable and indeed indispensable element of sophisticated legal reasoning and argument" (Fischl 1987, 522).

⁴² "After all, what else can you mean when you say that all law is politics?" (Tushnet 2011, 291).

⁴³ "In an explicit rejection of that approach, the Realists argued that law is indeterminate – that is, that what we call legal reasoning can rarely be said to require, in any objective sense, a particular result in a given case" (Fischl 1987, 513).

⁴⁴ *Vide* Billier & Maryoli (2005, 252–261).

⁴⁵ "Les 'règles réelles' et les droits réels – 'ce que les tribunaux feront dans un cas donné, et rien de plus extraordinaire' – sont des prédictions" (Llewellyn 1992, 131).

⁴⁶ "That history holds that CLS carries forward the intellectual program of the Legal Realists of the 1930's" (Tushnet 2011, 291).

⁴⁷ In the comments by A. M. S. Gaudêncio: "Opposed to this *formalist* concept, Realism adopts a perspective – which *Critical Legal Scholars* recover – Whereby a judge's decision is not pre-determinable, the subsumption of the facts does not sit with the judge as norms, but indeed with judges of *policy*: legal activity assumes itself as creative and political" (Gaudêncio 2013, 11, *translated*).

expression of pure will,⁴⁸ but reasoning located both politically and morally. Hence, one of the most important consequences of the theoretical approaches of CLS is that the *Theory of Law* ends up compromising the credibility of the ideas that maintain legal objectivity and neutrality, as R. M. Fischl clearly points out,⁴⁹ especially in the face of *hard cases*.⁵⁰

The outcome of this vision is an extremely strong approximation of the boundaries between the *Science of Law* and *Political Science*. Even so, Law continues to be seen as a *Science*,⁵¹ but the aims of the *Theory of Law* are projected in the field of the de-constitution of the mysticism of Law, on one hand, and, allocated in the field of *Social Emancipation*, on the other hand. Here is an important connection, elaborated by CLS towards bringing *Justice, Politics* and *Law* closer together, in order to criticise the neutrality of the *Traditional Science of Law* and point to *politics* as an attitude of *social justice*. As far as the boundaries between the *Science of Law* and *Political Science* become blurred, the theme of democracy becomes the structure of CLS - and, in particular, within the more systematic work of reconstruction elaborated by R. M. Unger -,⁵² wanting precisely to see a more vigorous and participatory democratic activity capable of overcoming the already *established system*, than that found in the traditional representation of vision of *liberal democracy*.⁵³

Thus, CLS opposes formalism, liberalism and positivism seen here as expressions of *Traditional Theory*.⁵⁴ But, results in greatly expanding its perspective of action, intersecting its concerns with issues and topics concerning the relations between *Law and Society, Law and Economics, Law and Politics*, leading to what could be called an '*amplified radical reformism*' of the modern world. CLS will steer away from the influence of Marxism, but

⁴⁸ "It does not mean, however, that judicial decisionmaking is altogether *arbitrary*" (Fischl 1987, 529).

⁴⁹ "To Critical Legal Studies, however, judicial interpretation is not and can never be an 'objective and neutral' activity" (Fischl 1987, 525).

⁵⁰ "The critic of conservative legal formalism, of Holmes of Legal Realism, amplified by the *Critical Legal Studies Movement*, ruined the academic trust of (*judicial neutrality*), at least before *hard cases*" (Gaudêncio 2013, 19, *translated*).

⁵¹ "Remain, here, nevertheless, the pretension of constructing law as science - even as a *pragmatic empirical* definition of science -, understanding that law is a science and in as far as legal thinking, from an empirical approach of facts, allowing the enunciation of forecasts which will guide legal operators in the implementation of its objectives" (Gaudêncio 2013, 16, *translated*).

⁵² One more radical idea of democracy. *Vide* Unger (2015, 111-113).

⁵³ In the vision of R. M. Unger: "The social ideal and the view of the relation of law to social life that I have just described can be translated into a program for the reconstruction of democracy and, more generally, of the established institutional regime" (Unger 2015, 107).

⁵⁴ *Vide* Gaudêncio (2013, 09-12).

free itself from its revolutionary and radical vision, to pursue a *critical and emancipatory reformism*, aimed at the re-understanding of governmental institutions and established forms for the exercise of modern power. It is for this precise reason, CLS has received a great deal of criticism from both the left and right and has been the target of numerous accusations,⁵⁵ such as those pointed out by R. M. Fischl (1987, 505-507). And this is because a radical posture surrounding the modern institutions is produced, which then leads all the efforts of the *Theory of Law* to a dissolute understanding of Law, such that is *Laws is Politics*. This is how legal activity is more connected to the dimension of *policy* than that of *correctness* (Gaudêncio 2013, 11).

Contrary to A. Ross's view, for which justice is something emotional and abstract, CLS understands the idea that justice can be sought by the *revision* and *surpassing* of the model of economy, society and the functioning of institutions. For this reason, moving towards forming firm proposals of *redesign* and *restructuring* of institutions, acting from a critical perspective (*criticism*) and constructive perspective (*construction*) (Unger 2015, 83-93; 95-107), starting from social ideas (*Social Ideal*), towards institutional programmes (*Institutional Program*), to the formulation of a deviationist doctrine (*Deviationist Doctrine*) (Unger 2015, 95-96), making use of this a theoretical-political vision that points towards equality and justice (Gaudêncio 2013, 7). And, thus, particularly in the R. M. Unger's conception, in the work, *The Critical Legal Studies Movement*, the centre of the *deviationist doctrine* is the critical understanding that Law forms an ideal system of legal rules (*idealized system*).⁵⁶

3. A Theory of Realistic Humanism: Brazilian legal realism

It is in the context of *fin de siècle* – considering the exhaustion of the 20th century – one can see the erosion of the ideals of *modernity*, which raises the discussions about the *postmodern condition*, and its impacts on *modern Law* (Bittar 2014). It is impossible to think of Law without considering the

⁵⁵ "The critics from the left might be correct in their claim that CLS diverts leftists from more productive political activities or even that CLS weakens the left" (Tushnet 2011, 295).

⁵⁶ "On an alternative account, the decisive feature of deviationist doctrine is the refusal to see law as an idealized system" (Unger 2015, 97).

empirical and historical diagnosis of the 20th century – a *Century of Catastrophes* – as defined by E. Hobsbawm (1995). There are significant initial influences of sociology by J.-F. Lyotard (1989) and Z. Bauman, which will be consolidated in later influences of J. Habermas and A. Honneth. To this extent, *Brazilian legal realism* is starting to emerge from *epochal consciousness*, from a Latin-American perspective, of social and paradigmatic mutations and transformations of *postmodernist context*, and which will disassemble the solid and structured architecture of *modern Law*.

This conception of *legal realism* thus unfolds, after the well-undertaken *linguistic turn* in the Brazilian *Theory of Law* (Streck 2009, 49-50), and the attention kept by the hermeneutic dimension of Law (Streck 2012, 227-228) – and in the scenario of *economic, moral and political crisis*, in the local and global contexts. This conception is entitled the *Theory of Realistic Humanism* – from this, simply entitled TRH –, affirming itself as the direct derivation of *Critical Theory* studies, especially from the influence of the second and third generations, in which the broadest consolidation of overlapping correlation stands out between *democracy and human rights*.⁵⁷

As a perspective of Latin-American thought, *Brazilian legal realism* is developed through the *Theory of Realistic Humanism* (TRH), brought to the public in a recent publication entitled *Introdução ao Estudo do Direito: humanismo, democracia e justiça* (*Introduction to Law: humanism, democracy and justice*).⁵⁸ Its formulation took costly years of work, and went through the maturing of previous stages, better established in autonomous works. It was, therefore, gradual that the formulation of the proposal of the *Theory of Realistic Humanism* (TRH) has been consolidating, especially considering the central theses of *Legal Realism*.

Firstly, the idea of *indetermination of Law* was clearly established in the work *Linguagem Jurídica: semiótica, discurso e direito* (*Legal Language: semiotic, discourse and law*), whose 1st edition dates back to 2001, a work deeply influenced by the studies of the *Semiotics of Law* and the *Theory of Language* (Bittar 2017). Secondly, the idea of Law connected with the *public sphere* (*Öffentlichkeit*) and the transformations of the contemporary world, was clearly established through two works, namely, *O direito na pós-mod-*

⁵⁷ For more on this, consult the specific and upright specific previous study about the theme. Vide Bittar, (2013).

⁵⁸ Vide Bittar (2018).

ernidade (The law in post-modernity) (Bittar 2014), whose first edition dates back to 2005, *Democracia, Justiça e Direitos Humanos (Democracy, Justice and Human Rights)* (Bittar 2016, 148-160), whose first edition dates back to 2011, and *Democracia, Justiça e Emancipação Social (Democracy and Social Emancipation)*, whose first edition dates back to 2013 (Bittar 2013). In the last three works, the presence of the influences of *Critical Theory*, *Sociology* and the *Frankfurt School*.

It is true that, in Brazil, *legal realism* has precedents, after its first tendencies were expressed in the 1920s-1930s, with authors such as Alberto Torres, Oliveira Viana and João Mangabeira, under the influence of American *Legal Realism*.⁵⁹ In addition to these conceptions, more recently, at the beginning of the 21st century, a series of studies have emerged, from a *critical Latin-American perspective* in the decades 1990-2010. Although it is not a properly *realistic* conception, the line of the *critical* and *emancipatory* work developed by A. C. Wolkmer, from the current entitled *Legal Pluralism*, is of huge contribution (Wolkmer 2006, 192; 2001, 169 ff.). Furthermore, a proposal for *Critical Theory* is clearly defined by L. F. Coelho (2012), strongly derived from Marxism and the influences of the tradition of the first generation of the *Frankfurt School*. The *Theory of Realistic Humanism* (TRH) fits into this context of plurality of Latin-American ideas, and – in comparison to other earlier Theories –, its study constitutes an important task for the current debates of the *Theory of Law*. And, this is because this conception gives them a historical sequence, and this, also, because it incorporates similarities and differences that should be better marked, to the point of conferring their epistemological *autonomy*, both in relation to Brazilian conceptions, and to Scandinavian and American conceptions.

The first step, in this sense, is to consider that it is impossible to develop a *Critical Theory*, from the Latin-American perspective, without making *social injustices* a central problem to the whole discussion of *Justice*, or even, to the role of Law. The topic of justice draws attention to the topics of equality, equity and social justice. This *theoretical sensitivity* is shared by all Latin-American critical conceptions; this is the reflection of Latin-American context, where the *social injustices*, *social inequalities* and *violence* are strikingly present in discussions about *Law* and *Justice*.

⁵⁹ Vide Garcia Neto (2008, 91-94, 110).

It is here that a *Critical Theory of Law* assumes its uniqueness. And one of its central starting points is the perception that the *crisis of Law*, in the contemporary world, threatens the very survival of effectiveness of the *legal system*, and consequently, threatens the collapse of the legal system as a whole. The vast distance between a *state of social justice* and a *state of social injustice* is responsible for this condition.⁶⁰ However, the experiences of *injustice*⁶¹ can become constructive precisely there where they become forces of struggle for the fight of human dignity and justice.

Unlike the systemic views of Law, where the *human* element disappears - derived from the vision of T. Parsons and N. Luhmann - because it is functionally adhered to in social structures and sociological rationalism, the *Theory of Realistic Humanism*, radicalises the understanding of *humanism* such that, *humanity* is responsible for its own destiny, and the destinies of *justice* and *injustice* are seen as the fruits of *social action*. Here, it is a *non-metaphysical, social, secular, pragmatic* and *republican humanism*. Here we see how much, within in theoretical model of the *Theory of Realistic Humanism* (TRH), the meeting of realistic, critical and humanistic demands reveals itself to be a complex meeting. In any case, it is attempted to make clear that the *Theory of Law* cannot be enough with the understanding of Law only as *law*, as a set of *formal operations*, with *Legal Science* having only a descriptive task of Law. The *Theory of Realistic Humanism* (TRH) wants to reinforce the approach of Law beyond *legalism* and *formalism*, emphasising the reconnection between *Law and Morality*, between *Law and Justice*, and, finally, between *Law and Society*.

Thus, social action and social interactions constitute the process of creating and re-creating Law. Law is a social and pragmatically situated construction. It is to this extent that the *Theory of Law* requires, first of all, a *Social Theory* in order to assert itself. Moreover, the *Theory of Law*, points to paths of the *de-repression* of the legal system, the *processes of humanisation* of the legal system, there where it is not *inclusive, participative, accessible* and able to face *violence, discrimination, hunger, social inequalities* and *social injustices*.

⁶⁰ The perspective is equally developed by Robert Alexy: "A legal system which will not be socially successful in global terms when a legal system collapses" (2011, 110).

⁶¹ "Ungerechtigkeit bedeutet primär Einschränkung von Freiheit um Verletzung der Menschenwürde" (Habermas 1998, 505).

It is clear, therefore, that the TRH is based, above all, on a *secular, rational, republican* and *pragmatic-democratic* conception of *humanism*, a form of *humanism* that goes along with the processes of modernisation to dynamically and permanently *correct* the *exclusions* and the *reification* which it creates. It is a critical and modern reaction to the processes of modernisation. Thus, Law transcends a mere bureaucratic task. The task of Law can only be fully achieved to the extent that it becomes an instrument capable of meeting social needs arising from social reality. Each society knows the challenges arising from their reality, and it is from this that the jurist's critical self-awareness must exercise its important and unique role of *social transformation*. Thus, the struggle for rights, and the practical achievement of rights, involves, first of all, an exercise in *humanism*, in so far as it accomplishes the essential tasks of respecting the dignity of human beings. It is a *realistic humanism*, aimed at the *qualitative, moral, social* and *political transformation* of social reality in which it is inserted locally, aiming at the *social emancipation* of *injustices, starvation, misery, ignorance, culturally* and *spiritual poverty* that holds *citizenship hostage, undermined* and *subservient*.

Contrary to the *Traditional Theory*, here there is an explicit presentation of the importance and the centrality of *values* in the construction of the *Theory of Law*. Of course, this is not a set of personal values, but the set of values socially consolidated in the derivation of the *Universal Declaration of Human Rights* (1948), as revealing the limits to the will and distribution of justice in society. Contrary to the need and the attempt to construct a conception of *Law* unrelated to *Morality*, or *disruptive* and *aseptic* to *social values*, the TRH returns values to the centre of the legal system, considering the danger of relapsing into *barbarism*, bearing in mind the warnings of Theodor Adorno, in *Erziehung zur Mündigkeit* (1971),⁶² before the abyss represented by Auschwitz. Here the paradigm of *modern horror, instrumental reason, deadly technique* is placed as a nerve point of the risks of instrumental modernity and its *pathologies*.⁶³ *Humanism* is based on the centrality of *dignity of the human being*, from where all the whole *foundation* of Positive Law should emerge, considering it the beacon from which every attempt (permanent and durable) to avoid a relapse

⁶² "The requirement of which Auschwitz does not repeat itself is first in all education" (Adorno 2003, 119, translation).

⁶³ "In the context of social theory, we can say in 'social pathology' which we always relate to social developments which they cause notable deterioration of rational capacity of members of society to participate in social cooperation in a competent manner" (Honneth 2015, 157).

of barbarism should be derived. At this point, one feels the strong inflection of Jürgen Habermas, in his last essay on the subject (*Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte*, 2010) (see Habermas 2012).

The *Theory* plays a double role, and is as much *descriptive* as *normative*, in the sense that it points towards the *Theory of Law*, and from the *Theory of Law* points towards the *Science of Law*, in its practical and operational challenges in the everyday life of the production of acts of justice and concrete decision-making. For this reason, the TRH fundamentally opposes *Traditional Theory* in a critical manner, namely in the worldview derived from *legal positivism*, which has been predominant in Brazil in legal culture since the 19th century, throughout the 20th century, reaching its crisis only at the end of the century. Normally, it is admitted that Law is a social phenomenon, but if the *Science of Law*, based on the model of the *Traditional Theory of Law*, becomes autonomous and distances itself from society, what bridges will remain between *Law* and *Society*? (Ferrari 2012, 04-06).

Therefore, from the epistemological point of view, in place of the modern ideal of the *scientific autonomy* of the *Science of Law*, it affirms the dependence of the *Science of Law*, by the interdisciplinary, complementarity and interconnection of knowledge with the other empirical contributions extracted from *Human and Social Sciences*.

Here, the most important task is the *redefinition* of the horizon of understanding of the *Science of Law* itself, which navigates society in operating social and legal understandings in disconnection with the other *Social Sciences*. *Humanism*, during the *formation* of a lawyer, becomes a source of knowledge to which the lawyer can address the *complexity* and *multidimensionality* of the “reality”, strengthening with this an approximation of *social phenomena* by the *legal form*, which does not hinder the *critical* and *humanised* vision in the relationship between *Law* and *Society*.

And, in this, contrary to what the *Pure of Theory of Law* by Hans Kelsen⁶⁴ states, a strong capacity for collaboration is attributed between the boundaries of *humanistic knowledge*. In this, he understands that the *pretension of purity* is only a *self-alienation* of legal, technical and specialised knowledge,

⁶⁴ In the words of H. Kelsen: “When designs itself as ‘pure’ theory of Law, this means that it proposes to guarantee knowledge only directed to Law. This is to say that it intends to free legal science from all elements, which are strange. This is its fundamental methodological principle” (Kelsen 1976, 17, translation).

differing from the processes of methodological reduction and the scientific terminology. Therefore, in place of the artificial opposition between *Sein* and *Sollen* of *Traditional Theory*, its replacement by idea of *tension* (*Spannung*) between *facticity* (*Faktizität*) and *validity* (*Geltung*).⁶⁵

From the methodological point of view, the TRH shares the concern for criticism of the *logical* nature of Law, which the other currents of *Legal Realism*, American and Scandinavian, have already established, but in a gradually different way. *Empiricism* here does not stem from the conception of *modern-scientific* empiricism, emphasising, on the contrary, that the results of empirical research of the *Social Sciences* can be the *sources of interlocution* for the *Science of Law*, and in this, supplies it with the best empirical instruments for the promotion of *justice* and fight against *injustice*. It is, therefore, another vision of *empiricism*, not *behaviourist empiricism* that arises from *legal decision*, but from a *methodological empiricism* focused on the *Science of Law*, at the level of understanding of *Law and Society*, aiming at improving conditions of access and achievement of justice in society. It is, therefore, an *epistemological, critical and interdisciplinary empiricism*.

The *Theory of Realistic Humanism* does not refer to the attempt to *predict* by which the judges will decide on the basis of norms. The TRH indeed identifies the importance of the *humanization of the system of justice*, as a task of distinct importance for the Judiciary to be able to exercise the task of *socially correct trials* and defence of the *Democratic Rule of Law*. In this sense, Law is not pure logic. *Realistic humanism* wants to emphasise that Law is formed by a *scheme of multiple social factors*. That is to say, the “*reality of Law*” is a “*complex reality*” (historical, multifactorial and local) in which it is inserted with the function of promoting *justice*, acting in such a way that it performs a double and simultaneous role, that of *social conservation* and that of *social transformation*. The TRH is a way of understanding that leads to a better understanding of the *social medium* in which a *determined* Positive Law will operate, in local-contextual manner. This approach results in favouring a better interconnection between *Law and Society*, turning neither to any *legal psychologism* nor any *behaviourist decisionism*.

Realistic humanism understands that the *legal system* is a system of *social institutions of justice*, and not systems of legal norms, so that its mode of action

⁶⁵ “Der Blick richtet sich vielmehr nach wie vor auf eine dem Recht *innewohnende* Spannung von Faktizität und Geltung” (Habermas 1998, 171).

is concrete and realistic, and not abstract and based on *Sollen*. The task of the *Theory of Law* is not only to understand and describe the *legal system*, but also to propose its improvement, and therefore, one of the reformist proposals of the system of the *institutions of justice* that form the legal system consists of its *harmonisation*. In this conception, the core of the *legal system* now taking into account the *legal rules* and the *legal principles* described in its positive Constitution, derives from a non-specific vision of the *dignity of the human being*, that is to say, capable of understanding the breadth of the *forms of life* in the world as equally relevant for the *equilibrium* and the merger of horizons of respect and preservation of the *forms* of life between sentient beings.

But, if it is true that the *legal system* retains within itself the *core values of modernity* that must be preserved, it is also true that Law is basically expressed by way of *legal texts*.⁶⁶ Here, the *indetermination of Law* is evident. This is a strong common meeting point amongst the many conceptions of *Legal Realism*. Under the influence of the *Semiotics* of the Lithuanian semiotician A. J. Greimas, the TRH states that *legal texts* confer objective existence onto rights and duties, and should be interpreted, being the subject of debates, arguments and legal discussions. Consequently, the *polemic* nature of Law is neither a field for the expression of the *pure discretion* of judges, nor for the expression of *pure analytically-deduced rationality* of Law. With this position, the TRH moves away from the discretion stemming from the tradition of *Legal Positivism*, without embracing *legal psychologism* of the *Scandinavian realism* of Alf Ross tradition. On the contrary, Law will concretely be carried out by the constant pragmatic-semiotic activity in legal actors of *construction* and *reconstruction* of the *legal meanings* in light of objective and subjective determinants existing at the time of each *legal decision*.

This does not mean that only legal decisions create Law; it is not only *legal power*, and what judges understand about valid Law, that in fact becomes the existing Law in a given society. In fact, according to TRH, Law already exists (partially) in legal rules, it is certain that Law will be held *in concrete* as an individual rule through the legal reasoning exercised by judges. Thus, *normative text* is seen as a *pre-text*, that is, as a *project of meaning*, and the *full meaning of legal discourse* will only emerge through the use by the community of interpreters, emphasising the end of the complex task

⁶⁶ Elsewhere it can clarify this in a more upright way: "Juridicity, consists of a reality of texts, called *legal textuality*..." (Bittar 2017, 81).

of reducing Law to *decision* by the judges, using *argumentative rationality*. Law will then be updated, referring to concrete facts and cases, carried out in *legal decision*, which means that Law *is not formed*, but indeed *complete*, in legal decision. Therefore, where *Scandinavian realism* by A. Ross finds a coincidence between *validity* and *existence* of Law, TRH sees the *anteriority of formal existence* of legal rules, which will be added to the *realisation* of legal decisions, in friction with the facts through *legal decision*.

Law is seen as a *powerful social instrument*, among several, acting in society, with high *decision-making power*. Beside *legal decision*, studied by the *Science of Law*, however, are *political decisions*, studied by *Political Science*, and the *economic decisions*, studied by Economics. Law does not act in a society disconnected from the interfaces with Politics, nor Economics, and is seen as a social instrument which acts, in both the sense of social transformation, and social conservation, understanding that within it *legal actors* act in both directions, dialectically opposite.

If the *Theory of Law* offers *normative horizons*, and does not only have a descriptive and cognitive role, *social emancipation* and *human dignity* form the field of *realistic utopia* of *human rights*,⁶⁷ with glimpses of *integral development of the human being* placed in society. Thus, each society finds itself at its own stage of development, knowing and pointing to its challenges and main specific social bottlenecks, in order to face them locally. In order to reach this *utopian-realistic horizon*, the means weigh as heavily as the ends, thus avoiding the *dystopian conceptions* of the 20th century history, ensuring that the path to the *effectiveness of human rights* is the means by which priorities and social efforts can be chosen for the purpose of achieving a more *free, just, pacific, inclusive, solidary* and *socially balanced* society, considering the horizons of *instrumental modernisation* and *emancipatory modernisation* mutually codetermined and in motion throughout history.

Justice is not merely a value between values - as highlighted by J. Habermas —,⁶⁸ but a vector of the orientation of *normative horizon* of Law, always beyond the horizons of *Positive Law* too, and is connected to the universal traits and demands of Responsibility (R) and Discourse (D). Thus, a *positive-legal system* should be evaluated for its capability to create *justice*, understood as a *social*

⁶⁷ "Mit der Idee einer gerechten Gesellschaft verbindet sich das Versprechen von Emanzipation und Menschenwürde" (Habermas 1998, 504).

⁶⁸ "Deshalb ist Gerechtigkeit kein Wert unter anderen Werten" (Habermas 1998, 190).

balance, in the task of assigning *responsibility* for social duties and actions, and *realise* legislative promises, rights and fair distribution of resources for social life. Thus, it will be fair if it is able to promote *values-structuring* democratic life, that is *inclusion, correction of social injustice, recognition of diversity*, and, above all, *grant effectiveness* to human rights. The TRH preserves *legality, freedom, diversity, equality, redistribution, recognition, solidarity, democracy* and *human rights* as *interconnected values*, considering that these values are expressly consecrated as central categories of modern Constitutions. That is where the legal system can be described as fair.

4. Comparative Study of the Theory of Law

Musical Theory usually talks about consonances and dissonances. The metaphoric use of the terms consonance and dissonance here wants to mean and indicate the points of agreement and disagreement between the diverse ideas of *Legal Realism* analysed at length in this paper. And, one of the points, which should be stressed, right from the start, when it comes to making a comparative analysis between legal realisms, is precisely the historicity and the contexts of their developments. Now, the *Theory of Law* is form of universal knowledge, and one that develops in different countries, regardless of the tradition of *civil law* and *common law*. But, every study originates situated and determined by certain sources of influence to which they react. Thus, *Legal Realism*, despite the same name, does not draw on the same influences, generating the false impression of being faced with the same theoretical idea. What will be sought from here are the most central consonances and dissonances amongst the ideas of *legal realism* studied here.

A comparative study between the tradition of *Uppsala School* (US), the tradition of *Critical Legal Studies* (CLS) and the tradition of the *Theory of Realistic Humanism* (TRH) should, firstly, take into account these differences determined by the traditions of *legal systems, cultures* and *historical moments* so different from each other. The *opposing theories, methods of study, dogmatic ideas* and the *view of Law* differ everywhere.⁶⁹ Thus, subsequently, Swedish, North American

⁶⁹ An example affirmed by Oliver Holmes, "Les moyens de cette étude sont un ensemble de recueils, de traités et de lois, ici et en Angleterre, qui remontent à dix siècles et qui augmentent maintenant par centaines chaque année..." (Holmes 1992, 123).

and Brazilian legal systems are not the same. In addition to this, the traditions of *civil law* and *common law* create differences in the weight given to the role of the legislator and the role of the judge, within the legal system. Finally, the conditions of social, economic, cultural and political reality are very diverse, forming environments conducive to other realistic stimuli and theoretical influences. However, what will be sought here is a reading of equivalence at the theoretical level, and in this sense, each School can be thought of from the perspective of its contributions, differences and potential complementarities.

To this end, points of consonances and dissonances will be pointed out, considering three models of analysis undertaken below, amongst the three models of *Legal Realism* in the next topics:

i. Consonances and dissonances between Scandinavian realism (US) and American realism (CLS):

i.a. consonances: *American realism*,⁷⁰ in its origin (1920-30), had already introduced a *radical scepticism* before legal rules, which will be harnessed and radicalised by the CLS (1970-80), and, at this point, there is clear *consonance* between the *American realism* and the *Scandinavian realism*, leading to an assessment of power and decision-making conduct of judges, knowing that for both universes, the vision of *common law* prevails above the vision of *civil law*;

i.b. dissonances: *Scandinavian realism* understands that *justice* is an abstract and emotional notion, whilst CLS understands that the notion of *justice* is a democratic effort for the *transformation* of institutions through the *political organisation* of society. *Law is Politics*, in the sense that it is possible to achieve another way of doing justice in society. The notion of *justice* preserves a trace of *normativity* within the *Theory of Law*, guiding *Politics, Economics and Law*. This is why, at this point, there are several *dissonances* between *American realism* (CLS) and *Scandinavian realism*, especially considering the radical role and *progressiveness* of rebuilding institutions, where A. Ross (US) only finds the *conservative* role of ascertaining the power of judges, the power of legal decisions and the capacity of coercion of the State.

⁷⁰ See, about the impact of the North-American Legal Realism in Italy, Gazzolo (2017, 447 ff.).

ii. Consonances and dissonances between Scandinavian realism (US) and Brazilian realism (THR):

ii.a. Consonances: A. Ross's version of *realism* has a significant precursory nature,⁷¹ and opens the door to the weakening and criticism of jus-naturalism and jus-positivism, make another form of understanding of the role of the *Theory of Law* possible, considering *epistemological realism* contained in *Uppsala School* (US). Despite the low presence of the influence of the *Uppsala School*, in the Latin-American studies, and, even more of the tradition of the *Philosophy of Law* formed in Brazil, it can be said that at this point, there is a significant *consonance* with *Brazilian realism* (TRH), in that it seeks to escape from the abstraction, supposition and the sphere of should-be, in order to constitute the foundations of the *Theory of Law* in a more concrete and empirical way;

ii.b. Consonances: The *active methodology*, which undoes the *abstract standard* of the *Theory of Law*, the undemonstrated deductive truths, the excessive cult of conceptualism, as well as the anti-formalist theoretical attitude, in recognising the lack of traditional methods, be it jus-naturalism which considers what is given before in the *nature of things*, or of jus-positivism which considers what is given in the positive norms of the legislator, are admirable marks of effort of the realistic currents, and, therefore, a strong point of connection in the inspiration of common tasks and challenges in the projects of the reconstruction of the *Theory of Law*. However, *Brazilian realism* (TRH) did not rely on these conceptions to structure itself, maintaining roots of tradition of the *Critical Theory*;

ii.c. Dissonances: *Scandinavian legal realism* (US) contains no concerns for *social emancipation* and there where the *Theory of Law* wishes to see and examine *how* judges decide, it plays the role of promoting *legal certainty* by offering *predictability* of legal decisions. This is a clear point of *dissonance* with *Brazilian legal realism*. And so the *Uppsala School* sees the power accommodated under the judges' robes, and does not allow for identifying any sense of *sovereign power* – of the republican tradition

⁷¹ "Il apparaît au contraire comme un précurseur du 'postpositivisme' qui tend à considérer que les sciences – y compris les 'sciences de la nature' – formulent des narrations possibles, relatives et révisables, qui reconstruisent une trame d'événements intelligible à partir du flot indifférencié des perceptions" (Tusseau 2014, 15).

– prior to legal power, not even leaving horizons for a relative burden of *realistic utopia* beyond the curtains of Courts;

ii.d. Dissonances: *Scandinavian legal realism* (US) results in *mentalist jurisprudentialism*, that is, it credits the full force of the *valid existence* of Law to the knowledge that judges have of *legal rules*. In the end, it strengthens one of the tripods of the tripartite of powers of the modern State, something very appropriate to the tradition of *common law*, but less capable of making sense of the tradition of *civil law*, from which Brazilian Law is derived. Therefore, where A. Ross should be an *empiricist*, in truth, he ends up leading the *Theory of Law* to see in Law only a *legal mentalism*. Here is a clear point of *dissonance*. And this because *Brazilian legal realism* (TRH) is not a *psychological realism*, working with the idea that Law is a social phenomenon, and not mental, derived from the clash of social forces that operate at a historical, cultural, economic and political level. In this sense, for a semiotic understanding, the TRH highlights the importance of the Judiciary's action, because no *legal meaning* is formed without *legal decisions*, so that the legal action complements the *project-of-meaning* previously presented in the legislation.

iii. Consonances and dissonances between American Realism (CLS) and Brazilian realism (TRH):

iii.a Consonances: *Critical Legal Studies* is influenced by various philosophical traditions, but receives an important and significant influence from the tradition of the *American Realism* and from the *Frankfurter Schule*. In this, the *consonance* with *Brazilian legal realism* (TRH) is clear. However, in view of the *democratic turn* occurring in *Critical Theory*, it is clear that CLS operates mainly with concepts extracted from the first generation (Theodor Adorno; Max Horkheimer; Herbert Marcuse), and that *Brazilian legal realism* (TRH) is inspired by the second, third and fourth generations of the Frankfurt School (Jürgen Habermas; Axel Honneth; Rainer Forst). Even so, both tendencies are opposed to *Traditional Theory* in their environments of academic debates, and are inspired by reformist motives in which they gamble on the conception of *participative democracy*. Therefore, both theoretical perspectives point to greater demands of *democracy*;

iii.b. Dissonances: *Critical Legal Studies* (CLS) promotes a radical blurring of boundaries between *Law* and *Politics*, and leads the epistemological boundaries between the *Science of Law* and *Political Science* to a near fusion of horizons. Here is a clear point of *dissonance* between the two conceptions, in that *Brazilian legal realism* (TRH), despite the interdisciplinary connections and the reciprocal collaborations between the *Social and Human Sciences*, seeks to preserve the *autonomy* of the *Science of Law*. Here, it is important to underline that the *Science of Law* will only achieve its epistemological maximisation, in the measure of dialogue and interdisciplinarity with the scientific advances of *Social and Human Sciences*, which provide the empirical elements necessary to complete the training of the lawyer;

iii.c. Dissonances: CLS works along the lines of *radical reformism* operated on the basis of the *Theory of Law*, which results in becoming *Political-Economical Theory* and *Theory of Law*. This is a point of dissonance, in as far as *Brazilian legal realism* (TRH) operates considering the weight of *legal decision*, alongside the weight of *economic decisions* and *political decisions*, knowing that a dialectic of opposites exists within Law, so that Law is only a social instrument, amongst others, which acts towards *social transformation*, or *social conservation*. For TRH, there is a quality to *social transformation*, which is, *push forward* the boundaries of Law (towards more justice), and there is a quality to *social conservation*, which is to *preserve* the legal symbolic and social accomplishments already incorporated in earlier stages in the development of Law (towards the preservation of justice). In this sense, the form of Law and institutionality of Law act as *forces of conservation*, as the dynamics of society and the demands of democracy act as *forces of transformation*.

Conclusion

Amongst the diverse conceptions of *legal realism*, an attempt was made to emphasise consonances and dissonances between *Critical Legal Studies* (CLS), *Uppsala School* (US) and *Brazilian legal realism* (TRH). This paper sought to compare three (3) perspectives of *legal realism* (Scandinavian; North American; Brazilian), and cut out with the utmost precision its field of *definitions, context, influences, theoretical premises* and *central conclusions*.

And, the first conclusion that can be reached cannot be any other than that of which *there is no unity* in this model of *Legal Theory*.

Although the currents of *legal realism* have the same *nomen* in common, they differ substantially with regards to: i.) *concept* of Law (i.a. Law as a set of legal decisions; ib. Law as politics i.c. Law as a system of institutions); ii) *legal method* of the *Theory of Law* (ii.a. scientific empiricism; ii.b. radical criticism of the liberal political model; ii.c. criticism, interdisciplinarity and complementarity in Human and Social Sciences); iii) and above all, the *finality* of the *Theory of Law* (iii.a. description of Law, promotion of legal certainty and provision of legal decisions; iii.b. reform of the political system and social emancipation; iii.c. social emancipation, promotion of a fair society and dignity of human beings through the effectiveness of human rights).

These theoretical qualities make the conceptions of *legal realism* differ on many points. Subsequently, once the *differences* in perspectives have been acknowledged, it is possible to identify a common stand in *legal realism*, in as far as all theoretical lines present themselves as criticisms of *legal formalism* and traditional *legal reasoning*, moving away from *abstract* concepts and the views centred on premises based on a *legalistic* and *dogmatic* view of Law.

Thus, one begins to notice the global dimension of *legal realism*, in its diverse *local appearances*, revealing itself with very peculiar characteristics, depending on stimuli, challenges and influences, which it receives locally. It appears that the various local developments in *legal realism*, in the U.S. (*Critical Legal Studies* – CLS), in Sweden (*Uppsala School* - US), in Brazil (*Theory of Realistic Humanism* – TRH) are *genuine contributions* around Law, and from whose *theoretical power* can draw important concepts in the face of the *Traditional Theory of Law*.

In their original environment, they contrast with *social forces* and different *lines of thought*. Among them, it seems that these *legal realisms* are in different degrees of *critical intensity*, going from the leftmost of the U.S. (*Critical Legal Studies*), to the dialectic profile of *conservation/transformation* in Brazil (*Theory of Realistic Humanism*), to the right of concepts, with the Scandinavian concept (*Uppsala School*). In any case, if the TRH can be considered the most incipient and recent of these conceptions, it is clear that, configuring itself as a *humanism*, maintains its *theoretical autonomy*, and in this preserves its conditions of struggle and affirmation, in the face of the Latin-American scene and its present and future challenges.

Finally, after this analysis, it can still be seen that the conceptions studied in a comparative way in this paper point to many diverse solutions, when the question is that of *legal reasoning*. In the *Scandinavian Realism* approach, the idea of *legal certainty* offered by the actions of judges is clear, given that the empiricism of this tradition leads to a *legal psychologism*. Therefore, it should be pointed out that the mistake by Alf Ross involves shifting the attention of the legislator, placing excessive importance on the activity of judges. In the *North-American Legal Realism* approach, there is an important criticism of the formalism of *Legal Positivism*, but the *predictability* becomes a false point of the theoretical project. However, its legacy is reabsorbed by *Critical Legal Studies*, which will meta-model the *Science of Law on Social Sciences*, dissolving, despite the autonomy and the internal identity of Law. In this line, the *decision-making process* serves as the *logic of policy*, and not as *logical syllogism*. In the *Brazilian Legal Realism* approach, the *decision-making process* is influenced by multiple factors, which leads to the requirement that legal education is interdisciplinary, marked by dialogue with other empirical sciences in the area of *Humans and Social Sciences*. But, what qualifies *legal reasoning* is not its full independence from legislation, and much less its purely political nature, and indeed its role as a *construction of meaning*, an exercise that depends on the intricate meeting between the fields of *legal language*, *semiotics of legal discourse* and *legal argument*.

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