Introduction to the conceptual categories of biolaw on legal discretion

Introducción a las categorías conceptuales del bioderecho en la discrecionalidad jurídica

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Abstract

The identification of the epistemological dispersion regarding decisions made in biolaw becomes evident in the critical incorporation of materialism and new forms of physicalism, since its epistemological basis refers to a broader context than the unifying relationship between mind and brain. Hence, the argumentative theories adopted by authors such as Wroblesky, Aarnio and Alexy, who identify a double requirement to justify, namely: 1) the internal justification, regulated by logic when connecting premises or staments that are part of the judicial reasoning; 2) the external justification that emphasizes in the arguments or reasons to justify those premises or staments.

Biolaw implies recognizing that psychopathology has already traveled the road to understand phenomena such as intentionality, interpretation and interpretative assumptions of the architecture of legal decision. Those who study biolaw must identify those assumptions that sometimes are thoughtless. This implies giving reasons about the underlying mind-body relationship, those elements that make up the legal the relevant human action, and the configura-

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tion of the basic human goods involved in the *litis* of the biolaw. All these elements that force us to rethink the cognitive status of the law in general, and the biolaws in particular.

Keywords: biolaw, hermeneutics, argumentation theory, and psychopathology.

1. Towards the need to identify some general assumptions of biolaw

The identification of so called epistemological dispersion in the history of legal thought, as the provable state in the philosophy of current law, the establishment of the manifesto in the permanent contradiction between the law's models and the constant debate in the decision making in the constitutional courts. This tension has evidenced how one of his most representative disquisitions in the Hart-Dworkin debate regarding the discretion or the possibility of awarding by a judge, who in many occasions starts with the adoption of a reference frame as a thoughtless datum, according to the conceptualization of Maurice Merleau-ponty.

Hence, as already published, argumentation theories are made authors such as, Wroblesky, Aarnio and Alexy that identify a double requirement in justification: on the one hand, the internal call, regulated by logic at the time of connecting the premises or of connecting the statements that are part of the judicial reasoning and, on the other hand, external justification, focused on the arguments or reasons used to justify the premises or statements (1).

That is the reason why the demand for this justification in the argument must be taken into account in notions such as judicial activism or the margin of national appreciation in legislative policies; this is evidenced in decisions such as Artavia Murillo vs. Costa Rica (2) regarding the possibility of using in vitro fertilization tech-

niques. This requirement of justification in the argumentation is also observed in the interpretation of the Colombian Constitutional Court of Article 42 of the Political Constitution of Colombia that defines the concept of family (3), in which it expresses that it is a community of related among themselves by natural or legal ties, which bases its existence on love, respect and solidarity, and which is characterized by the unity of life or destiny that intimately links its most intimate members. In this example, the Court is actually assuming categories related to the etiology of behavior; this etiology, which the courts assume as assumptions, meets the paradox of an epistemological dispersion: if a theoretical reference is assumed that explains the origin of the behavior, in this case associated with the decision to relate as a family, and that referent is of somatic origin, mental symptoms would be epiphenomena, or could be the result of social disintegration; but if a judge assumes evolutionary ontogenetic assumptions, the components of the decision to build a family would be the result of stopping a process of regression to an earlier stage (4).

2. Fragmented models as the foundation of the biolaw

In other words, contemporary thought is structured on the basis of models that must be justified not only in the field of biolaw, but, as expressed in Xavier Zubiri's general philosophy, the crisis posed to the new physics is not about an internal problem of such science, nor a problem of logic or theory of physical knowledge that deals with a problem of ontology of nature (5).

In the case of biolaw, one of the issues to be discussed consists of the criteria of the so-called construction of principles, represented in positions such as the following:

a) Materialism or radical physicalism: It is the opinion that mental processes do not exist, that is, we can argue that there is no mind, only body (6). In that order of ideas, the subjective character of

the sensations known as qualis in the structure of cognition, from the perspective of Rodolfo Llinás, is an empirical problem and therefore is not a philosophical problem (7).

b) The *parsychism*: It goes back to the first pre-Socratics. Thus Campanella, maintains that all matter has an inner feature, consisting of a psychic or conscious quality (6).

c) Epiphenomenalism: Understands physical processes as causally relevant to subsequent physical processes, while mental processes, although they exist, are completely causally irrelevant (7). From the perspective of the qualis, they are not necessary components or products of brain function that, if they were occasionally, are essentially fleeting and little trustworthy (6).

d) Identity theory or theory of the central status: Between mental processes and certain brain processes, there is an identity like that between the evening star and the morning star, which are alternative names of the same planet. In one of the versions of the theory of identity due to Sclick and Fleig, mental processes are considered as things in themselves, known by familiarity from within, while our assumptions about our brain processes, which we know by theoretical description, they come to describe things from outside (6).

This leads to remember, from the philosophy of law, that many of the decisions in this new branch called biolaw, presented as a theoretical construct, are involved with the vast advance of the neurobiological adventure. Now, the nature of the biolaw conflicts means that jurists will also have to face the technological difficulties that scientific research faces. In this respect, Llinás emphasizes that it is precisely in research that powerful centrifugal forces appear that move it away and take it to distant regions rich in data. But –he warns– if we want to come up with some explanation, these exploratory forces must counterbalance with forces that re-route the results towards a common and integrating conceptual framework. One approach that may be useful is to do

extensive searches that will allow to discuss critically crucial ideas, even if they have not yet been confirmed.

One of the main questions in the relationship of the statute of the neurobiological sciences with the biolaw is to recognize that the current state of neuroscience is largely pre-theoretical (underlines out of text). There is an uneasy tension between the increasingly precise resolution levels and the need to keep in view the general contours of the problem. The dangers, which are due to poor theorization of date, but full of theoretical grandeur, they look as supplemented by those who are infatuated with isolated facts that ignore hypotheses (8).

In the legal field, this profound questioning of the statute of the statements of a scientist has as one of its main scenarios the interpretation of the judge. In legal literature, it is found that this interpretation can be assumed as adjudication theory or as a theory of discretion, that is, the act of interpretation by the judge supposes a pretension of correction on the part of the judges, in particular in the work of Dworkin, who proposes as archetype Judge Hercules: in him we find some of the assumptions that are not made explicit in the theory of law –see Endicott–, who following Sainsbury proposes to replace the classical conception of vagueness, based on a model that maintains sustenance in the idea of limit, by which denominates model of the similarity of paradigms (9).

Another aspect that must be taken into account in the identification of the assumptions –often unreflective– in the decision-making process in biolaw, is the fact that in our fragmented current time, there is also a debate about traditions in the background. These traditions are based on the idea of a referential element of language held by Massini, Finnis, Vigo, Barzotto and others, who, based on the thought of the logician Georges Kalinowski, argue that philosophy without the rigor of thought and language that only logic can develop, it quickly becomes literature. Based on the previous approach, these authors have tried to rethink some of

the themes of natural law, with the methodological rigor provided by contemporary formal logic and the meta-theory of the sciences (10).

With a Neo-Aristotelian background, they assume sharp disputes based on proposals that defend the aforementioned referential element of language with authors such as Rawls: In the context of constructivism, John Rawls proposes a public theory of justice in a pluralist society, which is reached through a «formal construction procedure of Kantian origin» (11, p. 202), which concomitantly seeks to ensure the reasonability of these principles through a cross-linked consensus.

The school of the new natural law represented, among others, by Germán Grisez, answers to the neocontractualists questioning the relevance of connecting the contents of justice, in what Professor Massini calls «the procedural fallacy». Additionally it is highlighted, the split of this same neocontractualism, which implies that in the spheres of the person's life, a split that would result in a particular social order resulting from the location of the ideas of the good, assigning them to the private sphere and conceptions about the justice to the public discussion, and that leaves in question the capacity of motivation of those consensuses so that the citizens act with honesty –since the consensuses would only have a weak motivation capacity– (12).

3. The model of language: an assumption of the judge with consequences in the biolaw

Well, the conception of language adopted by the jurist will have consequences in the way of understanding the correctness of the decisions in the law, the margins of clarity or the ambiguity with which the cases are interpreted, with the corresponding consequences to the effects of such decisions on the structuring of personal life in society. All these elements related to the conception of

the language underlying decisions in the biolaw, are exemplified by the fact that in the classical conception to the extension of an expression is conceived as a geometric figure, and the vagueness in the expressions of the language is conceived either as a failure of language to capture its limits, or as a form of ignorance about those limits. In the similarity model, on the other hand, vagueness is flexibility in the normative use of paradigms or patterns of use, and indetermination is not conceived as a difference or an incoherence in the social facts that determine the meaning, but as a characteristic of creativity in the use of language.

In order to explain the similarity model in the above-mentioned language conception, Endicott cites the following passage in paragraph 71 of Wittgenstein's philosophical investigations: «Frege compares the concept with an area and says: an area delimited without clarity could not at all be called an area. This means that we could not do anything with it; so it is meaningless to say: «Stop here approximately!» Imagine that I was with someone in a square and said that. While I am doing it, I do not even draw a limit, but rather I make an ostensive passage with my hand, as if I were showing him a certain point. And that is exactly how it is explained what a game is. Examples are given and they are intended to be understood in a certain sense, according to the conception of Ellscheid » (3, p. 66).

The ability to delimit the application of language is exemplified by recourse to the ability to name an object, in this case we use as an example a star that appears when observing the sky: «As well as» The evening star is the morning star «(the example dilecto de Frege) involves that the properties that characterize the first are logically different from those that characterize the second, the properties that characterize the phenomenal are logically different from the properties that characterize the neurophysiological. Moreover, this has to be the case, because a condition for which such identities can be formulated is that there is at least one phenomenal property that can not be possessed by the neurophysio-

logical process, if not, the identities could not even be thought». (13, p. 301).

It is then recalled that the biolaw and the assumptions involved in the *Interpretative Architecture of the Decision*, such as the conception of the language to be adopted by jurists, is called to incorporate the debates on the science of the decision advocated, among others, by Facundo Manes: the reason is that in cognitive science, which has as its object of study human decisions and focuses on the way in which mental activities occur in the brain, it would be possible for jurists in their analysis of the decision to incorporate empirical data, as for example, those that someday could establish that the fundamental personality dimensions proposed by Eysenck (genotype/phenotype) were linked to the specific structures or functions of the brain. Suffice it to say that most of the research on the brain to date has been done in areas such as the cultivation of neurons in the laboratory (Angier, 1990), reading and language (Blakesselee, 1991), memory (Hilts, 1991), genetic instructions (Angier, 1992), antisocial traits –genetic traits that tend to occur in families– (Lykken and Cols, 1992), visual perception and cognition (Blakeslee, 1993 and Brody, 1993), genetic engineering (Liebssman-Smith, 1993), among others. It is anticipated from this perspective that we could be able to know our personal genetic risks (Kolata), which raises ethical issues serious as how this information would be used (Fisher) (4, p. 57).

4. Interpretation as a critical element facing materialism

But this reference to empirical evidence, as an element that must be taken into account by jurists in the decision on biolaw, is –as we know– in itself a philosophical problem. In a 1977 text called The Self and its Brain, Karl Popper and Eccles announce that materialism surpasses itself; differentiating it from the physicalism that de-

fines based on the expression of Otto Neurath, related to the idea of conceiving of men as machines and the consequent question about the explanation of human consciousness as one of the most important problems of philosophy.

Popper suggests, as one of the arguments against the aforementioned materialism that the emergence of levels or hierarchical strata, and that of an interaction between them, depends on a fundamental indeterminism in the physical universe. Each level is open to influences from lower or higher levels (6).

The implications of this critique of materialism are reflected in the case of biolaw, since, from the perspective of critical rationalism, decisions about what is considered fair are located in the world 3 and not in the world of material relations. These decisions and the corresponding debate on judicial activism in which the sources and material limits of the biolaw are involved, assume a justification as to whether the right can be reduced to its factual components ascribed to materialism. As an example, the case of Artavia Murillo and others (2) of the Interamerican Court of Human Rights can be observed: to solve this case, the judges must decide whether there is consensus or not to answer the question of what is a family *versus* the limits to the right to choose a personal life plan. Precisely the theme of the claim of justice could be framed within what Popper calls world 3, as already noted, based on what he calls a dualist-interactionist theory; This theory proposes that in order to understand the brain, mind and activities that are considered to be involved in the production of conscious experience, it should not be forgotten that this mind-brain relationship can be conceived as a machine of almost infinite subtlety and complexity almost infinite that, in special regions and under appropriate conditions, is open to interpretation with world 2, the world of conscious experience (6).

Precisely in world 3 Popper places the theories of justice, applied to this case the justifications about how the formation of a family is made, and argues that those who think that the mind is

a causal product of self-organized matter, would consider it difficult interpreting the 9th Symphony in this sense as only a material by-product, not to mention Othello or the theory of gravitation, because world 3 implies the possibility of applying the method of trial and error elimination without the violent elimination of us: this is what the great survival value of the mind and world 3 consists in. Thus, by predicting the emergence of the mind and world 3, natural selection surpasses itself and its originally violent character. With the emergence of world 3, the selection no longer needs to be violent: we can eliminate false theories through non-violent criticism. The non-violent cultural evolution is not a mere utopian dream, but rather is a possible result of the emergence of the mind by natural selection (6).

This critique of materialism, which involves in its background the crisis of positivism with its factual reductionism, is not only an argument that can be observed in the evolution of contemporary legal thought, but can also be identified in the evolution of some practices such as psychopathology. In this order of ideas, it can be seen how, in the middle of the 19th century, contacts began to take place between medicine, physiology, evolutionary biology and the psychology of association, which paved the way for emergence within the field of natural sciences, of the psychological science in particular, contexts that in the general frame of the science had a change that maintains a great influence until today. In this argumentative line that implied a change in the classification of psychology as a natural science, it is noteworthy to Emil Kraepelin, who, in addition to applying the experimental method, was developing the first classification of mental disorders on the basis of fundamental evolution and the outcome of the different diseases, and not on their supposed organic causes (4).

This advance, beyond strict materialism, serves as an example to draw attention to this gap in the evolution of Western legal thought, particularly on the explanation of human acts with legal relevance. It can be seen how Brentano points out the issue of

intentionality by allowing, among other aspects, the evolution of the understanding of such acts from phenomenology in an experimental direction (Stumpf) and towards a philosophical direction (Husserl) (4).

The school of Wüzburg is outstanding in this evolution or change of paradigm, since it raised that, regarding the thought process; the associationism fails to explain the results of the experimental tasks around the thought. One of his explanations consists in claiming that something should direct thought through the appropriate threads of the associative network; in Wüzburg they proposed that it was the task itself the one directing. In their terminology of the last season they affirmed that the task established a mental disposition that properly directed the use by the subject of his associative network; Shakow will pick up this concept in 1962 in his experimental work on schizophrenia by proposing a fractional mental disposition (*set segmentla*) as the cause of attention deficits in schizophrenia. His research on thought processes led him to a psychology of function rather than content psychology (4).

This phenomenon of the direction of human action, partly because of the task that is being carried out, is very important in the field of legal hermeneutics because, at the time of the configuration of the legal case, not only must the facts be proven, but that also the ordering of them conditions the legal qualification of the *litis*, which gives rise to different types of imputation. In other words, intentionality for the law interrogates a fiscal vision of human action governed by law.

A reference can be found to broaden the understanding of intentionality in human acts in philosophy and in the line of phenomenology, in particular to Karl Jaspers influenced by Husserl (1859-1939), who reviews this concept. It should also be mentioned Dilthey (1833-1911), author who creates a descriptive and comprehensive psychology, according to which only the correct psychological understanding of its meaning (*Verstehen)* and not the physical explanation of its mechanism (*Erklaren)* allows adequate

knowledge of human life based on what was stated by Laín in 1978 (4).

This methodological element is evident in the already well-known proposal to refute the Kelsenian idea that, with its normative positivist vision of science in general, legal science should limit itself to explaining the decision in law as a syllogism, justifying it in a deductive way, and with this ascribing itself to the assertoric logic, as is the case of Karl Popper and Kocch Russmann (14).

Other criticisms are added to the idea of Kelsen on the decision in law: given its basic model, obviously Kelsen is unaware of the existence of the hermeneutical circle involved in legal argumentation. In particular Otfried Hoffe pronounced, regarding the categorical imperative as a process of generalization: Gunther Ellscheid took the decisive step when he conceived the ethics of Kant as ethics of procedure and doctrine of justice: «in the beginning is not the material moral principle, but the procedure» (14, p. 80).

Many of the theorists of the law debate if an institution –in the case cited on the family– is based on nature, but, following the demands of reasonableness of the biolaw, for a decision to be consistent, the reference to nature is a topic that should be specified. Suffice it to illustrate Ellschid's claim in his so-called concrete natural law: law does not arise from a nature always considered equal nor simply from the law formulated as abstract and general. These are only, in a certain way, raw materials of which an act of procedural conformation (jurisprudence and in general the just act) has to leave the concrete right. This idea is not new in itself, but it was not fully aware of this point but first of all in hermeneutics. From Schleiermacher, this statement means that in the comprehensive sciences oriented according to sense (unlike those oriented in the causal-explanatory sciences) the subject-object scheme by principle lacks validity: a similar understanding is not objectively (since the sense is not any substance), but neither subjective (but both reflective and traditional and situational oriented); it is rather constantly subjective-objective at the same time. Any attempt to separate the

rationality of the personality it comprises in the comprehensive sciences is doomed to failure (15).

In this order of ideas, the biolaw must include in its debates the corresponding criticism of materialism; particularly the new forms of physicalism, in general, since its epistemological basis is in a much broader context than the unifying explanation of the mind-brain relationship. The biolaw implies the interpretation of human behavior and the different forms of emergence of intentionality studied by criminal law: malice, guilt and the pre-intentional modality. But this does not exhaust the need to justify the interpretative assumptions of the architecture of the legal decision. The student of the biolaw should justify the often unreflective assumptions of his decision or the jurisprudential tradition, this implies, therefore, give reasons about the underlying body mind relationship, the elements that make up the legally relevant human action, the configuration of the basic human goods involved in lawsuit in the biolaw, in the understanding that psychopathology has also problematized the relationships between different sciences and the way in which the subject-object relationship mediated by understanding arises, all these elements that make it necessary to rethink the cognitive status of law, in general, and of biolaw, in particular.

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