

AN ANALYSIS OF THE CRITICAL THEORY OF LAW: TRANSFORMATIVE INTERPRETATIVE REPERTOIRES



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ABSTRACT

The scope of this article is to launch a reflection on the transformative lights that the Critical Theory of Law makes possible to address legal phenomena in a context in which it relates law to other social relations, power and ideological demarcations of different groups in society. Exploring this legal current and its theoretical exponents becomes essential for technique and hermeneutics in the sense of contributing to proposals for interpretations of reality that are not sufficiently managed by the repertoire and positivist bias of the norm. Thus, the text intends to weave, briefly, some essential considerations about the contributions of Critical Theory.

Keywords: Law. Critical Theory. Justice.

INTRODUCTION

We begin this reflection and, as a starting point, we resolutely affirm that justice and Law are inseparable phenomena of clear social and historical importance.

Entering the theme, it is asserted that the analysis based on the Critical Theory of Law is an approach that seeks to understand and question legal norms, their tissues, their implications in social dimensions, as well as the diverse contexts in which they are applied. This perspective is fundamental to understand how Law is not only a set of rigid rules, but also a social phenomenon that reflects and influences the relations of power, inequality, and justice.

In fact, for a long time, the interpretative aspect of law from the perspective of Hans Kelsen predominated in the reflective horizons of many applicators-interpreters of law. However, in its pillars of theoretical support, such as *Justice and Natural Law* (1963), a notion of ideal and non-tangible justice prevails, as well as, in his *Pure Theory of Law* (1979), the concept of justice does not find shelter, since, as an element of composition external to the positive commands of the norms, it is left out, as well as any pre-notion external to concrete devices.

Thus, although there are reflections in contemporary times that relativize Kelsen's positivist *conceptions* and even propose new rereadings and new interpretative frameworks suggesting their joint applicability with hermeneutic techniques, the bias of the present text, which also reflects its problematization, is directed to a route whose necessary legal precept is justice associated with Law within a real and tangible possibility sustained by the precepts of the Critical Theory of Law with reflection of the application of law in a way in which justice is an element present in the decisions of the disputes.

It is emphasized, in the exegetical scope, that the Critical Theory of Law is the one influenced by currents such as Marxism and the critical theory of the Frankfurt School and, in this, its reformulations beyond economic criticism and schematic analysis of social infrastructure. In short, these approaches analyze how the Law can perpetuate structures of power and inequality when it should be an instrument to ensure justice to society. It is equally important to remember, in this regard, authors such as Karl Marx who argue that Law is a tool of the dominant classes to maintain their control over the oppressed classes, which contradicts in its essence the achievement of justice in terms other than ideals or the should-be itself.

Thus, contrary to the legalistic and conservative profile of a theoretical exponent widely used by law applicators-interpreters, this article aims, as its main objective, to provide a necessary reflection of multidisciplinary bias with the very fruitful interpretative enrichment between Law and Social Sciences, especially about the debate on real justice based on the Critical Theory of Law, especially focused on the reflections of Theodor Adorno, Max Horkheimer and Herbert Marcuse.

At the heart of the question is the central ideal, that taking into account the well-known three-dimensionality: Law is fact, value and norm. It is emphasized that it can never be reduced to just the norm. Thus, a critical structural understanding is reached that Law is not synonymous with justice. And if it is not, it needs to be.

In this aspect, the lessons of the Frankfurt School are substantially important for maturing legal thought and its forms of analysis of these legal phenomena, not as a closed and isolated field of *pure norm*, but as an object of investigation that is found in the trenches of social disputes and conflicts in which inequalities are the *structuring* structures of the struggles, borrowing this concept from Pierre Bourdieu's sociological theory.

It is reiterated that the Critical Theory of Law is influenced by various philosophical and social currents. However, the foundation of the present discussion is based on the relational biases between the theories of Theodor Adorno, Max Horkheimer and Herbert Marcuse, as it is understood that they can represent the consideration of the relational and critical aspect of the norm with the social and economic dimensions of the life of individuals in society subject to legal norms and crossed throughout life by them. Wouldn't its transformation into an instrument of justice be an old paradigm to be considered, from now on, with new critical interpretations in contemporary times and its many dilemmas?

Finally, the work is structured as follows. The main debate rescues the main interpretative axes and repertoires of analysis and hermeneutics of the Critical Theory of Law. In a complementary way, of a multidisciplinary nature, it relates justice as a necessary legal good for the construction of social peace and exposes the perspective of the perversion of its essential meaning through important philosophical concepts that have connections with an equally critical interpretation that is sedimented with the perspectives of the Social Sciences in contemporary times.

AGAINST THE FIGURES OF PURE LAW: the Critical Theory of Law and its reflections

"As the legal order does not speak for itself, the hermeneutic externalizes its meanings, through a comprehensive activity and, therefore, open to community values". (Ricardo Maurício Freire).

Critical Theory of Law is an approach that aims to examine and problematize traditional legal structures, focusing on how law can be used to mistakenly perpetuate social, economic, and political inequalities among many other harmful social dissymmetries. It emerges as a criticism of Legal Positivism, which tends to see law only as a set of neutral and objective rules, without considering the impact of these rules on power relations and the unequal social conditions in which individuals in society are inserted.

It is important to understand that the Critical Theory of Law, in addition to being influenced by various philosophical and sociological currents, such as Marxism, it intends to sustain the criticism of the neutrality of the norm enshrined in the legal system in an almost unquestionable way from the technical application of the provisions with little or with a certain emptiness of hermeneutic interpretations of a social nature, cultural, historical, gender and with many other dimensions involved. In this way, it seeks to understand law not only as a system of norms, but also as a reflection of power relations in society.

Critical theorists, among them, Theodor Adorno, Max Horkheimer and Herbert Marcuse, chosen in aspects of theoretical complementation for the purposes of (de)construction and reformulation of reflection, affirm that law is not a mere tool of justice or neutrality, but rather an instrument of maintenance of the established order and its *status quo*. This thought should not be understood as redundancy, but as an expression of an idea that cries out for equity in an unequal universe.

In fact, the Law can often be understood as a machine in large production of unacceptable or obscurely politicized decisions, in addition, it reflects and reinforces the dominant ideologies, contributing to the reproduction of social inequalities. But let's open a parenthesis, laws can be used to legitimize power and oppression, instead of promoting justice.

A philosophical and sociological movement known as the critical theory of the Frankfurt School, which seeks to understand and criticize the structures of dominance that exist in contemporary society, includes Theodor Adorno's Critical Theory of Law. One of the most well-known members of this school is Adorno, a sociologist and philosopher. While the study of law has not been the sole focus of his work, he offers valuable insights that are

applicable to this area, particularly when examining the connections between oppression, freedom, power, and the law.

A type of rationality that disregards social and human values in favor of efficiency and utility is known as "instrumental reason," and is criticized by Adorno and Frankfurt School theory. Adorno argues that this instrumental reason appears in social and legal structures that serve to legitimize oppression and dominance rather than promote justice and freedom.

In the context of Law, this can be observed when the legal system is used to maintain existing power structures, rather than questioning or transforming them. In other words, the Law, instead of being a mechanism of emancipation and justice, can become an instrument of domination, especially if it is not critical and reflective in relation to structural inequalities. In this sense:

Law is the primordial phenomenon of an irrational rationality. In it, the formal principle of equivalence becomes the norm and inserts all men under the same mold. Such equality, in which differences perish, surreptitiously favors inequality; a myth that survives in the midst of a humanity that is only apparently demythologized. Legal norms exclude what is not covered by them, all non-preformed experience of the specific by virtue of the systematic without breaks, and thus elevate instrumental rationality to a second sui generis reality. The whole of the legal field is a field of definitions. Its system orders that nothing that escapes its closed sphere, *quod non est in actis*, should be inserted into this field. This enclave, ideological in itself, exerts through the sanctions of law as a social instance of control a real violence that reaches its fullness in the administered world. In dictatorships, it immediately passes to the use of this violence; in a mediatized way, it has always been present (Adorno, 2009, p. 257).

Adorno also challenges the notion of an "autonomous" legal system. He believes that legal norms cannot be understood independently, as they are influenced by the social, political, and economic circumstances in which they exist. Thus, the law cannot be seen as a separate and isolated field, but must be examined in the context of power dynamics and social disparities.

According to Adorno, in a capitalist society, the law tends to reflect and reinforce the dynamics and inequalities of power that are present in other areas, such as economics and politics. In Adorno's perspective, justice is intimately linked to broader social change that empowers individuals by liberating them from oppressive and exploitative conditions.

Adorno's dialectical theory is crucial to understanding his perspective on law. He believes that complex issues in society, such as social, economic, and political challenges, cannot be easily solved through simplistic approaches. In the legal domain, this implies that justice cannot be reduced to a direct application of universal principles, but must take into

account the historical and contextual circumstances in which these standards are implemented. Let's see:

The name dialectic says at the outset nothing more than that objects are not exhausted in their concept, that they contradict the conventional norm of *adequatio*. The contradiction [...] is an index of the untruth of identity, of the exhaustion of the conceptualized in the concept. However, the illusion of identity is immanent to thought itself in its pure form. To think means to identify. [...] For the consciousness of the illusory character of the conceptual totality, it remains only to break immanently the illusion of total identity. [...] Dialectics is the consequent consciousness of non-identity (Adorno, 2009, p.16-17).

In essence, Adorno criticizes a "formalist" perspective on the law, which aims to apply laws mechanically, regardless of the social inequalities and contradictions that exist. In his perspective, law enforcement should have a discipline that encourages critical thinking, challenging its own foundations, and striving to reshape power dynamics.

This author did not believe that the law alone was sufficient to achieve emancipation. For him, the concepts of freedom and justice require more than just a technical application of laws. The law must align with a broader social project of liberation, allowing us to achieve freedom from oppressive systems and explore new possibilities. Consequently, the law, in his perspective, should be employed as a means of social change and the advancement of a more just and equitable society.

Theodor Adorno's Critical Theory of Law, while not a systematic field in his work, offers an important reflection on the role of law in contemporary society. His critique of instrumental reason, the formal autonomy of law, and the need for a dialectical view of social contradictions help to understand how law can be a field of oppression or emancipation, depending on how it is applied and reflected.

In the same vein, Max Horkheimer was also one of the leading philosophers and sociologists of the Frankfurt School. He played a crucial role in the formation of critical law theory.

Although Horkheimer, in his works, did not systematically deal with the theory of law, his philosophical approach and his critiques of social structures and the role of the state can be applied directly to the legal field

Horkheimer, within the line of criticism of instrumental reason and the domination of power structures, opposes legal positivism, which seeks to understand the law in a purely technical and normative way, disregarding its social and historical implications, focusing on the pure application of laws, legitimizing and retaining laws and legal heritage. This author

criticizes the idea that legal norms should be analyzed in isolation or abstractly, without considering the power relations and the social conditions in which they are inserted. For him, the law cannot be seen as neutral or just a conflict resolution technique, it must be critically examined, taking into account the economic, social and political interests that shape it. Like this:

Theory in the traditional, Cartesian sense, such as that which is in force in all specialized sciences, organizes experience on the basis of the formulation of questions that arise in connection with the reproduction of life within today's society. The systems of the disciplines contain knowledge in such a way that, under given circumstances, it is applicable to as many occasions as possible. The social genesis of the problems, the actual situations in which science is employed and the ends pursued in its application, are itself considered external. - The critical theory of society, on the contrary, has as its object men as producers of all their historical forms of life. The actual situations on which science is based are not for it a given thing, whose only problem would be in the mere verification and prediction according to the laws of probability. What is given depends not only on nature, but also on man's power over it. (Horkheimer, 1989a, p.69).

A relevant concept that was developed by Horkheimer and the Frankfurt School is that of reification. This term refers to the conversion of social interactions into objects, leading to the forgetfulness or neglect of human relationships and their social consequences. Within the field of law, this can be interpreted as the way in which legal norms and institutions, instead of promoting freedom and justice, end up being transformed into structures that sustain inequality and oppression, being seen as "things" or "institutions" that exist independently, without reflecting the power relations that sustain them.

Therefore, Law can be an example of reification when it is detached from social and human realities, becoming a norm that is applied in an impersonal and mechanical way, without considering the effects that this application has on people's lives. This reification in law helps to perpetuate the status quo and social disparities, and Horkheimer would highlight the importance of a constant critique of this trend.

Although Horkheimer was a critic of law as a means of domination, he also saw the possibility that, in a broader project of emancipation, law could play a constructive role. However, this function would only become viable if the Law was restructured to question the current power relations and aspire to a more just and egalitarian society.

According to Horkheimer, Law should act as an instrument for social transformation, helping to transcend structural inequalities and promote the freedom and autonomy of individuals. However, for this to be possible, it would be necessary to rethink the foundations of the legal system, so that it would be aligned with the values of emancipation

and social justice. Law, from a critical perspective, should not be seen only as a set of rules and norms, but as a social practice that should reflect the conditions and values of a just and democratic society.

Herbert Marcuse, a prominent thinker of the Frankfurt School, left an important mark on critical theory, although his perspective on law was not as methodical as that of Horkheimer and Adorno. He was strongly influenced by Marxist thought and its analyses of capitalist society, repression and the dominant culture. In his texts, he sought to investigate the social conditions that ensure domination and alienation, including a reflection on legal institutions and their role in maintaining inequalities.

Marcuse dealt with Law and the State mainly considering their role in the structures of domination and their relationship with human emancipation. For him, the contemporary State, especially in liberal democracies, exercises a repressive function, even if it is not openly recognized. The state, through its legal institutions, serves as a means to preserve the capitalist social order. This implies that the law is not an impartial instrument of justice, but rather a way to ensure the continuity of the status quo and protect the interests of the ruling class.

The conception of a "neutral law", which proposes to be fair for all, is an illusion. Marcuse argued that, despite seeming fair and egalitarian, the Law, in fact, sustains structural inequalities and power dynamics. This happens because the Law does not challenge the social and economic conditions that cause exploitation; on the contrary, it seeks to maintain stability in the relations of production and in class hierarchies. Thus, the Law, instead of promoting freedom, often reinforces domination.

In contrast, Marcuse argues forcefully about the critical and utopian potential that art, for example, autonomously possesses. In a text referring to Aragon, he warns: "Art as a tool of resistance depends on the alienating power of aesthetic creation; of its ability to remain strange, opposite and beyond normality, and, at the same time, to function as a repository of the repressed needs, abilities and desires of the human being, being truer than everyday reality" (Marcuse, 1999, p. 270).

Marcuse aligns himself with the criticism of other thinkers of the Frankfurt School in relation to legal positivism, who perceive Law as a set of rules to be applied without considering the social and historical conditions that underlie it. Legal positivism, in seeking a "technical" application of norms, ends up disregarding the context of oppression and exploitation in which those norms were elaborated and are employed. For Marcuse, Law

cannot be seen in a technical or neutral way, as it is immersed in power relations and in the material conditions of society.

He also challenged the notion that the law would be an independent and impartial structure. For Marcuse, Law is always influenced by the economic and social relations in which it is inserted and cannot be separated from the economic and political power that influences it. Therefore, Law is not a neutral reflection of reason, but rather an instrument that ensures the continuity of the current social order, especially in capitalism.

Marcuse was also affected by Marx's theory of alienation, which explains how individuals in capitalist societies become detached from the conditions of their own existence. For Marcuse, Law can be understood as a form of alienation, as it distances individuals from the material and social realities that impact their lives. In a legal system that only applies norms in an abstract and formal way, individuals become alienated from true justice, since the laws do not meet their real needs, but rather serve the interests of the ruling class.

In a capitalist environment, laws often regard property, labor, and commerce as disconnected and abstract entities, without recognizing the actual effects on people. This contributes to the alienation of individuals, who begin to perceive laws and law as something distant from their lives and their needs, unrelated to the search for freedom.

Marcuse also addressed the ideological function of legislation. He perceived legislation, especially in capitalist societies, as a form of ideology that conceals social contradictions and inequalities. Legal rules are often presented as just and universal, but in reality, they are deeply rooted in the power dynamics that underlie them. In this way, legislation acts as a way to validate the prevailing social order, providing an illusion of justice, while actually serving the interests of the class in power.

Finally, all thinkers with their deep reflection challenged the classical notion of law as a set of neutral and impartial rules. They argue that the law serves as a means of power that can legitimize and maintain social inequalities.

Thus, the Critical Theory of Law is fundamental to understand power relations within the legal sphere. It demonstrates that law is a tool of power capable of legitimizing and cultivating social inequalities. In this sense, adherence to its principles helps to indicate other directions and interpretative possibilities that are fairer, as contemporaneity demands within an alternative perspective.

FINAL CONSIDERATIONS

Critical Theory has an indisputable relevance for the methodological and interpretative approaches of contemporary law. It investigates a progressive direction, giving rise to new schools of thought that offer diverse critical perspectives on legalism. This interpretative approach has become a relevant means of investigation and evaluation of the great concrete issues that require an interpretation that goes beyond what should be.

In fact, the Critical Theory of Law needs to manifest itself in books, articles and texts, going to practical action. The social change promoted by various law enforcers and interpreters begins with the practical resolution of the conflict and the way in which these decisions and interpretations address issues of inequality as priorities. The truck is *praxis*.

Let us remember the teachings of Marx (2007) who teaches the clamor for social transformation: "Philosophers limited themselves to interpreting the world in different ways; what matters is to modify it."

It is essential to highlight that criticisms that are not translated into action, or in other words, into *praxis*, remain as imprecise concepts and ideas. However, even if there is no consensus within Critical Theory itself, social emancipation must begin with concrete actions and not just with propositions. This is the challenge to be faced.

REFERENCES

1. Adorno, T. W. (2009). *Dialética negativa* (M. A. Casanova, Trans.). Jorge Zahar.
2. Bourdieu, P. (2021). *O poder simbólico* (F. Tomaz, Trans.). Edições 70.
3. Engels, F., & Marx, K. (2007). *A ideologia alemã*. Boitempo.
4. Freire, M. R. (2019). *Hermenêutica e interpretação jurídica* (4th ed.). Saraiva Educação.
5. Hegel, G. W. F. (1997). *Princípios da filosofia do direito* (O. Vitorino, Trans.). Martins Fontes.
6. Horkheimer, M. (2002). *Crítica da razão instrumental*. Unesp.
7. Horkheimer, M. (1989). *Filosofia e teoria crítica*. Nova Cultural.
8. Kelsen, H. (1979). *A justiça e o direito natural* (J. B. Machado, Trans.). (2nd ed.). Studium.
9. Kelsen, H. (1994). *Teoria pura do direito* (J. B. Machado, Trans.). (4th ed.). Martins Fontes.
10. Marcuse, H. (1999). Algumas considerações sobre Aragon: Arte e política na era totalitária. In H. Marcuse, *Tecnologia, guerra e fascismo* (M. C. V. Borba, Trans.; D. Kellner, Ed.). Unesp.
11. Nobre, M. (1998). *A dialética negativa de Theodor W. Adorno: A ontologia do estado falso*. Iluminuras.
12. Pereira, L. I. (2018). *Adorno e o direito: Para uma crítica do capitalismo e do sujeito de direito*. Ideias e Letras.