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The Ricoeurian Critique

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ABSTRACT

This paper seeks to understand legal interpretation, legal argumentation and their relationship through Paul Ricoeur' work. To do so the paper looks at Dworkin's legal interpretation theory, and Alexy's argumentation theory. These two authors were extensively analysed by Paul Ricoeur's in his book "The Just". Paul Ricoeur's critique of both theories makes it clear that the relationship between argumentation and interpretation in law, is symmetrical to the relationship between explanation and understanding. From this symmetry it is possible to conclude that there's no true divergence between argumentation and interpretation.

KEYWORDS

Legal interpretation; Legal argumentation; Legal Discourse; Ricoeur; Dworkin; Alexy; Theory of subjectivity.

INTRODUCTION

This paper focuses on Paul Ricoeur, in particular on his contributions to the theories of interpretation and legal argumentation. By uncovering the conflict between the theories of interpretation and legal argumentation, we answer the following question: how should the legal text be interpreted? The answer is found in the Ricoeurian way of thinking.

Ricoeur, as well as Dworkin, and Alexy are a part of the post-positivist movement, this movement that challenges traditional positivism is further explained in PART I, while in PART II we seek to clarify the fundamental concepts in Ricoeur, such as Experience, Time and Text.

Then, and having “The Just” as a guideline, especially the chapter “Interpretation and/or Argumentation”, we explore the Ricoeurian critique, on one hand to Dworkin, and on the other hand to Alexy. In order to bring full circle, the Ricouerian criticism, we address the implications that Ricoeur's work has in law with the theory of the subject and with his legal interpretation and argumentation theory.

PART I - HISTORIC AND INTELLECTUAL CONTEXT

The ideal of legal positivism, which sought to bring law closer to a science, has been the object of several criticisms. The criticisms are a result of the fact that legal positivism separates Law from Morality. Since positivist thinking, entered a crisis, there has been an emergence of a new approach to analyze philosophical and legal issues.

In this context, Paul Ricoeur is of great relevance, since his works serves as a support for a philosophy of law that rejects the problematic dualism between being and obligation, the distinction between descriptive and prescriptive languages and also the separation of law

and morality. For this very reason, we seek to deconstruct Ricoeur's thinking in order to present his theory of law.

Ricoeur was not the only intellectual who sought to overcome legal positivism as it was known, thinkers such as Ronald Dworkin, Robert Alexy and Manuel Atienza were also a part of the post-positivist movement.

With regard to positivism, the first major event that contributed to its understanding was the Napoleonic Civil Code, which organized the law in a rational way, and when this codification of Law was considered valid, judicial subjectivity became inadmissible, since what prevailed was positive law.

All of this led to the creation of the school of exegesis that seeks to further study the textual element of legal norms. In relation to possible gaps in positive law, the school of exegesis reaffirmed its total submission to the reason expressed in the law, and the intention of the legislator slowly became the important factor in the interpretation of the law.

The crisis of positivism started after the Second World War because of the Nuremberg trials. The reality of these cases could not be ignored, that is, the rules and values that had been violated were not positive. The court could only convict the individuals for war crimes and crimes against humanity after disregarding what was law in Nazi-Germany. The court determined that the infractions did not occur solely because of what was written in the law. In this way, ethics, values, and natural law, returned to their relevance in legal science since positivist theories proved to be insufficient to build an acceptable normative order. For this reason, in the post-positivist era, it is understood that Law and Morality cannot be completely separated. In this context the theories of Dworkin, Alexy and Ricoeur take center stage.

PART II - FUNDAMENTAL CONCEPTS IN RICOEUR

As Ricoeur addresses a great diversity of issues in several of his works, it is extremely important to be aware of some relevant concepts.

EXPERIENCE

The concept has acquired a privileged place in the experimental sciences, where sensitive experience is a priority and only afterwards can it be interpreted. The experience is not just the experience that is done, repetitive, customary, the same. To think that we can fully objectify the experience, thematize it, clarify it completely, is an illusion, because the experience is inexhaustible, and it's the new things that always happens that densifies it.

The broadening of the concept of experience is present in expressions such as: historical experience, and religious experience. The expansion of this concept was woven from Hegel, to Husserl, Scheler, Heidegger and others. So, this broad conception of experience is today the prerequisite for understanding contemporary philosophy.

The experience, in this broad sense, is, for Ricoeur, the fundamental phenomenological assumption of a Philosophy of Interpretation. Thus, Ricoeur transformed Heidegger's ontological question of forgetting the sense of being into a phenomenological question, and this becomes a hermeneutical question when there is something that prevents access to meaning.

Experience is first in the face of language, as it is more original and fundamental than language. Language, therefore, is subordinated to experience. And, by emphasizing the derived and subordinate character of language in the face of experience Ricoeur agrees with Heidegger.

TIME

Time and human experience have always been a part of Western tradition. Time is divided into past, present and future, but the past no longer exists, and the future has not yet happened. Is there only the present? What is time after all? It can be the experience of time

itself, which can be measured or not. The question of time occupies a central place in Ricoeur's "Time and Narrative".

There is a historical time as there is a literary time. The narration is not only historical, it is also, for example, the legend, the novel, the short story, the myth, the novel. Narrating is telling, but it is telling not only of those who make history, but also of those who create and make fiction. And science and literature, like human acts, are acts in time.

TEXT

Ricoeur's position is very clear: the text is independent of the author's subjective intentions, the text speaks for itself, the text is autonomous. At the time of reading a text the author is absent. It is what we might call the "author's death". The text is essentially open, addressed to all who want to read it.

The primary function of language is to say, to say something about something. And the word is less and more than the sentence. Less because its actuality of meaning depends on the phrase. More because, while the phrase is an event whose timeliness is ephemeral, the word is loaded with multiple meanings and is always available for new uses.

Hermeneutics does not seek the author's psychological intentions, hidden under the text or behind the text, but, before the text, it seeks to interpret and make explicit the world that it shows, opens, and proposes[1]. Ricoeur's notion of text requires a new way of looking at the relationship between explanation and understanding.

PART III - RICOEURIAN CRITIQUE OF THE INTERPRETATIVE THEORY

[1] RICOEUR, Paul. *O Justo ou a Essência da Justiça*, Lisboa: Instituto Piaget, 1997. Page 144.

Ricoeur contrasts and compares the concept of interpretation with that of argumentation, which have been seen as opposites. With this the author seeks to show the insufficiency of both theories, which in turn will favor the author's position, that is, that the concepts are not antagonistic. For such, Ricoeur starts with an analysis of the Dworkinian theory on the Law as interpretation.

Dworkin raises the question of interpretation because of the paradox of difficult cases. That is why we have a theory that takes as its starting point the scenario of a judge exercising his role in a "difficult case", and from this Dworkin draws general considerations about the coherence of legal practice as a whole.

But when is a judge faced with a difficult case? When is faced with a specific case to which there is no legal rule that can be applied fairly. Dworkin is concerned with this legal aspect mainly because it allows him to further question legal positivism and three of its axioms: (1) the meaning of a legal norm is in the intention of the legislator, that is, the meaning that must prevail is the one that the material legislator wanted to give; (2) the law provides for unambiguous questions; (3) and the affected cases in which no solution is found in the law, the solution is at the discretion of the judge. It is the criticism of these axioms that will pave the way for the construction of the theory of Dworkinian interpretation.

In his theory the author brings the legal text closer to the literary text[2]. In the same way that a literary text must be coherent in itself, that is, each chapter and paragraph must be in agreement with what was previously written, the legal text, for example the Civil Code must also be consistent and ensure that each chapter and paragraph is in line with what was said earlier. This approach serves to establish that the meaning of a legal text should not be sought out in what the legislator wanted, but in the text itself, which must be coherent and consistent. In addition, and as already recognized by authors like Hart, some laws have an "open structure", allowing a set of interpretations that are sometimes not predictable.

[2] RICOEUR, Paul. *O Justo ou a Essência da Justiça*, Lisboa: Instituto Piaget, 1997. Page 146.

However, it was the criticism of the third axiom that allowed Dworkin to begin the proper construction of his theory of interpretation. Regarding this axiom, the author considers that only the judge's ability to find a precedent will be able to preserve the legal aspect of a decision-making within the scope of the judge's discretion. Dworkin was concerned with this third axiom since it could lead either to arbitrary decisions or make judges believe that they have legislative capacity.

With this, Dworkin answers the following problem: how is it justified that there is always a valid answer without falling into arbitrary decisions or in the belief that judges can create Law?

This is the fundamental question that allows the author to highlight the symmetry between the legal text and the literary text. In the same way that when reading a literary text, the author's intention does not necessarily contribute more to enrich the text or give it meaning, the same is true in the legal text. This comparison leads unequivocally to the following conclusion: the independence of the meaning of the text from the author's intention.

Dworkin creates a fiction[3] in which the legal text is enriched by a chain of narrators, each one adds a different chapter to the narration and no narrator can decide the overall meaning of the text, regardless, each narrator must guarantee maximum consistency of his chapter with the rest. This fiction maintains the precedent, without neglecting the whole that makes up the legal world.

The narrative model takes on a relevant importance in the reconstruction of the meaning of the text, because it will answer the following question: if the meaning of the text is not found in the intention of its author, then where is it located? Dworkin answers this question by stating that the meaning of the text is found in the narration, with this the concept of “fit” also becomes relevant. The interpretation of a given text will depend on the narration used being adaptable to the whole, that is, a segment of text must always be interpreted considering the whole of the text.

[3] RICOEUR, Paul. *O Justo ou a Essência da Justiça*, Lisboa: Instituto Piaget, 1997. Page 147.

This theory naturally allows for a great interpretive diversity of a single text, and to this point Dworkin never attempts to reconcile the theory of interpretation with a theory of argumentation. As Ricoeur indicates, this inability of Dworkin is due to the fact that he has focused so much on the criticism of the "no answer" theory[4].

The narrative notion of "fit" could have been reconciled with a theory of argumentation. We can try to start understanding why Dworkin did not try to conciliate by looking at some of his essays such as "Is Law a System of Rules?".

The essay "Is Law a System of Rules?" reveals that the author attaches greater importance to the substance of the arguments than to their formality, an observation made by Ricoeur. In this essay Dworkin contrasts the concept of "rule" with that of "principle" and uses Hart to proceed with his criticism. The essay criticizes "rules" since they normally have only one meaning, which does not allow the ethical-legal dimension of "principles".

And how does the distinction between rules and principles contribute to the theory of interpretation? Judges can use principles to decide on difficult cases. The principles are identified by their normative force, and their ethical-legal dimension leads to more than one meaning. In each case the principles would have to be interpreted since they have multiple interpretations.

PART IV - RICOEURIAN CRITICISM OF THE ARGUMENTATIVE THEORY

Alexy includes the legal discourse in the general rational practical discourse. The author lists a set of rules and forms of legal arguments, such as the rules and forms of internal justification and external justification. Compliance with these rules allows the rationality of the legal discourse, which seeks universal consensus. Having Habermas as his great inspiration, Alexy formulated a theory about the rationality of practical discourse and this

[4] RICOEUR, Paul. *O Justo ou a Essência da Justiça*, Lisboa: Instituto Piaget, 1997. Page 148 and 149.

enabled him to create the theory of legal argumentation. The author theorizes about the standard theory of legal argumentation, which advocates the justification of arguments based on the consideration that legal decisions can and should be justified.

For Alexy, the general practical discourse is a discourse in which the arguments deal with pragmatic, ethical and moral issues. Practical speech must obey certain rules that aim to correct the arguments. The creation and enforcement of these rules provide the rationality of the discourse, and it is precisely the rationality that gives universality to the conclusions reached by consensus. Rationality and correctness are identical in the speech, an idea similar to the Habermasian conception.

Alexy sets a series of rules that define practical rational speech: (1) anyone can participate in the speech; (2) no speaker can contradict himself; (3) speakers can only state what they believe; (4) the speaker who applies a predicate "P" to an object "O", must be prepared to apply "P" to any other object that is similar to "O" in all important aspects (in law it is the analogy); (5) different speakers can't use the same expression with different meanings and (6) the speaker must substantiate what he says if asked[5]. These ground rules define what a rational speech needs to always be sincere and logically consistent.

For Ricoeur these rules are situated in the "horizon of universal consensus" and are sufficient to guarantee the ethics of the discussion. He states that (1) some of these rules govern the taking of the discussion: everyone has an equal right to intervene and no one is forbidden to give the floor; (2) others rules focus on the entire course of the discussion: each one must accept the eventual request for the reasoning of his argument, or justify the refusal to substantiate it, and finally (3) there are rules that govern the conclusion of the discussion: each must accept the consequences of a decision if the well-argued needs of each are met.

The central theme of Alexy's theory rests on the following question: is a rational basis for legal decisions possible? Alexy's objective, therefore, is to demonstrate that the legal discourse can be rationally grounded.

[5] ALEXY, Robert. *Teoria da Argumentação Jurídica*. São Paulo: Landy, 2001. Page 189.

Correction is, in Alexy's understanding, what is discursively rational and appears to be the main element linking legal discourse to general practical discourse. Correction, in this case, must be understood through Habermas as being rational acceptability, this means it has to be supported by arguments. Ricoeur agrees with this position, stating that what defines a claim as being correct is found in Habermas and in his criterion of universal communication, in the horizon of universal consensus where the formal rules that lead to correction are located[6].What is correct is constructed through discourse. The claim for correction results from the very structure of legal acts and legal reasoning (Tiellet, 2014).

As for the thesis of Dworkin's only correct answer, Alexy criticizes it because of the impossibility of having a single answer for a legal question. Correction is a concept that guides us, but it's not absolute. For Alexy when looking at judicial decisions, the people who make the decisions don't need to explain, however, what they must do is justify the decisions.

According to Ricoeur, internal and external justifications could have allowed a shift from argumentation to interpretation. In Atienza, internal justification is just a matter of deductive logic, but in external justification, it is necessary to go beyond logic in a strict sense[7].

That said, Ricoeur considers the theory of argumentation insufficient, but why? For Ricoeur, the legal syllogism does not allow itself to be reduced directly in such a way that permits the application of a rule to a case. It is necessary, when applying a rule to a case, to assess if the rule is appropriate to the case, and the concept of "fit" of Dworkin can be applied. The application of a rule is a very complex operation in which the interpretation of the facts and the interpretation of the rule are influenced by one another.

Facts are not just raw facts, they have a meaning and must be interpreted. And they can have more than one interpretation, some of those interpretations may conflict.

[6] RICOEUR, Paul. *O Justo ou a Essência da Justiça*, Lisboa: Instituto Piaget, 1997. Page 151.
[7] ATIENZA, Manuel. *Las razones del Derecho. Teorías de la argumentación jurídica*. Segunda reimpresión. México: Universidad Nacional Autónoma de México, 2005. Page 173.

PART V – RICOEUR'S CONTRIBUTIONS TO LAW

INTERPRETATION AND ARGUMENTATION

Ricoeur believes that it is at the level of justification of the premises (external justification) that the connection between argumentation and interpretation is indisputable.

Ricoeur, at the end of "The Just", asks us to agree that perhaps the reconciliation between argumentation and interpretation in a judicial level is symmetrical to the reconciliation between explanation and understanding in sciences of speech and text. Therefore, it is necessary to explain more to understand better. For Ricoeur, the theories intersect when the theory of interpretation meets the question posed by the narrative model of coherence criteria applied to judgment in legal matters[8].

This dialogue within the theories of interpretation and argumentation not only restores the complex unity in the epistemology of the judicial debate, but also puts an end to the uncertainty brought about by the process. This means that the argument is present both in the interpretation of legal texts, which aims to formulate legal norms, and in the interpretation of facts and causal relations between them. Therefore, referring the rule to a specific case is always an act of interpretation.

THEORY OF SUBJECTIVITY AND INTERPRETATION

Besides the rejection of the antagonism between interpretation and argumentation in the legal discourse, it is also necessary to explain the theory of subjectivity developed by Ricoeur, as it is relevant and has implications for law.

[8] RICOEUR, Paul. *O Justo ou a Essência da Justiça*, Lisboa: Instituto Piaget, 1997. Page 160.

In the theory of subjectivity, the subject remains the one who is himself if he is faithful to the word given. As Ricoeur says, the promise serves as a paradigmatic model of a person's identity. As a result, the person who remains true to himself, regardless of the physical and mental changes that occur inside, fulfils the obligations assumed (Ferreira, 2017).

It should be noted that the aforementioned theory can provide a satisfactory answer to the key question about why the law is valid. It can legitimately be claimed that the subject's compliance with all legally relevant agreements stems from the subject's own ontological and ethical essence, which is himself.

Another element of the theory crucial from a legal point of view, is the relationship established between the subject of Law and the Other, who are equal to each other. Here, the ethical acceptance of a person's actions is a derivative of the recognition that is expressed in fulfilling the commitment assumed with the Other (Horcher, 2015). Ricoeur writes that the subject cannot respect himself without respecting the Other as he respects himself. This is how Ricoeur constitutes the principle of reciprocity. The philosopher also makes certain references to Aristotle's philosophy, in particular to his concept of friendship (philia) as a symmetrical relationship between equals.

According to Ricoeur's theory, all promises are made by a subject of the law as one made in relation to another contracting party. This means that this legally relevant promise is perceived as an ethically meaningful way of being subject to the law. As a result the decision to fulfil the obligation is made at the exact moment the promise is made.

It also should be noted that Ricoeur believed that literary narratives are interpreted in the same way as the real stories of human life. In this context, it can be said that the interpretation of the legal text allows the recipient to carry out a normative reinterpretation of the self (own actions) in the world and create an individualized and legally relevant narrative.

Interpretation provides the possibility of entering the "world of text" which is not the world of everyday language, but a tool to distance oneself from reality and return to it through literary

fiction. It can be argued that the text of codes contains a proposal for a normative world. When reading this text, the recipients move away from the current reality to revisit it with a new possibility of being in the world of legal obligations.

Making a projection of one's own possibilities in the world of the legal text represents a legally relevant reinterpretation of one's own activities and oneself. Consequently, what can be found is a modification of the self-narrative of the being, that is, the reader, being the recipient of the legal text.

When it comes to the assumptions of legal positivism about the interpretation of legal texts, the theory proposed by the author rejects the reductionist claim about the existence of only one true meaning of the legal text and the logical-linguistic method of interpreting legal texts. Ricoeur's thinking allows us to go beyond this restrictive perspective.

In Ricoeur's opinion, the text is autonomous in relation to the act of reading. In adopting this perspective, the logical-linguistic interpretation of legal texts loses the so-called text reference. Thus, Ricoeur's legacy provides a uniform theory of interpretation of legal narratives and the legally relevant narrative of human life.

Another relationship that must be analyzed is the one between the author (parliament, government, minister, etc.) and the legal text. Ricoeur's theory does not fit into the theory of static interpretation, according to which the meaning of a legal text remains unchanged in time (Villaverde, n.d). So, there is no place, in his theory for the concept of the so-called authentic interpretation of the normative act, which tells us the act in only binding if carried out by a formally invested author (parliament, government, minister, etc.).

THE NARRATION

The importance of the analyzed points for legal theory is even more visible in the context of Ricoeur's analysis of Dworkin the similarities in the interpretation of literary texts and law are enumerated and understood as a great narrative. Ricoeur suggests an analogy between the

open meaning of the text and the open sense of law. In light of Dworkin's views on the so-called "difficult cases", determining the meaning of the law goes beyond existing precedents, to the same extent that determining the meaning of the text goes beyond the author's intention.

Another similarity worth mentioning concerns the consistency of the interpretation, resulting from the coherence of the elements of the narrative undertaken. In the case of text interpretation, narrative coherence is due to the relationship between chapters, etc. In turn, in the case of legal interpretation, narrative coherence results from the structure of the law, as determined by precedents and judgments[9].

A question arises on whether it is possible to speak about the truth in legal reasoning based on narrative theory. Ricoeur believes that the affirmation of the truth is correlated with the consistency of the narrative undertaken. This means that, in his opinion, the truth is a consequence of the internal cohesion of the argument and interpretation of legal texts and facts.

OPPOSITION TO THE THEORY OF LEGAL SYLLOGISM

Ricoeur's opposes the theory of legal syllogism, considered as the reasoning method postulated by legal positivism. The theory assumes that legal reasoning is based on two analytically distinct premises, of which the main one is the abstract and general legal rule contained in the legal text, while the smallest is the description of the facts. The subsumption of the description of the facts to the rule raises fundamental doubts about a combination of normative and descriptive elements in the conclusion. Even more serious practical problems are caused by the positivist point of view in the judicial application of the law. These problems concern both different interpretations of legal texts by litigants and divergent testimonies from witnesses, who represent different points of view about the facts.

[9] RICOEUR, Paul. *O Justo ou a Essência da Justiça*, Lisboa: Instituto Piaget, 1997. Page 159.

In contrast, Ricoeur allows an uniform theory of legal reasoning, associated with a flexible view of the relationship between legal norms and reality. The coherence between the narrative of the legal text and the narrative of a specific case is the result of interpretative and argumentative attempts by the lawyer, judge, etc.

What is considered a specific case is, in fact, the result of verifying certain relationships that form a narrative, based on the arguments developed by the narrator. This view presented by Ricoeur is a practical and satisfactory alternative to the assumptions of the theory of legal syllogism.

CONCLUSION

With the exploration of the Ricoeurian critique to Dworkin, and to Alexy, and by comprehending the Ricoeurian hermeneutical proposal, the relevance and contribution of all these authors to the analysis of the legal discourse is clearly noted. The only possible conclusion is that it is not possible to completely reject any interpretative or argumentative theory. Although these theories are insufficient to fully explain the legal discourse, as shown by Ricoeur it is possible to reconcile both theories. With the Ricoeurian critique it is clear that the relationship between argumentation and interpretation in law, is symmetrical to the relationship between explanation and understanding. And with the hermeneutical proposition, Ricoeur radically challenges legal positivism and its principles, and these important contributions are noted in this paper.

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