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Reflections on principlism and Neoconstitutionalism. The so-called constitutionalisation of rights

Reflexiones sobre el principalísimo y el Neoconstitucionalismo La llamada constitucionalizacion de los derechos

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ABSTRACT: This analysis article describes the process of constitutionalization of law and argues around how neoconstitutionalism ends up appropriating the technique of general principles (sometimes deforming its meaning), whatever the philosophical sign of its cultivators (inclusive or exclusive positivists). The article states that it has occurred and continues to occur within inclusive positivism and analytical jurisprudence.

KEYWORDS: jurisprudence, legal system, general principles, public law.

RESUMEN: Este artículo describe el proceso de constitucionalización del derecho y argumenta en torno a cómo el neoconstitucionalismo termina apropiándose de la técnica de los principios generales (deformando en ocasiones su sentido), cualquiera sea el signo filosófico de sus cultores (positivistas incluyentes o excluyentes). Se asevera que a grandes rasgos esto ha ocurrido y continúa ocurriendo en el seno del positivismo incluyente y en el de la jurisprudencia analítica.

PALABRAS CLAVE: filosofía jurídica, sistema jurídico, principios generales, derecho público.

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INTRODUCTION

The history of law does not only fulfil the function of explaining and unravelling the past of institutions. Its functions are multiple and almost all of them have the effect of raising the culture of jurists and professionals who practise law or cultivate the law, giving greater rigour to the legal language they use in their respective professions.

If we consider that law, conceived as the set of prescriptions that govern a given system, is a social product and, therefore, dynamic and adaptable to a given reality, its epistemology needs to accommodate its philosophical dimension, since, to grasp and understand the essence and meaning of the present, it is always necessary to know the past.

The Enlightenment and the methods imposed by the encyclopaedic movement overlooked, for some time, the knowledge of the origins or sources of law and the history of the philosophy that nourishes it, pretending to enclose it, once and for all, in Codes that were supposed to represent the triumph of rationalism based on an immanent philosophy that closed access to the principles of natural law, even though it must be recognised that the positive consecration of many of those principles contributed to the realisation of justice in human relations.

In turn, German romanticism, which emerged as a reaction to enlightenment rationalism, generated an authoritarian political ideology based on the exacerbation of national sentiments, sowing the seed that germinated with the unleashing of barbarism and generalised violence, through Nazism and fascism, whose actions were based on Carl Schmitt's decisionist doctrine, which can be summarised as the rule of force and the will of the ruler (the leader) over reason and contempt for the enemy. In parallel, and with a common philosophical

kinship (Hegel and Nietzsche), this totalitarianism ended up confronting another international and more complex sign such as communism, whose modern construction is a mixture of the ideas inherited from Marx, Engels, Lenin and Gramsci (Camus, 1953). Then, Camus makes a profound critique of the philosophical roots of communism (state terrorism and rational terror), although without analysing the thought of Gramsci who, at that time, had not acquired the influence he had on the development of post-Marxism and the theories of so-called 21st-century socialism. Curiously, the philosophers and philosophical thinkers of the left have not taken much trouble to refute Camus who (arguing that authentic rebellion is not immanent but in line with human transcendence) makes a profound critique of Hegel's idealist philosophy and nihilist conception, showing his adversity to violence and adherence to man's freedom insofar as it favours human dignity.

This historical-philosophical context WAS followed by the development of the conception of legal positivism, whose continental European and Anglo-Saxon strands recognise different philosophical doctrines which, nevertheless, do not become opposites (mainly Kant for the former and Hobbes, Bentham and Austin for the latter) (Vega, 2018). The loss of validity of Kelsenian positivism (to which our compatriot Mario Bunge, a notable philosopher, attributed a severe responsibility in the theoretical foundation of the Hitlerist regime) has contributed to the fact that a good part of modern positivism's followers has reconverted, taking refuge in the Hartian conception of analytical jurisprudence, a kind of inclusive positivism, which, although differing from iusnaturalism, exhibits common aspects, in that it does not disdain the practical aim that should guide the science of law, recognising that, in short, "it is practical in the fullest sense if it is about and directed towards what is good to do, to have, to obtain and to be..." , (Finnis, 1993).

The basic thesis of positivism considers the positive norm as the centre of law and the legal system, considering that

any norm emanating from the predetermined state procedure is valid regardless of whether it is just or unjust, moral or immoral. Such a conception holds that the values of justice are subjective and irrational and even metaphysical, that a theory of law must be pure and limited to positivised material and, consequently, that morality must be separated from law. As Bobbio (1958) has put it very well, legal positivism is a doctrine "which reduces justice to validity" (p. 30), to which should be added a strict separation between morality and law.

In contrast, the conceptions of iusnaturalism revolve around what is just and morally good for individuals and the common good, conceiving law (by which we mean just) as the object of justice. Strictly speaking, pure legal positivism (much later than the iusnaturalist thought of Aristotle and St Thomas) held exactly the opposite: that justice consists in the formal validity of a law or, in other words, that the object of justice is not real law (what is just) but its formal validity, accusing classical iusnaturalism of introducing metaphysical or religious elements into the theory of law, whose purity it claimed to be an irrefutable dogma. Moreover, based on Hume's naturalistic fallacy, positivists went so far as to say that, if nature was the order of being, it was false to argue that normative prescriptions (the moral order or ought to be) could be derived from human nature.

What is certain is that, as has been demonstrated in recent years, the naturalistic fallacy did not exist in iusnaturalist thought as argued by Finnis, quoted by Massini Correas (2018), who, on this point, agrees with his critics since he never came to hold that normative prescriptions derive directly from being (human nature) but that normative knowledge of natural law, far from deriving from prior knowledge of human nature, "starts from first principles known by evidence and which are rationally developed - with practical reason - either through conclusive inferences or through the circumstantial determination of what in the principles is indeterminate".

In this scenario, in which the most varied currents of positivism (both inclusive and exclusive) and classical iusnaturalism compete, without analysing other conceptions that are inapplicable in continental European or Latin American systems, such as North American realism or some that have lost doctrinal relevance such as structuralism (Suñé Linas, 2006), a trend has developed which, without actually configuring a conception of legal philosophy, assigns prevalence to the general principles of law over norms.

This trend has had a great reception in modern constitutional law, given that a good portion of these principles was incorporated in the positive constitutional texts sanctioned from the 19th century onwards and the fact that, subsequently, they were regulated in the Constitutional Charters in the Second World War together with a plethora of international treaties.

However, although this fact is not recognised by other disciplines, the fact remains that administrative law was built based on the prevalence of the general principles of law over the rules from its very origins (Laferriére) until, finally, the French Council of State recognised their primacy (Coviello, 2020), giving rise to one of the greatest changes in the understanding and operability of the general principles of public law, This was initially highlighted in France by Jean Rivero (1951) and Jeanneau Benoit (1954), in one of the pioneering works on the subject, by describing and founding a jurisprudence that was later projected to European administrative law and, finally, although without recognising this origin, to constitutional law, whose doctrine fell into the error of considering that the birth certificate of the constitutionalisation process was to be found in the positive texts of the European Constitutions sanctioned at the end of the last global conflagration. In this way, the fundamental theories formulated in French law (Hauriou, 1927) and the jurisprudence of its Council of State were ignored, which, implicitly or expressly, ended up enrolling in iusnaturalism, as did many of the German authors of the previous century (Otto Mayer), in which adherence to the truths of natural law can be seen (García de Enterría, 1984).

A clear and resolute position on the transcendence of the general principles of law in the configuration of modern administrative law can be seen throughout the work of García de Enterría (1984), who, at the end of his first research on the subject, could not suppress his astonishment that in France, the homeland of legalism, an administrative law had been built in which principles prevail over written laws, in a system where "the idea of general principles has only gained ground" (p.44-45).

However, contrary to what positivists maintain, principlism has not come to supplant positive legality but to reinforce its validity in a rational-moral dimension of justice that coexists with the factual or formal dimension coming from the authority of the social sources of law (Massini Correas, 2018).

It is precisely in this dimension of rational-normative validity that the general principles of law "discovered and functionalised by jurists" and "collected and developed by jurisprudence or in legislation" (García de Enterría, 1948, p. 43) are housed.

In this scenario, before describing the process of constitutionalisation of law and seeing how neo-constitutionalism ends up appropriating the technique of general principles (sometimes deforming its meaning), regardless of the philosophical sign of its proponents (inclusive or exclusive positivists), let us see, broadly speaking, what has happened and continues to happen in the heart of inclusive positivism and analytical jurisprudence (Acosta, 2016).

While the number of philosophical conceptions increased exponentially, making it difficult to understand legal science and the methods that guide the interpretation and application of the law, there was an abandonment of the premises of legalistic positivism by prominent legal philosophers who have been described as inclusive positivists or iusmoralists (Dworkin, Alexy and Nino).

The fact of being blessed with the qualification of iusnaturalists (brilliant paradoxical rhetoric), developed by no less brilliant philosophical pen than García Amado (2015), implies that all those who illuminate the moral dimension of law and do not admit a sharp conceptual separation between morality and law are iusnaturalists. Moreover, to the disgrace of pure positivists (a strange purity that leads them to be blind to avoid seeing what is happening in reality), a professor from Oxford University (John Finnis), trained in Hart's analytical school, has burst onto the philosophical scene, of Protestant origin, after converting to Catholicism, he adhered to Aristotelian-Thomistic iusnaturalism, within the analytical model, making this conception more comprehensible to Anglo-Saxon thinkers (Massini Correas, 2018).

Finnis' iusnaturalist approach breaks the conceptual separation between morality and law but does not fail to attribute to positive law, emanating from factual and social sources, a weighty hierarchy insofar as there are no situations likely to seriously and extremely affect justice as shaped by the general principles of law, conceived according to an Aristotelian Thomistic vision that attributes a central role to the law produced by the authority of formal sources. These are not limited to the law, where judges play a creative role in the case of legal gaps or having to interpret ambiguous concepts that characterise natural language (which lacks the precision possessed by the exact sciences).

Other significant points that exhibit dissent with certain sectors of legal positivism and even iusnaturalism lie in 1) the dogma of the plenitude of the positive legal order and that positive law regulates its creation; 2) the conceptual meaning of the law, justice and the function of analogy; 3) the distinction between norms and principles and their status in both cases as binding rules; 4) whether the source of a principle can be extra-legal or constitutional and the principle is therefore not positivised; 5) the question of ought-to-be in the legal system; 6) the binding or merely optimal character of a principle; and, the

methods of interpretation and,7) the theory of argumentation and rational justification of judicial and administrative decisions (Vigo, 2015).

We have dealt with some of them in our previous works, but their analysis would require a more extensive work that we are unable to address in this article, in which, nevertheless, it seemed important to us to set out the general lines of the speculative scenario.

1.PRINCIPLISM, THE CONSTITUTIONAL RULE OF LAW AND THE VARIOUS NEO-CONSTITUTIONALISM

Principlism can be understood as the speculative tendency that assigns predominance to principles over norms, considering that both categories constitute binding legal rules and sources of law. It is debated whether the authoritative character constitutes, in principle, one of the characteristic features of the Constitutional Rule of Law, as Ferreyra (2019) points out insofar as "in the Constitutional State every right of the State must be genuinely authorised by the fundamental positive norm of its coercive order" (p.344); but, in any case, it must always be a State of limited and limited powers, in which its organs (also called powers) act with reciprocal independence and harmony, subject to the principle of legality (whose maximum expression is the block of constitutionality), to the principles of justice (that is, to the law and the law) and to the jurisdictional control of constitutionality. The State's way of being is best combined with the rational, evaluative and critical element (Massini Correas, 2014), without relegating the role of positive law as long as it does not degenerate into injustice or immorality.

In trying to unravel the phenomenon of neo-constitutionalism, things get complicated for several reasons. We will now explain the fundamental ones:

Firstly, there is the inertia involved in admitting changes, especially when these changes are being developed after the extraordinary dogmatic development carried out by

the great constitutionalists who built the edifice of the Rule of Law, especially when the changes are in the process of being implemented (Muñoz Machado, 2006). A second reason concerns the different sources of knowledge on which the doctrinal positions are based, the focal criteria of which vary according to the orientation of the philosophy of law, on the one hand, and constitutional dogmatics, on the other. In turn, within each position, different conceptions and classificatory criteria are developed.

On the other hand, the transition from the historical conception of the Rule of Law to the Constitutional Rule of Law has been an evolutionary process in which, as German doctrine has warned, a series of geological layers have been superimposed, which do not supplant the original principles of the classical Rule of Law. They give them content adapted to the new political, economic and social realities, always maintaining the objectives of protecting individual and collective freedoms (Aragón Reyes, 2013) and security (Isensee, 2020) as the fundamental aims of the state legal framework.

In this scenario, two kinds of neo-constitutionalism have emerged, among others, both considered as trends or movements, characterised by the diversity of the points of view they postulate (Cardenas, 2019). However, it is also true that only one of them represents the true constitutional rule of law. In turn, other criteria have also been put forward to classify neo-constitutionalism, depending on whether the central criterion used is formulated based on whether or not it is ascribed to legalistic positivism (Vigo, 2015) or whether the classification is made from the perspective of constitutional dogmatics.

In our opinion, and opting for the path opened up by constitutional dogmatics, it is possible to recognise a systematisation that exhibits two main types of neo-constitutionalism, although only one is compatible with constitutional law rooted in democracy.

The first is what is known as the Constitutional Rule of Law and is nothing other than the regulation of democracy by the Constitution, the main lines of which remain unchanged: the Constitution as a way of limiting power for the benefit of the freedom of citizens, of the equality of all in that freedom (Sumar and Zúñiga, 2021). Even when this new constitutionalism strengthens and increases the power of the judges in the control of constitutionality, this circumstance does not authorise them to go beyond the Constitution or to become legislators or administrators of public affairs, since the principle of separation of powers, correctly interpreted, does not admit such excesses or deviations of power. The empowerment of the judicial function is a product of the principalist conception of law, since, as the principles are binding mandates lacking in factual assumptions and the precision that characterises the rules, judges acquire a greater interpretative role, provided that they do not exceed the constitutional limits represented by the principle of separation of powers.

The second of this neo-constitutionalism necessarily leads to a deformation of the Constitution, in both a formal and a material sense, in that it

> (...) makes power prevail over control, the unity of state action over the division of powers, the "political" understanding of democracy over its "legal" understanding, direct "plebiscitary" democracy over indirect representative democracy, political will over laws, and, in short, the decisional state over the rule of law (Aragón Reyes, 2013, p.6).

It is, therefore, false constitutionalism or "anti-constitutionalism", which has little to do with authentic constitutionalism, the risks of which have been highlighted by authoritative doctrine (Vigo, 2015).

Certainly, regardless of European or American origin,

in the field of constitutionalists and legal philosophers in favour of the distinction, who adhere to the true conception of the constitutional rule of law, there are both the so-called inclusive positivists (who admit morality as an ingredient of law) and the iusnaturalists (whether classical or the modern ones of the New School of Natural Law)[1].

The relevant aspect that should be emphasised, as a central condition of the constitutional rule of law, is the principle of supremacy stemming from the model of the rule of law adopted by the Constitution of the United States of America. This principle, adopted in the constitutions of the entire American continent, was later transferred to continental European law, making a decisive contribution to the abandonment of legiscentrism, i.e. the historical conception of law based, among other things, on the omnipotence of the legislator. For this reason, when we speak of the transition from the rule of legal law to the rule of constitutional law, we must bear in mind that, at the beginning of comparative constitutional law, two different conceptions coexisted and that, in America, constitutional supremacy never ceased to rule, despite the tendency to consider that certain constitutional precepts and the principles set out in the constitutional preambles were of a programmatic and non-operational nature (Robalinho, 2019).

However, since the end of the Second World War, the Constitutions sanctioned in Europe, as well as doctrine and jurisprudence, expressly or implicitly recognised the supreme nature of the Constitution and, consequently, the operative nature (sometimes with derived operability and limited to the financial possibilities of the States) of its principles and rights, which ended up unifying the comparative systems of the countries of America and the European continent, with the Constitution becoming the "supreme rule" (Ferreyra, 2019).

1 The name was given to the legal-philosophical movement of modern legal-naturalism, led by John Finnis.

2. THE CONSTITUTIONALISATION OF THE LEGAL SYSTEM

The expression "constitutionalisation of the legal system" does not seem to allude to anything new. Furthermore, the supremacy of the Constitution over the rest of the public or private legal system has always been upheld in the field of constitutional dogmatics. However, there is nothing to oppose its modern use either. At least in classical Argentine administrative law (Marienhoff, 1990), the majority of the doctrine always taught that the heading of the chapters of administrative law was to be found in the Constitution, following the thinking put forward by Alberdi, when he spread Pellegrino Rossi's well-known phrase.

In this way, the enshrinement of the constitutional rule of law has generated a series of effects that are projected onto the judicial control of constitutionality, among which the following stand out:

1. The effectiveness assumed by the supremacy of the Constitution, whose norms, principles and rights are no longer considered programmatic but operational, or at least with derived operativity;

2. The emergence of general principles which, according to much of the doctrine, take precedence over laws, informing, at the very least, the legal system;

3. The strengthening of the role of the judge in the application of these general principles, as a result of the fact that they must apply binding mandates lacking in factual assumptions and legal consequences, given that, although judges are not empowered to replace the law nor must they become legislators, they are obliged to rule in cases of normative deficiencies or gaps, using the technique of analogy and not subsumption (in the absence of a specific rule to resolve the issue).

This does not imply an objection to the civil legislator when, for example, it increases the insertion in the CCCN of the general principle of good faith, to the extent that the interpretative task of the judges is carried out following the constitutional principle of reasonableness which, as a matter of principle, excludes all arbitrariness or interpretative abuse.

Then, in some cases, judges need to apply general principles to resolve normative shortcomings, through the technique of weighting, replacing the subsumption to which the positivist technique forced them to resort, a sort of dead end.

CONCLUSIONS

The law is not a static reality but a dynamic reality that can be adapted to historical, social and economic circumstances, but this does not justify altering the essence of the aims, rules and principles of the Constitution. In this scenario, the Constitutional Rule of Law constitutes a legitimate and positive brake on the so-called false neo-constitutionalism, which replaces the will of the constituent and the legislator with the ideological convictions of the judges.

The legal phenomenon is not as we would like to see it, but as it is, and it cannot be ignored that evolution has ended up imposing the constitutionalisation of public and private legal systems (Dalla Via, 2015).

Constitutional supremacy (belatedly recognised in European law due to the doctrinal influence of Lasalle), the separation and independence of powers and the principles that make up the block of the legitimacy of the constitutional rule of law, constitute the central pieces of the edifice of representative democracy, which it is essential to preserve to maintain the dignity of all members of the community, regardless of their political colour.

The purpose of this constitutional rule of law is to pursue the common good, through the allocation of constitutional powers, and it must be oriented towards achieving the aims, principles, rights and duties prescribed by the Constitution, while preserving the freedom and equality of individuals, the true central objective of public law and, by extension, of private law. This is essentially what the constitutionalisation of the legal system and the work of the judiciary are all about.

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