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Facts and Rules: Incidence of the Social Environment in the Understanding and Elaboration of Law, from the Communicational Theory of Law

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Abstract

The Communicational Theory of Law (CTL) usually differentiates between Legal Sociology and Legal Theory, in the sense that Legal Sociology is concerned with the social validity of the rules and Legal Theory with the formal or legal validity of the rules. It can be argued that both disciplines are two different perspectives of the same empirical reality (legal rules). Also, legal System and social milieu are two closely linked realities; they cannot be separated because they need each other. The Law is the form or order that the social milieu takes, and, at the same time, the social environment provides the ideas, collective representations and other matters that need a legal regulation. For this reason, the epistemological separation between Sociology and Legal Theory must be overcome when the theoretical perspective comes to legal decisions. Thus, the decisional moment becomes the meeting point between the legal System and the social milieu. This is where the concept of the legal System fulfils its main function, as it allows for the dynamism and adaptability of the legal order. The hermeneutic re-elaboration of the normative texts will be the channel through which the social facts and other material elements can inform the meaning or possible interpretations of the rules and institutions of the legal order. This happens primarily by influencing theoretical and doctrinal works of an expository and didactic nature; and secondarily by influencing the decisions of legal operators and courts. This study seeks to explain how the social context influences legal decisions and the formation of the legal System, from a communicational perspective of Law. In order to do so, it will be necessary to set out two epistemological premises of CTL: the semiotic tripartition of the Theory of Law and the legal Order-legal System distinction.

Keywords Social milieu · Legal order · Legal system · Legal sociology · Legal theory · Legal hermeneutics · Legal decision making · Communicational Theory of Law

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1 Introduction: the Communicational Theory of Law

The Communicational Theory of Law (hereafter CTL) owes its origin to the research work of Professor Gregorio Robles Morchón. It is a Theory of Law which Robles has developed since 1982, when he published his work *Epistemology and Law*, and is currently contained in more than 20 books, primarily, though, in his three volumes titled *Theory of Law. Foundations of the Communicational Theory of Law*.

The national and international success of CTL is justified, since it represents an original conception of the Philosophy of Law that allows for the reconciliation of different theses traditionally opposed in the field of the discipline, such as the positivism, the institutional conception of Law, and the decisionism characteristic of *legal Realism*. Likewise, on a methodological level, it defends an intermediate position between the hermeneutic and the analytical options, which can be particularly functional in explaining legal systems that are highly conceptualised (16: 170–174).

CTL reminds us that Law is a communicational reality and, therefore, complex. It is not possible to reduce Law to a single element, so a genuine Philosophy of Law must embrace all the manifestations of Law, whether as normative language, institutional language, or decision as a speech act. Thus, CTL proposes a triple analysis of the legal phenomenon, emulating the triple analysis that Linguistics proposes for language. Syntax, Semantics, and Pragmatics are translated in CTL in the so-called Formal Theory of Law, Theory of Legal Dogmatics, and Theory of Legal Decision (16: 173–174). The Formal Theory of Law aims to study the pure forms of Law and the categories present in all possible Law. The Theory of Legal Dogmatics proposes the investigation of the constructive work of theoretical jurists, that is, the hermeneutic function that allows completing the dictates of the legal order. Finally, the Theory of Legal Decision delves into the nature of decision as a dynamising element within Law, proposing the replacement of the classic doctrine of the sources of Law by the individualisation of norm-creating decisions, whether general (legislator) or individual (judge).

This triple analysis has been called "Tridimensionalism" by some of its critics (12: 25) and is applicable to the study of almost all legal substance. From the formal perspective, the definition of the legal object should be sought with the aim of being universally applicable to any legal order; from the dogmatic perspective, it is necessary to discover what meaning can, through normative regulation and dogmatic elaboration, be attributed to the legal material in a particular legal order; and from the pragmatic perspective, understood as the theory of legal decisions, it is necessary to debate the axiological purpose that should be conferred on norms and other legal decisions.

The methodological conception of CTL is understood as a Hermeneutic-Analytical Theory. With great clarity of exposition, Robles (17: 393) states: "Hermeneutics and Analytics point, in this way, to two aspects of the text that are different and complementary. The first is directed at meaning, the second at formal components; the first at content, the second at form. However, content cannot

exist without form, nor can form exist without content. Hence, in working with texts, both functions are always present. I cannot find the meaning of a text if I do not understand its structure, and I will not understand its structure if I do not comprehend its content". In accordance with this hermeneutic-analytical method, to understand the entirety of texts that constitute the legal order, it is necessary both to unravel their formal structure or logical order and to discern their connections of meaning. The hermeneutic method is omnipresent to the extent that every cognitive operation on legal texts implies a reconstruction of their meaning, but it is no less true that this operation would be impossible without understanding the formal structure and the nature of the norms that form the legal order. Thanks to the use of this method, Robles' idea of a System originates, which implies a rational reformulation of the legal order, overcoming its imperfections and allowing the updating of the meaning of legal texts, in function of the specific historical and doctrinal circumstances (17: 403).

It has been critically asserted that CTL, in its eagerness to reconcile Hermeneutics and Analytics, forms a Theory that is neither one nor the other; it merely instrumentalises hermeneutic and analytic categories to ground its vision of Law as the language of jurists (22: 177). In our opinion, despite the intellectual foundations of CTL (with clear legal positivist roots), in its vision of the System, a hermeneutic philosophy of Law predominates, which, however, is enriched by the analytical as a means to approach the knowledge of the legal. Thus, the analytical method is employed to explain the conceptual and logical structure of the legal order, that is, with distinctly theoretical aims. On the other hand, the hermeneutic method is used when it is necessary to explain the practice of jurists and the products of their art (18: 253). Consequently, as Albert (1: 310) states: "the hermeneutic-analytical method can thus be applied globally to the entire CTL, that is, to syntax, pragmatics, and legal semantics, at least in some basic respects, since the three levels of analysis of CTL share some common characteristics".

Having presented the possible reasons for the interest that CTL holds in the field of contemporary Philosophy of Law, it is deemed necessary to delve deeper into the systematics of CTL, with the aim of analysing the coherence and suitability of its postulates to legal reality, particularly in the epistemological relationship between facticity and normativity, or the difficult relationship between Sociology and Theory of Law from this communicational perspective of Law.

2 A New Formulation of the Idea of Normative Positivity

One of the central problems of the Philosophy of Law in our time has been the positivity of Law, that is, questioning which is the form of externalisation or formalisation of Law, its positive reality. Without aiming for exhaustiveness, it is possible to point out that there are three general ways of conceiving legal positivity, which in turn correspond to different "iusphilosophical" schools: (a) The legalistic approach, like the normativist school, identify positivity and statehood, so that only the laws or the Law emanating from the State is positive Law. (b) The historical school, on the other hand, considers as positive Law the true Law existing in the life of peoples,

that is, the spirit of the people embodied in different norms and institutions. (c) Finally, the sociological school identifies positivity with social validity and, therefore, focuses its attention on social facts or behaviours that reveal the existence of Law and its norms. This last direction is followed by the Communicational Theory of Law (CTL), which observes legal positivity as the phenomenon of the social implantation of Law and thus reserves its study to legal Sociology (16: 429).

However, the question of what the true positive Law or, otherwise, the positive content of legal norms, is, cannot be answered from a merely sociological approach and requires the use of the hermeneutic-analytical method characteristic of the Communicational Theory of Law. In this way, it must be distinguished between the social fact of legal positivity that manifests in very diverse forms such as judgments, execution acts, compliance, exchanges, etc.; and the positive meaning of the norms, that is, the real message of the mandate or normative provision ascribed to the legal order. The basal thesis of CTL in this respect is that the positive content of the norms is not found in the normative provisions as they are written in legal or normative texts, but a rational re-elaboration or hermeneutic construction is necessary to reach it (16: 142). This rational construction is called "System", and it is in it that the jurist will be able to find the true positive Law, the real content of the legal norm at each specific moment or particular case.

In the Communicational Theory of Law (CTL), unlike what happens with normativist theories, there is no confusion or identification between order and System. The legal order or set of normative provisions, even presenting a certain order per se, lacks sufficient rationality and coherence to allow its immediate practical application. In other words, the legal order exists as a totality of texts, the raw material; it is the set of norms as they are published in the "Official State Gazette" (*Boletín Oficial del Estado*, B.O.E) (16: 141). This raw material, which is called legal order, requires a hermeneutic construction, which endows it with sufficient rationality and systematisation to resolve the particular conflicts that occur in every community. The result of this rational construction is the elaborated text called the legal System, a totality of texts that, although it reflects the legal order, offers a more elaborated horizon of rationality suitable for its practical application (16: 149).

The legal System in the Communicational Theory of Law (CTL) is a product, rationally elaborated from the raw material that is the legal order. The way in which this raw legal material is elaborated or perfected combines analytical and hermeneutical methodology: (a) the analytical method assumes a syntactic perspective of the normative texts and, consequently, consists in identifying, ordering, and explaining the functions and form of pure or universal legal concepts; b) and the hermeneutic method starts from a semantic perspective of the normative texts, seeking to explain or clarify the concrete meaning of the different normative provisions (17: 397–403).

The idea of the System in CTL combines these two perspectives so that a didactic-expository system can be first identified, which represents a theoretical-conceptual formalisation of positive Law. This presents and explains the different norms of the legal order, the values, principles, universal concepts, and institutions of the same. In a second stage, the jurist will find the proper System, which is the hermeneutic explanation of positive Law, that is, the explication of the meaning or the concrete content of the institutions and norms of the legal order.

The didactic-expository system is the result of the abstract and conceptual formalisation of positive Law; likewise, the proper System is the product of the intellection or concretisation of the meaning of the institutions and legal norms, the true positive Law. This reality becomes apparent when considering that the didactic-expository system can be seen reflected in the dogmatic treatises and manuals of each branch of the legal order; and the proper System must be sought in the judgments of the courts, to be more precise: in their *ratio decidendi* (17: 554–556).

Although from a sociological perspective the positivity of norms is identified with social facts that demonstrate their validity, from the perspective of the Theory of Law, the positive state of legal science and, likewise, the positive meaning of legal norms and institutions is revealed in the legal System; more precisely, it is manifested in the dominant doctrine within each branch of the legal order. In this sense, the primacy of one doctrine over the others will be the determining fact of its positivity, which can occur due to its special merit or to the number of followers of that doctrine (16: 155). On the other hand, the positive meaning of legal norms is manifested through the judgments of the courts, especially in their *ratio decidendi*, and in as much as they assume or establish an interpretative position that constructs, enriches, or adapts the content of the norm to the different individual circumstances of life (17: 570).

The judge's ruling, whether understood as a speech act or an act of will (16: 429), is the fact that constitutes the positive (real) content of legal norms and institutions. In summary, the real and positive meaning of legal norms is always the result of a hermeneutic construction process, which can only be understood from this peculiar interaction between order and System.

3 Communicational Theory of Law and Legal Positivism

The Communicational Theory of Law can be epistemologically identified by its opposition to the normativist Positivism of the Kelsenian type. In this sense, the epistemological premises assumed by Positivism are rejected and overcome in CTL, which is especially visible with regard to the notion of the System. To see this more clearly, it is necessary to point out which the identifying features of positivist legal philosophy are and which the position of CTL is in this regard.

- Normativist legal philosophy maintains a descriptivist view of Legal Science, according to which the scientists must limit themselves to describing the norms that make up the legal System (10: 16). In contrast, CTL views Legal Science from a constructive or hermeneutic perspective, meaning that the theoretical jurist, through their work, contributes to the development and perfection of the legal order.
- Normativism maintains the lack of differentiation or identification between the legal order and the legal System, such that the legal order is per se a System (10: 73). The unity is the legal order, which, as its name suggests, is already presented as ordered and systematised (16: 147). CTL, on the other hand, starts from the duality of legal order and legal System, with the latter being the result of the

rational construction of the legal order. The legal order represents a raw totality of texts, and the System represents a horizon of meaning or a more rational and practical totality of texts.

- Normative Positivism is defined by its axiological neutrality and the condemnation of the traditional metaphysics of Legal Science (10: 31–35). The Science of Law should be independent from ethical positions about the behaviours regulated in the norms and contemplate the content of the norms aseptically; that is, it should understand the set of norms from the particular normative logic: factual condition-legal consequence. By contrast, CTL assumes that the legal order possesses its own ethical nature and that this affects the constructive mission of the Science of Law, as well as the jurists. The System will reflect what is the positive content of the different valuation guidelines, principles, and values inherent to the legal texts, which are also essential for determining the meaning of legal norms. This is what is called in CTL "ambital justice" or "ambital System" (21: 858).

However, CTL retains the rigor of other positivist premises, mainly two: (a) the necessary separation between disciplines of the study of Law, clearly distinguishing the tasks of Legal Sociology from those of the Theory of Law; and (b) the establishment of the legal order as the sole frame of reference for the Theory of Law and the phenomenon of juridicity.

The first of these premises involves distancing from the work of Kelsen, who loses methodological purity by introducing sociological categories in the study of Law (16: 356); and also leads to questioning the appropriateness of the theses of the Scandinavian realists to the extent that Sociology or the method of Social Sciences usurps the place of the Theory of Law (16: 362). On the other hand, the fact that the legal order constitutes the obligatory frame of reference implies that, from the perspective of CTL, any other evaluative, sociological, or political element foreign to the legal order should be left out of theoretical reflection. The internal perspective or that of the jurist obliges us to limit the view within the confines of the legal order (21: 860).

Given this situation, it can be questioned whether CTL does not suppose a new modality of Positivism of a conceptualist nature, which seeks to encase Law in a kind of theoretical bubble, shielded from the study of social phenomena and other material or axiological elements that influence the formation and determination of Law. This is where the idea of the System plays its main role, as it is the theoretical category that allows for the dynamism and adaptability of the legal order. The systematic construction of the legal order or the hermeneutic re-elaboration of the normative texts will be the channel through which social facts and other material elements influence the meaning or possible interpretations of the normative texts and institutions of the legal order (21: 511–517). Through the idea of the legal System, CTL overcomes the structural or formal dimension of the idea of Law and paves the way towards the explanation of its functionality and substance, which demands the opening of the Theory of Law towards Sociology and Ethics. This necessity has also been pointed out by Bertea (2: 273–275) when highlighting the need to overcome the narrow view of Positivism, focused on structure and logical-normative

procedures, to find an explanation of normativity and authority founded on human action (*agere*).

4 Communicational Theory of Law and Legal Sociology

The legal System and the social environment are two intimately connected realities, mutually dependent; because the Law is the form or order that the social environment takes and, in parallel, the social environment provides ideas, collective representations, and other materials in need of legal organisation (18: 153). However, this mutual dependence raises some significant epistemological problems for Legal Science; since, if Law is considered as a formalised and autonomous normative system, introducing the social environment into the matter of its knowledge would only cause confusion between the normative and the social reality. On the other hand, if Law is considered a social fact, the question of the juridicity of norms and the logic of their systematisation would be merely superficial and trivial; because what would be relevant is the study of social facts or the empirical reality of Law, that is, the relationships of obedience and punishment. Here lies the cause of the mismatch between the so-called "normativist positivists" and the so-called "sociologist positivists". Normativists believe that Legal Science or Theory of Law should focus its attention on the concept of norm and the study of the normative set or legal order. Sociologists or realists, on the other hand, start from the premise that Law is a social fact and therefore must be understood using the methods of the Social Sciences, particularly the sociological method.

Legal Sociology presents itself as the true Legal Science, and the analysis of social facts as the only valid method for understanding Law. This is the Copernican turn given by the Uppsala School and Scandinavian Legal Realism. Hägerström, the founder of the Scandinavian Realist School or Uppsala School, is a good exponent of this epistemological turn, which begins with the condemnation of neo-Kantianism for having reduced sensible reality to the projection of the cognisant consciousness, that's a form of subjective idealism. By contrast, according to Hägerström, space–time conditionality is what allows the identification of individual beings and reality, being therefore a condition of knowledge and existence. The Swedish philosopher maintains a narrow concept of reality, limited to the incontrovertible space–time reality and, consequently, excludes ethical values and formal concepts as unreal. For this reason, it becomes necessary to purify legal categories, removing their ethical and metaphysical burden and focusing on the investigation of the facts in which the Law is realised (6: 153–155). Law is a fact that occurs within space–time coordinates and, like with any other empirical phenomenon, the task of a deserving Legal Science is to find the true meaning of legal concepts, to know what function they really perform, once stripped of their metaphysical load (16: 356–357).

As Dreier (5: 120–124) has pointed out, the differentiation between Legal Theory and Legal Sociology should begin by clarifying that the former deals with the study of legally valid Law, while the latter focuses on socially valid Law. Consequently, it

can be asserted that Legal Theory and Legal Sociology are two different perspectives of the same empirical reality (the legal norms).

It still needs to be determined whether they are opposing or complementary perspectives. CTL acknowledges the validity of both epistemological positions but insists on the necessity to separate two levels of legal knowledge: the internal perspective, which is that of the jurist, characteristic of Legal Theory, and the external perspective, that of the sociologist, characteristic of Legal Sociology. Both disciplines aim to study the Law, though they differ in their methods of analysis. In this regard, Robles (16: 363) states: "*Legal Theory and Legal Sociology represent two parallel investigations; this means that each employs its own legitimate categories within its domain, but these categories cease to be valid when they invade the neighbouring field*".

Legal Sociology starts from the epistemological premise of observing Law fundamentally as a social fact and, consequently, employs the method typical of Social Sciences for its study. According to this perspective of the legal phenomenon, the validity of the Law should be socially verified by examining social facts that reveal its existence and obligatory nature (20: 135). Legal Theory, on the other hand, observes the validity of the Law from a formal logical perspective, according to which the validity of norms derives from their inclusion in the legal order; it is here therefore necessary to examine what conditions a norm must meet to be considered part of the legal order, that is, what requirements a norm must fulfil to be considered part of the legal order. In summary, Legal Theory is concerned with studying the way in which legal norms are produced and the procedural conditions they must meet to be considered part of the legal order (16: 380–384).

However, this epistemological separation is overcome in CTL when dealing with legal decision-making and its different modalities. Thus, the decision-making moment in Law becomes a point of convergence or reconciliation between the legal System and the social environment. Indeed, a legal decision cannot be reduced to a mere formal issue regarding the conditions of its validity; nor can it be studied solely as a social fact, without critically addressing the conditions of its reasonableness (3: 270–272). The social context or environment, including ethical, political, historical, ethnic, cultural, economic, religious conflicts, and so on, provides the collective representations (ideas, values, ethical principles, social morals, etc.) on which legal decisions are, more or less intensely, based (18: 156–158).

5 Context, Subjects, Modalities, and Processes of Legal Decision-Making

Legal decisions hold the genetic primacy within the framework of CTL, because at the beginning of every form of Law lies the decision, that is understood as the trigger of the legal order, its norms, and institutions. As explicitly stated by Robles (16: 105), "decisions constitute the generative or dynamic aspect of the legal order, as they are the ones that generate new substance, new matter. Without decisions, there would be no Law, no norms, nor institutions". In this sense, the Theory of Legal Decisions studies the dynamic aspect of the Law, understood as

a heterogeneous context of communicative acts that affect different legal operators and their decisions. Thus, emulating the pragmatic analysis of language, the Theory of Legal Decisions should focus on the study of the main subjects involved in legal decisions, the different decision-making contexts, the recipients of these decisions, and the various modalities of legal decisions (19: 22–23).

According to this proposal, Robles indicates that the communicational context is defined by the concept of the legal Ambit (AMB). This is the virtual space or communicational axis in which the relationship Order-System unfolds (16: 489). Within each legal Ambit, multiple processes of legal communication occur; however, the most relevant communicational process would be the interaction between the legal order and the legal System.

This complex communicational context, which is the legal Ambit, like any sphere, possesses an intrinsic rationality or organising principle upon which the hermeneutical spiral of Order-System unfolds. This is the concept of "ambital justice": the ideals of coexistence of a particular legal Ambit, or, alternatively, the idea of justice as institutionalised in a specific legal Ambit (21: 858–890). It seems logical to think that the Constitution plays an essential role in defining and organising any legal Ambit, as it not only defines the subjects of political power, their competencies, and decision-making processes, but also, typically, articulates the institutionalised axiological compendium that the constituent power has considered fundamental for coexistence within the established order (18: 159).

As we see, the relationship Order-System constitutes the gravitational point of the entire Communicational Theory of Law, becoming again evident when addressing the question pertaining to the subjects of legal decisions. Firstly, and due to its prominence in the creation of the legal System, we find the constituent power; secondly, comes the Legislator, in a broad sense, as the creator of the raw legal material that constitutes the legal order; next, we find theoretical or dogmatic jurists who, through their propositive decisions, seek to endow the legal order with rationality and coherence; and finally, judges and courts, who through their rulings concretise the content and meaning of legal provisions and determine the proper legal System.

Regarding the modalities, CTL distinguishes the following types of legal decisions (22: 82):

> "A) Ordinamental decisions: generate texts of the legal order.
> B) Propositive decisions: generate doctrinal texts, with proposals of constructed legal norms, belonging to the didactic-expository system.
> C) Systemic decisions: generate texts belonging to the legal System.
> D) Implicit or tacit decisions: generate texts that, at first, are not explicit and that, belonging to the order, become explicit in the legal System.
> E) Extra-ordinamental and extra-systemic decisions: generate texts that are neither of the order nor of the System, but of the legal Ambit".

It is clear that the basis of this classification is the relevance of the decisions in the context of the Order-System relationship (19: 26–34).

Therefore, ordinamental decisions are all those normative decisions that contribute to the formation of the legal order, understood as the raw material.

Propositive decisions are constituted by theoretical research, treatises, and monographs that seek to organise the legal order rationally and systematically.

The systemic decisions are the sentences of the courts, which incorporate the various theoretical proposals and effectively concretise the meaning of the legal provisions of the System; that is, they reflect the legal System and the sense of positive Law.

Implicit or tacit decisions are also constituted by the sentences of the courts that reflect the content or meaning of the legal customs and legal principles prevailing in the legal System, although not necessarily spelled out in the legal order.

Finally, extra-ordinamental and extra-systemic decisions are those that are generated within the legal Ambit of a specific political community and that are not directly related to the relationship Order-System; either because they refer to technical or merely pragmatic issues (filing a lawsuit, precautionary jurisprudence, business and legal relations of all kinds, etc.); or because they refer to the very creation of the legal order, as is the case with the constituent decision.

Each type of decision has its own decision-making process, that is, the set of steps to follow for decision-making. Thus, every legal decision necessarily implies deliberation and a positioning regarding the legal order and the social reality on which it acts; but the way in which this deliberation and positioning occurs differs depending on the type of decision in question (19: 25).

Now, as hermeneutic theory teaches, every decision reflects, more or less intensely, the social and historical context in which the subjects unfold and in relation to which they must position themselves (7: 373–375). In this sense, in all the modalities of legal decision, the impact of extra-legal motivations can be appreciated, which affect their formation and realisation as a consequence of the social insertion of the subject (18: 149).

In any case, the communicational study of legal decision-making must combine the theoretical analysis of the various types of legal decisions and their specific procedures, with the sociological study of the legal decision understood as a social phenomenon. In this way, the theoretical analysis will provide the categories or abstract forms that allow understanding, organising, and controlling the dynamism and variability inherent in the processes of legal decision-making; but, likewise, the appropriation of factual motivations and the social insertion of the subjects will make it possible to enliven the theoretical forms and fill them with reality (3: 260).

The communicational dimension of CTL is most evident regarding the explanation of the decision, as it requires coordinating normativity and facticity, as well as theoretical explanation with sociological explanation. Moreover, this reflects the success of the hermeneutic-analytical method advocated by the author. All this, despite the author's recurrent resistance to breaking the epistemological separation between Legal Theory and Legal Sociology.

6 The Constituent Decision

The constituent decision is the *fiat* of the legal order, its original element, and has a much broader freedom or creative power than the rest of the legal decisions (16: 107). In this sense, the idea of justice unfolds with much greater intensity than in

the rest of legal decisions, as it will be the constituent power that will delimit its material content in the political community (21: 128). Explicitly, Robles (18: 159) reminds us: "the Constitution verbalises the supreme principles or values of the constituted legal order, which are to inspire the political action of the subjects of power. These values are the institutionalised axiological compendium that the constituent power has chosen as basic for coexistence within the established order, and whose development will be verified autopoietically through the institutional mechanisms of the System".

This original decision about justice and the political order (the constituent decision) is divided, according to the approach of CTL, into three core positions: (a) the constituent process; (b) the forms of government; and (c) the constitutional values.

6.1 The Constituent Process

The constituent process can be defined as the set of acts of the constituent power, or its delegate, that lead to the constituent decision. Generally, this process tends to take the form of a debate about the criteria of justice and political form that should govern the life of the community in the future, with the aim of reaching a consensus or common position among the different social and political actors (16: 112–114). However, it is necessary to question what the minimum conditions of this debate should be: pluralism and political consensus (15: 155). The first is sociological in nature and the second procedural.

Pluralism emerges against the monolithic moral character of primitive societies, given the fact that in modern societies a diversity of moral positions coexists. In these societies, the individual possesses a kind of religious and political freedoms that guarantee them a personal position in relation to the State. However, the process of socialisation that these freedoms have undergone has led to the substitution of the individual by political parties. Thus, the parties have become the actors in political life, to which should be added the so-called social movements (environmentalists, feminists, pacifists, etc.) insofar as they act within political life (15: 141). Parallel to this, economic life has also experienced a marked polarisation: national and transnational capitalist interests, the transformation of the individual into a consumer, labour movements and unions, among others (15: 143–151). In short, the constituent decision cannot abstract itself from the social framework in which it is situated, so this moral, political, and economic polarisation constitutes the context in which the material content of justice of the constitutional text must originate.

Consensus is conceived from CTL as the dialogue that overcomes the disintegrating pluralism in which our societies live. Robles explicitly says (15: 160): "*the theory of discourse or rational dialogue constitutes a constant pattern that must be applied to every process of rational decision-making*".

The realisation of consensus requires ideal conditions of dialogue that reduce to zero the possibilities of deception, concealment, and irrationality of the participants. However, the conditions of the ideal dialogue are rarely met in real political dialogue, which is contaminated by multiple interferences (15: 160–161). The mission of a Theory of Decision, and more precisely of a Theory of Justice, is to construct a

consensus as close as possible to this ideal dialogue. Considering these ideal premises, it will be examined the conditions under which real political dialogue has been developed. If the procedure complies with these fundamental conditions, a satisfactory consensus will be reached (15: 163).

Now, what are these procedural conditions around which real dialogue must orbit to resemble the ideal model? Although it is not an easy task, let's try to summarise them as follows: (a) an irrevocable core of values that are not open to discussion; (b) given the impossibility for all individuals to be interlocutors, the involvement of all social actors (political parties, social movements, companies, and unions); (c) media independent from power structures; (d) a class of independent intellectuals; and (e) a model of democracy whose sense of justice goes beyond the decision-making procedure and delves into the meaning of these decisions (15:163–169).

Finally, the material content of justice will largely depend on the degree of fidelity of the real dialogue to the ideal conditions of it, that is: the greater the respect for these conditions, the greater the degree of political justice (15: 170). Thus, this core of values, agreed upon as indisputable in the constituent dialogue, will constitute the axiological core of a particular community. Consequently, the constitutional consensus not only possesses a formal-procedural dimension but also reproduces an axiological material content (15: 171). From an empirical or sociological perspective, it is true that this consensus never meets the demands of an ideal, fully rational consensus, but it constitutes the only political foundation of a shared axiological core (15: 173). It could be said even more: the reached consensus constitutes the ultimate foundation of the legitimacy of the entire legal order and of the very idea of legality. The real consensus would be the positive externalisation of the set of deep and transversal conventions on which the legal System is based, understood as a social practice (8: 174–175).

6.2 Forms of Government

The constituent decision must necessarily establish the form of government of a State (21: 116–117), that is, it seeks the foundation of the supreme powers of the State or constituted powers (legislative, executive, and judicial). Although, from a formal perspective, any decision on this point deserves the name of "constitution" (19: 47), the truth is that the current world is characterised by the universal acceptance of democracy as the legitimate form of government (18: 161).

Following the classification of Tocqueville (23: 76), democracy can be comprehended as an ideal, as a political form, and as a form of social life. In its idealised consideration, democracy appears defined as the government of the people, by the people, and for the people. In this sense, the democratic ideal serves as a critical horizon that demands greater participation of the people in the exercise of power and in the public sphere, calling for more transparency in political actions and, consequently, more information about political decision-making processes 18: 162).

Democracy as a political form has taken various manifestations, and from the CTL perspective, the most historically and socially elaborated form is the political form of the Rule of Law, typical of Western states. The Rule of Law combines

the quintessential democratic ideologies, Liberalism and Socialism. In this way, the political form of the Rule of Law allows the unification of the advances of Liberalism in the defence and promotion of individual rights with the successes of Socialism in terms of correcting social and economic inequalities (21: 922–924).

Democracy, understood as a form of social life, is nowadays a product of the universality of communication. This phenomenon is characterised by unlimited communication—both in a horizontal and in a vertical sense—capable of generating opinions in the individual about everything that can be opined upon and making them a participant in everything that happens. The communicative universality can provoke, according to Robles (18: 163–164), a social hyperdemocracy in which all opinions have the same value and can only be judged quantitatively by the common measure or the principle of majority. In this context, the media emerge as a primary political power because they are capable of creating states of opinion, influencing the opinion of others, and directing the lives of citizens without them barely realising it. Consequently, one of the greatest dangers to political coexistence is informational manipulation.

6.3 Constitutional Values

Lastly, but no less importantly, the constituent decision must take a position on the material-axiological core on which the entire legal order to be constituted will be built. In this sense, the constituent decision must verbalise what are the set of constitutional values that should preside over the actions of the subjects of power; particularly, it must specify what are the superior principles or values of the legal order, the fundamental rights of individuals, and the social and economic principles that should govern the behaviour of the constituted powers (21: 189–190).

Through the decision on these values, a model of justice for the entire nascent legal order will be established, which, although it must be specified in later instances, imposes per se certain limits on the decisions of the constituted powers (21: 206).

In the constituent decision, the so-called human rights can find their place, being the mission of the constituent to incorporate these principles of justice within the constitution with the aim of guaranteeing a minimum of justice in the political community (15: 129). However, in CTL, human rights are conceived as aspirations of ethical reason and cannot be identified simply with fundamental rights, which have been constituted as a result of a real political dialogue and in view of a specific political community, not from the perspective of the universality of the human species (Robles, 15: 175). The constituent decision will transform those ambiguous human rights into concrete fundamental rights.

Since this catalogue of moral principles and principles of justice has been incorporated into the constitution and effectively guaranteed through a procedure to enforce them, we are faced with fundamental rights. These are now fully integrated into the legal order and, even more, within the framework of the primary norm, which is the constitution. In this sense, they delimit the content of lower-grade legal decisions, and it can be affirmed that these decisions will have as a mandatory

reference framework the content of these fundamental rights. In other words, the principles of material justice included in the constitution, whether configured as fundamental rights or as ethical-legal values, contribute to delimiting the framework of justice in which legal decisions unfold (16: 383–384).

Therefore, the constituent decision represents the first impulse for the institutionalisation of the values or ethical system underlying the social ensemble, which will later nourish the set of legal decisions and, especially, the norms that will explicate and develop these values. However, from a sociological perspective, it should always be examined whether these values institutionalised in the text of the constitution and other lower-ranking norms are effectively respected by the subjects of power and whether they actually correspond with the ethical convictions of the general population (18: 178–179). From this analysis will derive their suitability as conventions to establish the authority of legal operators and the general duty to obey the Law (11: 153).

7 The Legislative Decision

It is appropriate to remember that the Law, like every norm, from the perspective of CTL, is a raw material of texts that requires further elaboration, so that the decision of the Legislator does not exhaust its meaning or scope, since the ultimate meaning of the legislative provision is obtained through its hermeneutic or rational reconstruction in the legal System (21: 374).

Based on this reality, the legislative decision can be theoretically studied like any other normative decision, identifying who holds the legislative power, what is the procedure for legislation, and what can or cannot be materially decided by a law.

From the formal perspective of the Theory of Law, these issues do not present a particularly difficult problem to answer, to the extent that the constitutional text will reflect which organ holds the supreme power to legislate, what is the composition of the organ, the procedure for legislating, and the general axiological guidelines around which legislation should orbit (16: 380–384).

From the perspective of the Theory of Legal Decisions, the issue is somewhat more complicated: first, because it must be explained what a legislative decision is, that is, what its peculiarities are with respect to other normative decisions; and second, because the factual elements in which this type of decision unfolds must be taken into consideration: it must be checked to what extent the theory conforms to reality.

Theoretically, the legislative decision is simply a speech act, or the act of will of the Legislator, according to the established procedure. Like any act of will, the legislative decision implies a choice by the Legislator about the achievement of certain ends and the means to reach them. Consequently, according to the scheme of CTL, the study of the legislative decision must seek to ascertain which were the ends pursued by the Legislator and what means he decided to use for their achievement (21: 376).

The study of the teleological possibilities of the legislative decision must be combined with the fact that the Legislator, like any constituted power, must obey the

constitutional text, where the axiological core that should guide the legislation is found. Though within this general catalogue of principles, fundamental rights, and constitutional values, the truth is that the possibilities of action of the legislator are quite broad. Therefore, the discovery of the real purpose intended by the Legislator, as well as the secondary purposes, must occur considering the specific circumstances, the interests at play, the nature of the social conflict that motivates the law, and the ideology that informs a certain legislative action (21: 385–390). An interesting exercise would be to discuss the purposes intended in the imminent Amnesty Law that the Spanish government is preparing.

The choice of the precise means for the realisation of the intended purpose presents a procedural dimension and a technical dimension. The procedural consideration of the legislative decision refers us to the study of the norms that deal with establishing who are the subjects with the power to legislate, what are the competencies attributed to them, and the norms that indicate the procedure to follow for legislating (21: 382).

According to a purely technical consideration, laws are texts and therefore must fulfil an essential requirement of communicability, that is, they have to be intelligible, so that they must respect the grammatical forms and demonstrate a good command of the legal vocabulary. At the same time, they also must accurately combine the use of normal language with technical-legal language without losing rigor in expressions. Then, the drafting of the law cannot neglect the proper use of the verbs that make up the different types of norms. In this sense, the verb "to be" must be used for ontic norms, "to have" for procedural norms, "can" for potestative norms, and "must" for deontic norms (21: 397–403).

Furthermore, the legislative decision is seen in CTL as a communicative act and, therefore, naturally presents a rhetorical dimension: it naturally aims to persuade or convince about the opportunity and justice of its message. In this sense, keeping in mind that the Law is socially externalised in the form of a text, the key to its proper rhetorical construction lies in the use of complete argumentation about the characteristics or nature of the social conflict that generates it, the plan of action outlined by the Legislator, and the rational forecast of its results (21: 397).

According to a dogmatic or institutional perspective of the legislative decision, Robles considers that, both in the deliberation about the legislative action and in the drafting of its text, the Legislator must be aware of the normative or systematic co-text and the social context. The success or failure of the legislative action will largely depend on the degree of adequacy of the legal text to the legal System and the correctness of the reading of the social reality on which the law must operate (21: 409). By this, the continuity relationship that exists between the hermeneutic elaboration of the meaning of legal provisions and the reality of social facts, on which the normative purpose is based, is verified anew.

From a factual or sociological consideration of the laws, it turns out that the legislative decision can be moved in multiple directions and will not always correspond to the ethical or axiological ends of the legal order; this is what in CTL is called "ambital justice".

A sociological investigation of the content of the law will serve in the first place as a control of the intentions of the Legislator, to the extent that it will allow

detecting the sectoral, partisan, or class interests that divert the law from its vocation to the general interest. Assuming the external perspective or that of the observer, which is proper to the sociologist, the objective must be to verify what are the social or factual conditioning factors of the legislative decision and what is the function that laws fulfil in the social system (18: 165–166).

From this perspective, it is possible to find multiple contradictions between the traditional postulates of Political Science and the reality of the facts, which reveal the weakness of the legislative power or the Parliament, generally closely linked to the executive power and driven by partisan interests, pressure groups or lobbies, and other invisible forces (18: 167–169). Here, Bobbio's wise observation (4: 125) should not be overlooked: the one who commands is all the more terrible the more hidden he is, and the one who must obey is all the more docile the more scrutable and scrutinised he is in all his gestures.

Finally, the study of the functionality fulfilled by the laws is nothing more than the analysis of their efficacy and efficiency, that is, to verify if the social facts that reveal the compliance with the norm, its efficacy, or the obedience of its recipients really happen; and if the norm efficiently fulfils the objectives or social purpose intended (21: 389).

8 The Judicial Decision

The judicial decision is the embodiment or externalisation of the exercise of jurisdictional authority, which involves stating the law or giving each their due in accordance with the System. More precisely, through the judicial decision, the law is put into service of life, moving beyond the generality of norms and focusing on the factual and individual reality, establishing what the law is in relation to a specific case (21: 467–468).

Determining what the law is in each case is partly a process of discovery and partly a process of obtaining (16: 573). The law is not simply given to the one who judges; it requires the judge's effort to obtain it. Obtaining the law is a task of constructing of facts and norms understood as follows: the judge must recreate the facts of the case while hermeneutically understanding the norms that apply to them (17: 355). Legal interpretation involves, using the ideas of Kaufmann (9: 70): formulating the concrete legal propositions towards the material content and constructing the material contents towards the law.

Analytically viewed, the judicial decision involves a set of particular decisions that naturally lead to the final decision (17: 573). From the perspective of CTL, these partial decisions reveal the judge's stance on the findings of meaning offered by scientific doctrine. The search for the applicable legal norm (systemic norm) is done by the judge through the exploration of various doctrinal positions and preferably determining one among them. By doing so, the judge incorporates the doctrinal proposal into the *ratio decidendi* of their judgment and hermeneutically reconstructs the legal order (21: 515). Judging, therefore, is necessarily an activity carried out from a hermeneutical position determined by the idea of a legal System, because the

judicial decision can only be understood within the System and as a specific stance regarding it.

Regardless of the material aspect of the judicial decision, this latter is certainly a manifestation of the exercise of jurisdictional authority and, like any authority, is delimited by the idea of competence. This presupposes that the judicial decision must always be made within the framework of actions allowed by the norms that confer such authority (16: 436), in other words, in accordance with the norms that establish the material and territorial competence of the jurisdictional organs (21: 470).

The judicial decision is the culmination of the judging activity, concentrated in a series of acts carried out within the framework of the judicial process. In this sense, the judicial process has certain defining characteristics that directly affect the mode of production and the content of the judicial decision. Consequently, the decision of the one who judges cannot be understood without necessary consideration of the process in which it occurs (21: 474–477).

The judicial process can be considered both normatively and institutionally (21: 473), the first perspective being that of the procedural norms governing the object, prerequisites, and procedural acts; the second or institutional perspective considering the judicial process as a totality of meaning that, according to various procedural principles, encompasses the set of legal relations and situations that occur in the judicial process (21: 490–495).

Obviously, procedural norms directly influence the judicial decision by establishing the conditions or prerequisites of the judicial process, the competencies of the judge, the procedure to follow, and their procedural duties (21: 479–488). Similarly, the institutional sense of the judicial process directs the judicial decision under the assumption of the specific procedural principles on which the judicial process gravitates, namely: the principle of legality, the principle of contradiction, the principle of procedural economy, the dispositive principle, the inquisitive principle, the free assessment of evidence, and the broader right to effective judicial protection (21: 503–507).

However, the judicial process must also be considered from a decisional perspective, thus highlighting its procedural character. In this sense, the judicial procedure should be noted for its dialectical and controversial nature, as well as its dynamic or sequential character. Consequently, the material content of the judicial decision can only be grasped within the framework of this episodic and dialectical unfolding that is the judicial procedure.

As with the previous legal decisions, the hermeneutic-analytical analysis of the judicial decision must be completed with its sociological consideration to verify to what extent these theoretical postulates correspond to the social reality of the judiciary. In particular, it should be investigated what the relationship of the judiciary is with other political powers, especially with the executive power; and the influence of the social origin, social environment, and ideology of judges on their decisions (18: 172). At this point, the necessary independence of the judiciary from other political powers is a factual prerequisite necessary to ensure the objectivity of judicial sentences (18: 172).

Sociologically, a significant impact of the social origin of judges (the fact that they generally belong to the upper middle class of the population) on the content of their sentences should be rejected, or, conversely, the absence of class interests in the judicial decision (18: 173). Nevertheless, the study of the factual reality of the administration of justice reveals notable dysfunctions that hinder the success of the judicial process, specifically: procedural flooding that overburdens courts and hampers judicial work; the delay of judicial processes that casts doubt on the efficacy of the administration of justice; social and economic barriers that hinder access to and knowledge of the administration of justice by citizens; and, ultimately, the asymmetry between parties, as corporations or companies have a de facto very different economic and social position from the average citizen, which also influences their experience with respect to the judicial process (18: 174–177).

9 Conclusions

The concept of System, as developed in CTL, reconciles the traditional conflict between the abstract formulation of a norm and its concrete or positive reality. This is achieved through Legal Dogmatics, serving as a mediating element that enables the rationalisation and adaptation of legal texts to specific factual circumstances.

CTL's success regarding the concept of System can be considered a conceptual shift in the Theory of Law, avoiding falling into Conceptualism. Through this conceptual shift, what constitutes positive Law at any given moment, or the positive meaning of norms, becomes subject to the rational or hermeneutic elaboration of legal texts. However, this is not about imposing erudition on the jurist, since dogmatic elaborations are merely proposed meanings whose real potential depends on their practical applicability, which in turn depends on the behaviour or decisions of practical jurists.

In any case, the legal System in CTL is not immune to a sociological inquiry that might explain the real (not always dogmatic) causes behind the primacy of one doctrine over others, and the factual (not always dogmatic) reasons why a certain interpretive position dominates in court jurisprudence. Beyond theoretical-dogmatic reasons, there are multiple motivations, interests, causes, or reasons that also explain the behaviour of jurists, and not all of them are as adequate as the pursuit of truth and justice.

Consequently, a sociological approach to the concept of System in CTL could surpass the simplicity of dogmatic positions and more accurately reveal the underlying reality of the legal System.

From the strictly epistemological perspective of CTL, the separation of Legal Sociology from the Theory of Law is defended: it distinctly differentiates between the hermeneutic-analytical method, characteristic of theoretical formulation, and the empirical method used in Sociology. However, the rigidity of this division becomes blurred when Robles addresses legal decisions, mainly because these always occur in a specific social context, being driven by the social circumstances or conflicts that motivate them.

It is in the context of legal decisions that the internal perspective of the jurist and the external one of the sociologist seem to converge. Maybe it cannot be otherwise since the appropriateness and timeliness of theoretical formulation must correspond to the factual and circumstantial reality of social life. An analysis of social facts or the social insertion of Law might then reveal the naivety of the theoretical formulation, requiring a more critical and reflective approach. In this situation, Sociology cannot be excluded from the theoretical construction; on the contrary, it should complement and enrich theoretical analysis, redirecting it towards the reality of social facts and conflicts. Similarly, the normative perspective enriches the sociological analysis insofar as it imbues the strictly empirical view of facts with meaning (ends, intentions, and values). As Bertea (3: 252–254) maintains, there is a continuity between facts and norms, and the Theory of Law must find a model of rationality that reconciles this mutual interdependence.

The communicational study of legal decision-making processes demonstrates the impact of the social environment in various ways, whether in the structure of the decision-making processes themselves or in the actual content of the decisions. This social context impact can be overlooked in a quick reading of the three volumes of the *Communicational Theory of Law*, but it becomes clear in a comprehensive reading of Gregorio Robles' work, especially in the third volume of his major work.

In his *Sociology of Law*, the author already advocates introducing the sociological method into the understanding of Law, primarily as a critical element for assessing the efficacy and efficiency of the normative system as a reflection of the political order of coexistence. It is in this work that he first includes a sociological approach to legal decisions, demonstrating how the social environment can easily distort even the most accomplished political constructions. However, it is in the third volume of his work *Fundamentals of Communicational Theory of Law*, dedicated to the study of legal decisions, that the important link between hermeneutic-analytic analysis and Legal Sociology becomes evident once again.

Firstly, the reader will find the concept of ambital justice, which is the idea of justice that drives the entire legal System. A knowledge about this justice cannot be attained through rational dictates, meaning it is neither the fruit of practical rationality or ethical prudence nor a deductive-rational construction of universal character. Instead, it is a relative notion, different in each legal System, determined by its positivitation in the constitution and other normative sources (including legal principles). Essentially, it is the empirical and social data of its explication in the text of the norms that allows its identification, and its insertion into the legal System will allow for the development and expansion of its guiding vocation.

Thus, ambital justice can also be understood as a positive social morality, depicted in the text of the norms of the legal order and in the current legal System. It is also dynamic in that the semantic scope of the idea of ambital justice is determined by temporal variations occurring in the relationship Order-System. As a result, this axiological corollary is in a continuous process of updating, upon which depends the virtual extension of the so-called legal Ambit (14: 167–168). In this sense Ricca (13: 6) remarks: "But it is simply impossible to establish once and for all clear categorical borders. On the contrary, as soon as such borders are drawn,

immediately and almost compellingly features and profiles of continuity between the semantic connotations inside and outside each specific category".

Secondly, when Robles deals with legal decision-making processes, he relates the material content of the decision to the procedure by which this decision is made. Now, a deeper understanding of this phenomenon reveals that different decision-making procedures reflect certain social conventions, without which Law itself could not be understood. In this sense, the requirement for the constituent process to follow the steps marked by the idea of consensus and rational dialogue among different social and political actors shows, from a social perspective, the social acceptance of democracy as the only legitimate form of social governance.

Furthermore, the normative regulation of the legislative and judicial processes shows the general social acceptance of the Rule of Law or Law's Empire as the legitimate form of Law. Consequently, it can be concluded that there are certain social conventions that constitute the source of legitimacy of norms and without which the different decision-making procedures could not be understood. The norms that regulate procedures are not alien to these conventions or legitimacy criteria; they are constructed from the assumption of their imperativeness. The reasons for obeying the Law are situated beyond the rules that establish what the Law is, mainly on political or moral grounds (11: 152).

Thirdly, the social environment necessarily influences the material content of all types of legal decisions for various reasons. The first reason is gnoseological, highlighted by hermeneutic philosophy: it is the social insertion of the subject or the necessary social and historical conditionality of the interpreter, so that no legal operator can avoid the circumstantial nature of every decision. Another no less important reason, of a pragmatic nature, is constituted by the social relevance of every legal decision, starting with the constituent decision, which cannot ignore the historical character of its purpose, as it is called to politically organise social coexistence, and therefore, must account for the set of social movements, ideologies, values, and beliefs of all kinds that will influence the legal order. This is also true in the case of the legislative decision, insofar as it is motivated by a particular reading of the social context and driven by the force of social events or conflicts, but also insofar as it involves a specific plan of action on the social whole. Finally, the social environment also influences the judicial decision, as the judge is a privileged bearer of the dogmatic tradition from which they understand the content of norms and is responsible for their update in each specific case they resolve. It is not unusual to find the ultimate foundation of the most significant jurisprudential changes in social changes, especially when they reveal the inequalities and social injustices that threaten our peaceful coexistence.

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