BETWEEN DWORKIN'S LIBERALISM AND LUIGI FERRAJOLI'S GARANTISM - THEORETICAL APPROXIMATIONS AND DIVERGENCES

ENTRE O LIBERALISMO DE DWORKIN E O GARANTISMO DE LUIGI FERRAJOLI – APROXIMAÇÕES E DIVERGÊNCIAS TEÓRICAS

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ABSTRACT

The present review proposes compare two different ways of understanding the law, in order to point out their approximations and dissimilarities and with this, better debug the discretion of the legal practice. In order to do so, it was invested in the comparative analysis between Dworkin's theory and Ferrajoli's, both because they are very attractive to contemporary law, and because they imply different forms of conception of law with a supposed inheritance of positivism and jusnaturalism. For this, through a bibliographical research, the Dworkin theory was expose, at a first moment, to later address the one of Ferrajoli. In a third moment, the comparative analysis between the two is carried out and it concludes by the practical approximation of one and the other, because in both the dialogue between law and morality is possible. Nevertheless, from the different discourse on the relation between law and morality, there are different possibilities for the right and the moral in each of them.

Keywords: Liberalism. Luigi Ferrajoli. Ronaldo Dworkin. Right and moral. Comparative analysis.

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RESUMO

O presente trabalho se propõe a comparar dois modos diversos de compreensão do direito, sob o propósito de assinalar suas aproximações e dessemelhanças e, com isto, melhor depurar a descrição da prática jurídica. Para tanto, investiu-se na análise comparativa doutrinária entre a teoria de Dworkin e Ferrajoli, tanto porque se mostram muito atrativas ao direito contemporâneo, como porque implicam diferente forma de concepção do direito com pretensa herança do positivismo e jusnaturalismo. Mediante pesquisa bibliográfica, expõe-se, a um primeiro momento, a teoria de Dworkin, para depois abordar a de Ferrajoli. Num terceiro momento, analisa-se de forma comparativa ambas as abordagens e conclui-se pela aproximação prática de uma e de outra, pois nestes modos teóricos se possibilitam o diálogo entre direito e moral. Não obstante, do diferente discurso sobre a relação entre direito e moral resultam diferentes possibilidades ao direito e à moral no âmbito de cada uma delas.

Palavras-chave: *Liberalismo. Luigi Ferrajoli. Ronaldo Dworkin. Direito e moral. Análise comparativa.*

1. INTRODUCTION

Justice has been a recurrent theme in philosophy and law throughout human history. Thus, in the course of time, aporetic questions, such as freedom and equality, have constituted the framework of ample discussions to contemporary jurists, who are inspired by sources such as jusnaturalism, juspostivism and the very interfaces between law and morality. Thus, the conception of law and justice is faced in its own way by Ronald Dworkin and Luigi Ferrajoli.

The academic interest in analysing the theories of these authors is justified by the fact that they have impacted the understandings of law and the directions taken by courts worldwide. On the one hand, Dworkin was - and still is - a methodological and theoretical foundation. On the other, Ferrajoli presents a theory that has been consolidated as the foundation of the limitations of the State in a post-positivist model, whose guidelines are also taken on a doctrinal scale. Thus, Dworkin and Ferrajoli represent facets of legal ideas that oppose and complement each other for the understanding of fair law.

In this way, the discussion about which models of rule of law are sufficient to guarantee the best legal security gains relevance, facing the limitations of the separations between law and moral, facing the liberal visions of the world. Above all, there is in the discussions the need to guarantee the comprehensibility of a just law, by the legal security of the liberal law and which is effective in dealing with the problems caused by classical positivism.

In this way, questions remain, such as what would be the decisional models proposed by Ronald Dworkin and Luigi Ferrajoli to deal with the problem of deciding well, facing the liberal paradigms of equality of the authors?

The objective of this work is then to understand the systematics of Ronald Dworkin's thought and subsequently Luigi Ferrajoli's theory, in the context of the moral of freedom and equality and the applicability of the just law, through legal certainty facing the problems of juspositivism.

These authors invest in different methodological discourses to explain law, which have proven to be paradigmatic: the positivist discourse on the one hand and the hermeneutic discourse on the other. Otherwise, the different methodologies proposed for legal practice imply different theories on the relationship between law and morality. In this panorama, the present article is dedicated to the comparative analysis of the two conceptions of law, that of Ferrajoli

and that of Dworkin, with the purpose of highlighting their similarities and differences, in order to make them clearer in their outlines.

Since this work proposes a comparative analysis between two thinkers and their conceptions of law, it presents an eminently bibliographical nature. In this sense, the present study approaches initially Ronald Dworkin's theory, especially the liberal model adopted that would be accomplished, elementarily, by the axiological official neutrality as a State restraint. Then, the theory of garantism is analyzed with the assumptions of Luigi Ferrajoli, who presents it as a general theory of law in a neo-positivist clothing that would be appropriate to neo-constitutionalism.

In a third moment, the conceptions of Ferrajoli and Dworkin are compared in order to seek approximations and divergences between them. At the end, we conclude that, although the methodological discourses are different, in practice, Ferrajoli's post-positivism is close to the Dworkian theory, since it enables an intense dialogue between law and morality through argumentative efforts. Nevertheless, this observation generates a double warning: a) even if we abstract from the discourse and focus on practice, the difference in the treatment of the relationship between morality and law by the two theories results in different ultimate foundations of law, with implications in some areas, especially international law; b) even if in both theories there is a different emphasis on the relevance of morality to law, philosophy should be taken seriously in both, so that law does not become a kaleidoscope of opinions without a solid foundation.

MERITUM MAGAZINE • v.15 • n.4 • p. 187-201 • 2020

2. RONALD DWORKIN'S THEORETICAL FOUNDATIONS

Equality and freedom are fundamental themes in the analytical framework of Ronald Dworkin (DWORKIN, 2000), who proposes a liberal model of state that conforms to a theory of justice whose axiological basis is committed to the content of equality: people are equal to the extent that the state treats with equal consideration the various models and choices of life. In this way, freedom and equality, as the content of justice, would imply material and discursive limitations on the State, but would also demand the assumption of duties by private individuals and by the public authority to ensure equality of resources - equalisation of environmental and personal differences so that all have equal opportunities to develop within their choices.

It goes further: for liberal theories, be they constituted by the classics, such as Locke, Kant, Mill or by contemporaries, such as Dworkin, Rails and even Ferrajoli, restrictions to freedom only fit into a supposedly democratic legal system upon plausible, rational and legitimate justification. In this sense, Dworkin would be proposing a model of freedom to which the axiological neutrality of the state would be an elementary condition, which implies abstentions, but also actions, in order to enable the exercise of personal formulations of each individual. (IOSA, 2017).

Thus, the limits for state intervention are not the exclusive result of the legal claim, but mainly of the philosophical understanding from which the interpretation of law derives. Thus, even under the positivist bias, acceptable by part of the liberal thought, or by a hermeneutic

thought more built in the jurisprudential view, the philosophical constitution drives the right (MELO; POMPEU, 2017).

It is important, however, not to lose the perspective that the claim to justify equal freedom as a parameter of limitation, but also of information and guidance of the State, is derived from the previous axiological conception that each human being is equal in dignity and has equal right to the equitable search for his best personal portion, thus understood the set of goods and rights that best suit the life model established by each person to himself. As each person is equally worthy to any other, each one may choose their own life model, without the State intervening - significantly - except, and from here we return to the Kantian warning, if personal choices interfere, directly and fundamentally, in the freedom of others who are equally worthy.

Freedom and equality express facets of formal and material protection by the State, which are not achieved, as already warned, by the non-intervention or abstraction of the State from imposing or inducing some model of good life for all. Equality and freedom would constitute models of society in which the allocation of goods is allowed, which are a function of the conceptions of life adequate to the personal aspirations of equally worthy human beings, in a formal and material way (FACHIN; SCHAUMAN, 2008).

To justify the material content he attributes to equality, as an equal system of freedoms that ensure the exercise of individual autonomy, Dworkin develops the "metaphor" of the auction on the desert island. Thus, he describes a fable that deals with the problem of the division of goods on an island among castaways (DWORKIN, 2005). To test the justice of the To test the justice of the distribution method, he makes a series of propositions: first, he suggests that the equal distribution of goods be carried out. In this case, he concludes that the method is unjust, since it would result in an undeservedly large share to those who do not deserve it, as well as imply a bad distribution of scarce resources, since it would impose a specific share of good to the castaways that, due to this condition, would not adequately satisfy the personal interests of each one. This distribution methodology would not pass the test of greed (DWORKIN, 2005, p. 81), which is why the mechanical division of resources would be insufficient to establish a standard of equality qualified by the freedom and autonomy of individuals.

He then proposes another method: the distribution of equal amount of tokens to the castaways for the realization of a dynamic similar to an auction. This system aims to reveal the market as a "just" instrument for distributing economic goods, given that each person would spend their tokens on a personal strategy of life plans; that is, to the limit that brings them personal satisfaction. In this hypothetically fair system, each person would be left equally free and responsible to allocate their goods, but under the cost of the sum of personal choices. (DWORKIN, 2005).

The market, therefore, would respect the "prior" axiology based on equality of freedom and responsibility. This is because a system of distribution of wealth in society reveals itself to be fair to the extent that formatted by a mechanics that allows people to be equally free and responsible for their fate. In short: the auction, as a metaphor for the market, proves to be fair as a method of distributing goods, since it equally respects the various models of life by giving everyone equal freedom, resources and responsibility to amass their share of good without implying, therefore, a homogenizing or dictatorial construction (MONTARROYOS, 2013).

The concern with equality as a reference of law is a maximum that goes beyond Dworkin's conceptions. It has equality, or at least the absolute non-equality, respecting the ways of life, as an essential parameter for a democratic criterion and especially for a criterion of fair law application (MARCO, SANTOS, MOELLER, 2019).

Thus, we have in Dworkin's theory the axiological foundations or justifications of social institutes, which is given by showing according to the formal and material conditioning of justice. It is a fact that, outside the hypothetical plane, the issues of developing and improving instruments and mechanisms that observe the conditions of justice acquire great complexity. However, for the purposes of this paper, the aim is to highlight the Dworkian methodology of ascertaining the justice of the methods of distribution of social goods through their conformity to the conditions of equal dignity of the individual.

But beyond the fair criterion of distribution of economic goods, Dworkin also ventures into the fair criterion of distribution of rights. This would be representative democracy (DWORKIN, 2000, p. 288), which would be limited and conditioned by the prior axiology of equality, as much concerning the economy, as other areas of regulation, such as civil rights and bioethics. Dworkin, in this way, maintains the tension between the concept of fundamental rights and democracy: democratic process would be fair to the extent that the various individualities were equally respected, in order to ensure equal dignity to the different models of life (VIRGÜEZ RUIZ, 2015).

In this sense, the Dworkian concept implies that democracy, per se, would not be sufficient to constitute a just model. However, a just model could not be non-democratic. That is, a just model depends on the democratic conception that personal wills have equal weight and relevance, both in economic and political relations. Thus, the interference of the state is legitimized both in the democratic process and in the axiology that is prior and basic to it: the equal individual autonomy as an integrating limit of the right, which is not incompatible with decision making based on moral standards of specific conceptions of life models (KYRITSIS, 2016).

Thus, Dworkin presents a criticism to positivism, making use of the paradigm of interpretation, so that the positivist structure would not be the only one to shape the law (RODRIGUES, 2013). However, even in the face of the theoretical application in which positivism would be structurally wrong, Dworkin does not rule out legislation and decisions through cooperative models of law with legal certainty.

Dworkin also proposes the distinction between the majoritarian and the cooperative model. The majoritarian model would be the one in which the simple decision of the majority would be sufficient to interfere in the freedom of the minority, including the largest possible minority, be it the individual. A cooperative or partnership model, on the other hand, understands that, as much as there is the possibility of joint action and interference due to public values, one must respect the ways of life and the axiology that provides for equal dignity among human beings. Only through a cooperative system of partnerships would a fair constitution be feasible, and, therefore, interference in individual autonomy would be rational (GOODHEART, 2013).

A liberal and just interpretative model would not, therefore, discard legality, which could suggest a rapprochement with positivism. However, the cut of legality does not mean that the literal interpretation is the only possible, on the contrary, the legal bases are posited and interpreted through the axiological element that serves as the integrating league of law: the

equal dignity of individualities. Law, for Dworkin, is not performed in a semantic framing practice which would be performed by the respective factual description. Rather, the legal practice would be interpretative, it would take place in the effort of argumentation through coherent considerations from a common value axis. Before the law finds its legitimacy and validation in a functional and a priori methodological structure, it would be legitimised by the construction of a serious interpretation, which, before venturing into the factual description of how it happens, proposes to present itself in its best lights.

3. THE LEGAL GUARANTEEISM

The theory of garantism emerges as a structuring legal theory for the formulation of a general theory of law and as a parameter of post-positivist justice. In this way, it brings up the validity of legal rules and the vectors of normative application, so that the theoretical conceptualization of Ferrajoli's ideas is indispensable to establish the epistemological framework on which, significantly, contemporary law rests.

Moreover, in this work it is verified that garantism, in the orbit of domestic law, as a reflection of a liberal theory, talks with Dworkin's theory, which would lead to a preliminary observation that it would not be incompatible with the logic of garantism. However, the previous verification is not a contradiction of ideas, so that the models of Ronald Dworkin and Luigi Ferrajoli complement each other in the compression of the best application of the law.

3.1 THE GENERAL THEORY OF LEGAL GARANTISM

The theory of legal guaranteeism, as proposed by Luigi Ferrajoli, constitutes a spectrum of ideas linked to the trunk of theories on law that have legality and the protection of individual liberties as their parameters. Although there is a reasonable misrepresentation of the concepts of guarantee linked to common sense, even in a pejorative way due to movements linked to groups that protect human rights, it is necessary to understand what guarantee theories effectively imply.

In the etymological plan, the word garantism originates from the neo-latin languages, so that it brought, in the primary texts, the idea of guardianship, protection and safeguard of the weakest. That is, garantism, initially, meant the guarantee of protection. At first, these terms were linked to the countries of civil law culture, such as Italy, Portugal and even Brazil, and related to negative freedoms, i.e., limitations of the state by law (IPPOLITO, 2011). It should be noted that there is not even an old English translation for garantism, which uses the word "garantism", whose construction was totally brought from the Roman-Germanic doctrine.

This term had, with the advent of the welfare state, a semantic enlargement, so that it is no longer limited to mean the guarantee of individual protection, or limitation of state discretion. Rather, it was extended to the appropriate means for the effective protection of that which was intended to be a right. Thus, it was imposed not only the individual protection of the weak-

est, but also the positive need for the implementation of a constitutional matrix of protection of individual freedoms and the implementation of social rights (IPPOLITO, 2011).

Luigi Ferrajoli, when analyzing the etiological origin of the term, gives to the word constitutionalism (or garantism) three senses. It should be mentioned that these meanings of the word are not to be confused with the dimensions described in the book Law and Reason (FERRAJOLI, 2014), but they complement their understanding. The first sense would be in the word garantism as "paleopositivism", because, for Ferrajoli, it would embody the revisiting of legal positivism with a bias towards material protection. The second interpretation of the term would be linked to the definitions of validity and validity, in relation to which garantism would imply the guarantee of validity and validity within a constitutional model of the norms understood as fair by that society. The third meaning of the word garantism appears in the political philosophy model, under which a general theory of law would be based on material bases to define, in a democratic and legitimate way, what a "good government" would be like (COSTA and VERAS NETO, 2016).

Therefore, it is extracted from the etiology of the term garantism the idea of guarantee, effectiveness, security, defense, preservation of individuals against state discretion. Thus, there is in garantism a law model and a general theory by which individual freedom is guaranteed through a system of protections and protections based on legality and constitutionality under formal and material aspects (AVILA, 2017).

The considerations of garantism as a theory exclusive to criminal law or criminal procedure are quite common in lay understanding. However, there is no academic parallel of exclusive linking of garantism to the criminal or criminal procedural sphere. Rather, Ferrajoli's ideas deal with a general theory of law by philosophical shades, since, as a professor, he is dedicated to teaching the disciplines of General Theory of Law and Analytical Philosophy (FERRAJOLI, 2014).

It is verified, thus, the application of the guaranteeist postulates in all branches of law. As an example, Fredie Didier (2011, p. 211) deals with the applicability of the garantist doctrine in the procedural scope, covering in this case the civil procedure. In this way, the doctrine is described as the one that would aim to protect the citizen against abuses of the state in a liberal model of limitations. Thus, for Didier (DIDIER, 2011), the system of process garantist stops treating it as a mere duel between parties and considers it by the necessary conformation to principles, such as the guarantee of adversarial proceedings, the need for improvement of judicial decisions and even the construction of a theory of argumentation based on legality coupled with the material effectiveness of those principles considered indispensable.

It is true that in the book Law and Reason by Luigi Ferrajoli (2014), it deals several times with matters directly linked to the material and procedural criminal area. However, it is not possible to deduce, let us say once again, that the so-called garantist system is restricted to these issues. What can be verified is that, as a liberal theory based on the concepts of legality and molded by the previous liberal aspiration of limiting state discretion, Ferrajoli works on an axiology that can be clearly applied to criminal law, a source of various kinds of discretion and where the syllogistic character is traditionally reinforced. Therefore, Ferrajoli's theories constituted a basis to curb punitivism and meddled in useful points to criminal sciences, criminology and criminal law and criminal procedure itself (FREITAS, MANDARINO, ROSA, 2017).

The garantist notion is posed, then, as a liberal theory of eminently constitutional nature. Thus, it is verified that, for garantism, the protection of the citizen should be that embodied in the unnecessary non-intervention of the State, and this in any legal branch, whether procedural or material law, which refrains - it is believed - the imposition of life model or logic persecutory of citizens. In short, garantism would be a liberal model founded on legality and constitutionality, under the respect of fundamental guarantees (SERETTI, 2009).

The structure of the garantist system proposed by Luigi Ferrajoli for the protection of individual liberties, with liberal foundation, uses essentially the legality, but without disregarding the constitutional advances of positive safeguards. In this way, the double face of normative respect to the constitutional text is formatted in the garantist system. The first face manifests itself in the guarantee of no unnecessary intervention, while the second is revealed in the need for positive action of the state to guarantee that defined as fundamental to the citizen (CADEMARTORI; GRUBBA, 2012).

Therefore, the garantist system defines three (3) structuring axes: the first to be embodied in the normative material hierarchy of the Constitution by a dynamic of "strict legality" under the epistemological plan; the second to reveal itself as a critical instance of law and reality, in which the norm is evaluated for compatibility and effectiveness, in order to avoid teratological decisions based on a solid argumentation; and the third ventures into philosophy and political criticism, instances by which the law is legitimized to protect the purposes of the state and in which work the characteristics of democratic society in a broad sense, i.e. under the focus that the wills and decisions of the majority prevail, provided that the minimum limits of minorities are respected (FERRAJOLI, 2014).

Alexandre Moraes da Rosa deals with four fronts or dimensions of garantism. i) The first front is described as the need to verify the formal and material compatibility of the norm with the Constitution, hierarchical primacy that must be fulfilled by positive binding; ii) the second dimension is the verification of a system by the imperative of democratic effectiveness. In this dimension, it is assumed that the norms must be legitimate, which occurs when observing the rights considered as fundamental; iii) the third front is the binding of judicial activity to the law, according to which the magistrate is strictly subject to the norms. He would be, therefore, bound to legality and constitutionality; iv) finally, the fourth dimension would be concerned with working on the critical sense of legal science with the purpose of avoiding teratological decisions (ROSA, 2003).

In this way, garantism implies a general theory of law, understood as a democratic theory of justice, applicable to the several branches of legal knowledge because it has a constitutional character. Guaranteeing is the theory that preaches the democratic conformation of respect to the constitutional text. In this way, the terms proposed by Luigi Ferrajoli (FERRAJOLI, 2014), when formulating the structuring axes of general theory conducts that bind the Public Power, differentiates the mere validity and vigor of the norms produced, while classifying them between illegitimate and legally valid. Norms can only subsist in a legal system if they are materially adequate to it.

Therefore, garantism is understood as the process applicable to constitutionalized post-positivism. The garantist formulation intends to be a guide not only for the judicial decision, but also for the legislative formulation itself, by establishing parameters of State action based on the non-intervention and on the effective fulfillment of the constitutional provisions. More-

over, for the theory of warranties, the principles, as norms, should be positivized even if they represent previous axiology (FERRAJOLI, 2014).

Thus, in order to have a democratic system and consequently closer to justice, it would be necessary from the epistemological point of view the separation between three categories: i) what can be decided by the majority; ii) what should be decided by the majority; iii) what cannot be decided by the majority. In this way, the legal system is consolidated by the limitations between what cannot be decided by the majority, because it hurts minimum guarantees inherent to the human condition, diverging from those issues whose public interest predominates, so that in these should be decided by the majority or can be decided by the majority (FERRAJOLI, 2014).

For such is that the democratic dimension of garantism is understood as the sharing of powers, in which the adherence of each one to its function allows the creation and application of the norm in a substantial way, here understood as the one in which freedoms exist and are respected not only at the formal level. That is, for garantism, the legislature has its specific function in the functioning dynamics of the state, which is circumscribed to the decision on what should be decided - that is, on the creation of legitimate norms -, while the judiciary has the duty of legitimate application of the norms produced by the legislature, which it does through critical normative application on rational grounds (CADEMARTORI; CADEMARTORI, 2006). Therefore, in an effectively democratic system, not everything can be decided, while decisions are taken through the system of laws, especially the Federal Constitution, which limits the powers of the state.

In this context, the garantist theory does not rule out a previous axiological limitation that is, in a way, based on morality. It only understands that the guarantees formulated by the security of the positivist liberal model should not be removed, constituting support to be applied in conjunction with the principles that would be positivized in the system, as the need of each society, according to a legislative process shaped from values (ZANON JÚNIOR, 2015).

Therefore, the garantist model is the one in which the system of principles is constitutionalized. It invests in the construction of a formal model of operation, legitimation and validation of the law, but it does it in an airy way to morality, since the application of the rules can be mitigated by the adoption of a principiological material interpretation, under the critical concern of avoiding teratology in its decisions.

4. APPROXIMATIONS AND DIVERGENCES BETWEEN LUIGI FERRAJOLI AND RONALD DWORKIN

Initially it should be said that Ferrajoli and Dworkin constituted their works and their ideas in different correlations of legal space and mentality. Dworkin turned to writing based on North American hard cases, in order to seek a formulation of serious arguments for decisions in a system typically described as Common Law. On the other hand, Ferrajoli developed his theories in Italy, surrounded by Civil Law theories and after long periods of low stability in the Italian peninsula.

It is noticeable that both authors make logical distinction of principles and rules, as well as consider that the principles would be somehow involved in the rules, so that the rules should be removed when they confront principles (ZANON JÚNIOR, 2015). Moreover, this applicability of principles would be based on a prior axiology conformed in a supposedly universal value system.

But what closely calls attention is the sharing, in general features, of a liberal philosophy. Ferrajoli adopts the liberal caveat that the state should not be allowed to intervene in decisions and models of life, which he does by warning that one should ensure maximum effectiveness to the advances arising from the welfare state, for which the construction of a constitutional dynamic is elementary (AVILA, 2017). In the same vein, Dworkin proposes himself as liberal, both for the warning that the State treats everyone as equal to the extent that it equally respects the various models of life, from which results the official axiology of neutrality, as for the legal epistemology that adopts, in the sense that the interpretation of law is serious while coherent, which claims the effort of argumentation under the integrating element "of equality" in the liberal garb of equal consideration to the various models of good life (AGUILHERA PORTALES, 2015).

The assumption of the material content of equality as equal dignity of individualities constitutes a common point to both theories. If for Ferrajoli this would be realized in the impossibility of the State to interfere in an illegitimate way, i.e., to take the decision for whom it cannot take it or to decide on what it cannot decide, for Dworkin the limitations to the State also consubstantiate elementary concern in his work, whose central axis gravitates on the conditioning of legitimate governmental actions, even if justified by the will of the majority, to equal consideration to the various models of life, so that "democracy", when understood by the political process, would be limited by the essential nucleus that safeguards the equal dignity of individualities.

Nevertheless, it is important to point out the differences, the greatest relevance of which, on a theoretical level, is found in the relationship between law and morality. For the theories of guarantee, at least in a linguistic formulation, law and morality should be kept separate. The former would consist only in the material content of the right, when justified by public interest (BARRETO, 2016). However, the idea of a theoretical distancing between law and morality does not exempt philosophical thought (MELO; POMPEU, 2017). Philosophy starts as a paradigm to indicate how legal the moral will be, in the face of possible state limitations, so that even in the face of the difference the logic and completeness of the system is maintained.

Ronald Dworkin, in turn, treats the right from the moral. Since earlier writings, such as Empire of Law, Dworkin works on the "integrating" epistemological element as an adequate methodology to the practice of law: integrity of principles. Said element, in turn, already had a material content, flirting with the concept of equality as equal relevance of the various models of life. It is true that, at that first moment, the epistemology of the integrity of principles, as well as its material content, were understood as a specific way the North American political community sees and conceives itself.

Nevertheless, on the occasion of his penultimate book, Justice for Hedghogs, Dworkin adopts the metaphysical perspective of liberal axiology: it would be inherent to the person and not to a culture. The person would have two moral duties elemental to his dignity: self-respect and authenticity (DWORKIN, 2011). That is: he should take his life seriously - and not

treat it as a wasted opportunity -, which he does by building a life narrative consistent with his elementary values. This metaphysical construction of the person, otherwise, is an element that is considered to be more strongly Kantinian than jusnaturalist heritage. Following Kant's example, Dworkin gives the law a fundamentally anthropological character, since he conceives and shapes it in adequacy to the elementary moral duty to the rational person: but while in Kant the moral duty is revealed in the categorical imperatives, in Dworkin it manifests itself in the existential dimension of building a life coherent to what is effectively valued.

Another relevant aspect is that Dworkin, on Justice for Hedghogs, warns that the hedgehog knows only one thing, but "the" essential: the integrating element of things. This element, for Dworkin, which limits, conditions, inspires and justifies social institutes, such as law, economics, the market, the political process, presents a specific axiological content, as already mentioned. Here, morality and philosophy are prior to law: they are not an element of the theory of law, as it is for the constructions of positivist hue. For the North American, it is repeated, morality would be the right's guide, especially in those difficult cases, for which the law and precedent are insufficient (KYRITSIS, 2016).

It is important to draw attention to the point that began to be addressed above: different epistemological conducts on law and morality. In the theory of garantism, positivism stands out as a system of legitimation: morality is an element that can even justify law, but does not integrate it per se. Philosophy integrates the general theory of law. It would be understood from a legal perspective. Dworkin, on the other hand, and this since the beginning of his works, works on a theory of overcoming positivism or legal practice which he calls semantics. Abstracting himself from the modulation of a legitimation and validation dynamic, Dworkin adopts the epistemological perspective that law is interpretation, which should be carried out from an integrating axiological element: morality embodied in the equal dignity of individualities. But this intimate relationship between morals and law, it is important to emphasize, would not be involved in absolute freedom or discretion on the part of the judge. The decisions of hard cases pass mainly through the choice of the best possible decision, i.e., the one that through a serious argumentation represents the "best choice" among the possible legitimate decisions to the case (MARINHO, 2017). And the knowledge of a philosophy that is not colonized by law would prove to be absolutely necessary for the construction of this serious interpretation, which is the correct one as long as it remains consistent in the face of the various counterfactual arguments.

Despite an apparently distinct formulation of law, positivism has come very close to morality. See: although positivism, in its positivist perspective, insists on the legitimation of the norm by a formal epistemology, the adequacy to the matter and to the form prescribed in the superior norms by those of lower hierarchy, the emphasis on the material adequacy, especially when the Constitution adopts moral principles of semantic openness, implies an intense dialogue between morality and law. Law is being built on moral principles, not only in a perspective of prior, aprioristic justification, but incorporating it into its content. In these terms, the practice of garantism is not fundamentally different from the interpretative theory of law adopted by Dworkin, although the theoretical formulation on the relationship between law and morality is different.

5. CONCLUSION

The present work aimed to bring different and usual theories into the discourse of legal practice, for which purpose the writings of Ronald Dworkin and Luigi Ferrajoli were taken as paradigmatic elements, in order to explain the similarities and differences and understand the epistemological conceptions of law that mark the legal practices of contemporaneity.

Ronald Dworkin, as we have reported in the course of this article, has impacted jusophilosophy with the construction of an interpretative theory of law based on axiological arguments of the liberal order. By adopting an axiological basis founded on the equal dignity of the various models of life that inspires, conditions and legitimizes state intervention, Dworkin has demonstrated not only the compatibility, but also the indispensability of the market and the democratic political process as instruments for the realization of this liberal axiology.

Dworkian theory, in large part, was formulated through the analysis of concrete cases, which already implied the effort for serious legal argumentation as a criterion for the realization of law. It reveals, on the other hand, his US culture informed by common law. In this methodology, he refrains from working on a closed model of legitimation and validation of the law: Dworkin opposed the positivist theory of law by conceiving it as an interpretative practice that is carried out by the method of integration of principles - he consequently abandons the conception of pragmatism and conventionalism. Ronald Dworkin, it is good to stress, works the law as an interpretative enterprise of several aprioristic data, Constitution, laws, precedents, under the effort of coherence and fidelity to reveal itself in the integration of principles as a methodology to better build a solution for the concrete case.

Luigi Ferrajoli, on the other hand, has constructed the theory of garantism. From the epistemological point of view, such theory is formulated as a general theory of law, in the democratic context that finds in political philosophy the justification for the model of centralization and hierarchy of the constitutional rules as a liberal primacy of protection and tutelage of rights. In this way, garantism does not despise a philosophical axiology, since it incorporates it as an element of interpretation of law and limitation of the state: but it does it in a colonized way to a preconceived model of validation and realization of law. Perhaps it does so because the garantist ideas were formulated in a context of countries that adopt as legal methodology a rigid system of legality.

The sharing of a liberal philosophy guided by individuality, which demands propositions of limitation and legitimation of the State, reveals that the liberal aspirations of equality and freedom have informed, axiologically, the law, which, when confirmed in other comparative analyses, will serve as an important element to those who cultivate the cultural aspect as a legitimating source of legal practice. Nevertheless, the two authors have invested in different methodological discourses. Garantism presents traces of positivism, in an effort to adapt it to post-constitutionalism, while Dworkin completely rejects the positivist perspective of law, to which he attributes a semantic effort of discovery and explanation of a fact as opposed to an interpretative enterprise, which would be the true essence of law. However, garantism, by insisting on material adequacy as an element of legitimation and validation of norms, in the context of the positivization of values, brings morality into law, incorporates it into legal practice. Therefore, before investing in garantism or in the integrity of principles, one should be open to a serious and responsible knowledge of philosophy, which will often serve as the last

argumentative instance of law. The study of philosophy, not only as an appendix to the general theory of law, but in its broad sense, undermines subjectivism whose Trojan horse, in not rare cases, presents itself in the figure of semantic abstraction principles that propitiate interpretations without substance.

It is necessary to raise philosophy to a relevant level in legal experience, so that a responsible legal practice is carried out, which is assessed by the quality of argumentation. In practice, therefore, the distinction between the positivist exercise and that of the integrity of principles is losing much of its sharpness; nevertheless, the maintenance of different discourses still reveals relevant empirical differences, especially with regard to the grounds. Positivism, by insisting on a formal and closed system of validation and legitimation of law by a hierarchical normative chain, limits the practical reach of axiology as a founding element of law: it is in force while incorporated by legal norms. This perspective is especially relevant in the context of international law, when there is a debate about a universal axiology that determines all peoples, regardless of their history and culture.

Otherwise, the perspective that law has a hierarchical and formal legitimising dynamic ends up working in a different way from the conception of law as an interpretative enterprise based on a prior axiology. In the first case, the epistemological emphasis on the method of validation and legitimation tends to relegate philosophy to the subject of law. Be that as it may, one cannot forget the warning: philosophy should be treated with due seriousness and respect, so that it does not corrupt the legal practice by achisms that end up colonizing the law to particular modes and points of view.

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