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A Teoria do Planejamento Normativo de Shapiro*

Shapiro´s Normative Planning Theory

La Teoría de la Planificación Normativa de Shapiro

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Resumo

O objetivo desse texto é apresentar as características principais da Teoria do Planejamento Normativo desenvolvida por Scott J. Shapiro na obra *Legality*, apontando eventuais convergências e divergências perante os modelos clássicos de positivismo jurídico desenvolvidos por Kelsen, Hart e Bobbio. O problema de pesquisa em questão diz respeito à ampla discussão, no campo da filosofia do direito, quanto à identificação da teoria com maior fidelidade na descrição do fenômeno jurídico e, notadamente, com maior potencialidade normativa, mormente considerando a função do direito. Nesse contexto problemático, a hipótese em discussão é aferir se a proposição de Shapiro apresenta avanços teóricos sobre os desenvolvimentos clássicos do juspositivismo, atribuídos aos autores antes referidos. Em sede conclusiva, foram apontados aspectos teóricos a indicar a classificação da teoria de Shapiro como uma proposição pós-positivista, de cunho culturalista, notadamente ao apresentar pontos de conexão entre direito e moral, ao invés da pretensão de enquadramento no modelo do positivismo jurídico exclusivo não formalista, recomendando investigações futuras sobre esse ponto. Quanto à metodologia empregada, destaca-se que na fase de investigação foi utilizado o método indutivo, na fase de tratamento de dados utilizou-se o método cartesiano, e o texto final foi composto na base lógica dedutiva. Nas diversas fases da pesquisa, foram acionadas as técnicas do referente, da categoria, do conceito operacional e da pesquisa bibliográfica.

Palavras-chave: teoria do planejamento normativo, positivismo jurídico, moral, inclusivo, exclusivo.

Abstract

This text aims to present the main characteristics of the Normative Planning Theory developed by Scott J. Shapiro in the work Legality, pointing out possible convergences and divergences concerning the classical models of legal positivism developed by Kelsen, Hart, and Bobbio. The research problem concerns the broad discussion in the philosophy of law field regarding the theory identification with greater fidelity in describing the legal phenomenon and, notably, with higher normative potential, especially considering the function of law. In this problematic context, the hypothesis under discussion is to assess whether Shapiro's proposition presents theoretical advances over the classical developments of legal positivism attributed to the authors mentioned above. In conclusion, theoretical aspects were pointed out to indicate the classification of Shapiro's theory as a post-positivist proposition of a culturalist nature, notably when presenting points of connection between law and morality, instead of the intention of fitting it into the exclusive non-formalist legal positivism model, recommending future investigations on this point. According to the above, it is clear that this article is strictly linked to the research line Constitutional Principles, Legal Policy and Artificial Intelligence (Doctorate) of the Postgraduate Program in Legal Science at the University of Vale do Itajaí (Univali). Regarding the methodology used, it is worth highlighting that the inductive method was used in the research phase, the Cartesian method in the data processing phase, and the final text was composed on a deductive logical basis. Referent, category, operational concept, and bibliographic research techniques were used in the various phases of the study.

Keywords: *Normative Planning Theory; Legal Positivism; moral; inclusive; exclusive.*

Resumen

El objetivo de este texto es presentar las características principales de la Teoría de la Planificación Normativa desarrollada por Scott J. Shapiro en la obra Legality, indicando eventuales convergencias y divergencias ante los modelos clásicos de positivismo jurídico desarrollado por Kelsen, Hart e Bobbio. El problema de investigación en cuestión está relacionado a la amplia discusión, en el campo de la filosofía del derecho, cuanto a la identificación de la teoría con mayor fidelidad en la

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descripción del fenómeno jurídico y, notablemente, con mayor potencialidad normativa, principalmente considerando la función del derecho. En este contexto problemático, la hipótesis en discusión es comprobar si la proposición de Shapiro presenta avances teóricos sobre los desarrollos clásicos del iuspositivismo, atribuidos a los autores antes referidos. En sede conclusiva, fueron indicados aspectos teóricos a señalar la clasificación de la teoría de Shapiro como una proposición post-positivista, de característica culturalista, notablemente al presentar puntos de conexión entre derecho y moral, en vez de la pretensión de encuadramiento en el modelo del positivismo jurídico exclusivo no formalista, recomendando futuras investigaciones sobre este punto. De acuerdo con lo expuesto, se nota que el presente artículo está estrictamente vinculado a la línea de investigación Principiología Constitucional, Política del Derecho e Inteligencia Artificial (doctorado) del Programa de posgrado en Ciencias Jurídicas de la Universidad del Vale do Itajaí (Univali) Cuanto a la metodología empleada, se enfoca que en la fase de investigación fue utilizado el método inductivo, en la fase de tratamiento de datos el cartesiano y el texto final fue compuesto en la base lógica deductiva. En las diversas fases de la investigación, fueron accionadas las técnicas del referente, de la categoría, del concepto operacional y de la búsqueda bibliográfica.

Palabras clave: *Teoría de la Planificación Normativa; positivismo jurídico; moral; exclusivo.*

1 Introduction

The objective of this text is to present the main characteristics of the Normative Planning Theory developed by Scott J. Shapiro in the work *Legality*, pointing out possible convergences and divergences in relation to the classic models of legal positivism developed by Hans Kelsen, Herbert L. A. Hart and Norberto Bobbio (Shapiro, 2013).

The research problem in question concerns the broad discussion, in the field of philosophy of law, regarding the identification of the theory with greater fidelity in the description of the legal phenomenon and, notably, with greater normative potential, especially considering the function of law. For a long time, there has been a conflict between the defenders of the paradigm of natural law, such as Hugo Grotius, Samuel Pufendorf, Lon Füller and, more recently, John Finnis, with the authors of the model of juspositivism, such as Hans Kelsen, Herbert.

L. A. Hart, Norberto Bobbio and, more recently, Luigi Ferrajoli. In addition, there is also a current of authors who defend the overcoming of legal positivism, without going back to natural law bases, from a post-positivist perspective, such as Ronald Dworkin, Robert Alexy and Richard A. Posner. In this context, the importance of presenting Shapiro's non-formalist juspositivist theoretical perspective emerges, including possible comparisons, when relevant, with other propositions with a similar profile.

The hypothesis under discussion, in this problematic context, is to assess whether Shapiro's proposition presents theoretical advances over the classical developments of juspositivism, attributed to the aforementioned authors (Kelsen, Hart and Bobbio).

At the end of the analysis of the work in question, in conclusion, aspects of Shapiro's theoretical proposal will be highlighted that can be deepened, in later discussions, in order to evaluate whether it remains with the descriptive and prescriptive flaws attributed to previous positivist models or, alternatively, if it presents a sustainable version of the juspositivist model. There is also the possibility that his theory presents points of identity with propositions of a natural law or post-positivist nature, especially with regard to the thesis of the

necessary connection between law and morality.

Before inaugurating the theoretical exposition proposed herein, it should be noted that it was decided to use the expression legal science to refer to the field of studies on law, both to honor the institutional option of the program in the context of which this text was produced, and also because it is considered highly recommended to suggest an effort of seriousness and coherence in the development of research with empirical bases in this specific area (Zanon Junior, 2019a). However, the content of this article is not lost if the reader replaces the expressions that refer to legal science with another more appropriate to his line of thought, such as legal theory or philosophy. As for the methodology used, it is noteworthy that in the investigation phase the inductive method was used,

In the data processing phase, the Cartesian method was used, and the final text was composed based on deductive logic. In the various phases of the research, the techniques of the referent, the category, the operational concept, and the bibliographic research were used (Pasold, 2021).

2 The theory of normative planning

Scott Jonathan Shapiro, a professor of philosophy at Yale Law School, developed a theory proposal Planning *Theory of Law*, allegedly classified in the category of legal positivism of the exclusive type, although of a non-formalistic nature, characterized by focusing on the function of creating organizational and structural plans inherent to legal systems, in his book *Legality* (Shapiro, 2013, p. 171).

At the outset, it is important to emphasize that the author under examination states that his study is focused only on the analysis of how legal systems actually are (*analytical jurisprudence*), an approach that, in his understanding, would be technically distinguishable and separable from the appreciation of how law should morally be (*normative jurisprudence*).

From the author's perspective, the theory in question is not affected by the classic challenge of the philosopher David Hume, since it does not make the mistake of deriving an obligation ("ought to be") from a fact ("being"), precisely because it is limited to extracting findings about the existence and content of legal planning, that is, the respective reasoning is limited to factual analysis (extracting "being" from what "is") (Shapiro, 2013, p. 188).

Despite this, it is recognized that the description of the theory is made on devices aimed at the normative orientation of conducts constructed with moral concepts (Shapiro, 2013, p. 191). Thus, despite its alleged adherence to a purely descriptive profile approach, as mentioned above, it is admitted that the morality of law is a matter of vital importance (Shapiro, 2013, p. 2-4).

With this approach, the author seeks to point out the descriptive (and also normative) flaws in John Austin's juspositivist theoretical propositions (Austin, 1998; Shapiro, 2013, p. 51-78) and Herbert L. A. Hart (Hart, 2009; Shapiro, 2013, p. 79-117) and, subsequently, to present a proposition capable of overcoming the respective deficiencies, considering the criticisms of post-positivist authors such as Dworkin (Shapiro, 2013, p. 282-306 and 307-330), without incurring in setbacks of a natural law nature.

Having referred to these preliminary issues, the first and most central aspect to be highlighted is that the theoretical proposition in question focuses mainly on *the planning objective performed by legal systems*. The author's intention is not to draw an analogy between law and plans, but rather to extract reciprocal implications, aiming to preserve the juspositivist model, despite the criticism of natural law and post-positivist thinkers (Shapiro, 2013, p. 118-119).

The theoretical framework for the development of this theory is Michael E. Bratman's work on the psychology of practical rationality, which refers to intention as an element of action plans, which serve as a support for human activities and organizations (Bratman, 1999). Based on this work, the author proposes an implication between planning and legal systems, considering that the aforementioned psychological study suggests that human beings have the desire to achieve complex goals and, therefore, exercise their ability to set goals and organize the behavior of collectivities, for a certain time, to achieve them (Shapiro, 2013, p. 119 and 122).

More precisely, the author's central argument is that legal activity is a form of social planning (Shapiro, 2013, p. 195). From this perspective, the legal system consists of planning the organization of efforts to achieve the complex objectives of a given society (Shapiro, 2013, p. 155).

According to the theory of normative planning, legal systems are social planning institutions created with the aim of compensating for the deficiencies of other forms of resolution of legal issues, as they allow overcoming the complexity, contentiousness, and arbitrariness of community life (Shapiro, 2013, p. 171). In fact, the need for legal planning derives from the complexity of objectives, individual limitations, and the pluralism of values and preferences of the members of society (Shapiro, 2013, p. 192).

In this logical line, the function of planning a legal system consists precisely in guiding and coordinating people's behavior, compensating for their cognitive limitations, in order to resolve doubts and disagreements that may eventually arise in strategic contexts. This is because the adoption of plans tends to reduce the risks and costs involved in solving potential problems, especially in massive groups of people (Shapiro, 2013, p. 138). More than that, the sharing of a plan, at least by the majority of people, with a regular hierarchical structure, is a necessary requirement for the success of a society (Shapiro, 2013, p. 149-151).

Following the logic of the theory in question, an agency has authority when two conditions are met, namely, (1) the master plan authorizes that agency to plan for the others and (2) the members of the community normally respect this planning (Shapiro, 2013, p. 180). This authority is based only on a perspective of legality, which does not depend on the recognition of the moral legitimacy of the competent body or on its planning (Shapiro, 2013, p. 186-188).

The construction of plans can be *top-down planning*, when you start with the general lines of goals to be achieved and then break the task into smaller activities to be followed. On the other hand, it is *bottom-up planning*, when one starts from a vague sense of the desired objectives and, from there, the partial actions are scrutinized in detail, aggregating them until they are sufficient to achieve the general scope. The construction of the legal system, in fact, is usually represented by a combination of these two modalities (Shapiro, 2013, p. 124-126), although the model of jurisprudential law (*common law*) is an example of the prevalence of the latter modality referred to (from the bottom up) (Shapiro, 2013, p. 198). Having explained this central point, it should be noted that the juspositivist models of legal theory, as the author classifies under discussion, they present as a central pillar of support the *thesis of the separation between law and morality*, which receives specific contours in the theoretical proposition under consideration (Shapiro, 2013, p. 178). Notably, according to the theory on display, the inexistence of a relationship between legality and morality is characterized by the argument that the existence and content of law are determined only by social facts (Shapiro, 2013, p. 31).

More precisely, the author's objective is to maintain that normative authority is determined only socially, regardless of its moral legitimacy, in order to confirm the assertion that the existence of legal systems (the description of what is) is not to be confused with their moral adjectives (the analysis of how it should be) (Shapiro, 2013, p. 119). More than that, in his view, morality *never* defines the content of the right (Shapiro, 2013, p. 302).

In view of this description that law is a social fact, contrary to morality, it can be seen that the author conceives morality as a set of metaphysical criteria of conduct, that is, he understands that it (morality) is an abstract concept referring to idealized patterns of behavior (Shapiro, 2013, p. 128). Therefore, the thinker does not adhere to the culturalist version of the concept of morality, which also conceives it as a social fact, artificially produced by society, which reflects relative opinions about what is right or wrong, as previously defended by the juspositivist Hans Kelsen (Kelsen, 2006, p. 54 and 78; 2005, p. 11 and 19) and exposed in the Complex Theory of Law (Zanon Junior, 2019b).

According to the author, the legal system constitutes a shared plan, whose existence and validity depends only on social facts, that is, it does not depend on its adequacy to idealized moral postulates (Shapiro, 2013, p. 177). In fact, the discussion about the morality of plans would

undermine one of the main functions of normative planning, which is precisely to overcome the insecurity and risks arising from the reiteration of the moral analysis of the criteria for evaluating conduct in the emergence of conflicts (Shapiro, 2013, p. 177). Thus, in his view, the theoretical proposition in question embodies a legal positivism of the plans ("*plan positivism*") (Shapiro, 2013, p. 178). Having made this description, the author aims to demonstrate that the theory of normative planning overcomes the central criticism of the thesis of the separation between law and morals, consisting of the argument that the existence and legal content do not depend only on the sociological analysis of social facts, since normative interpretation it would necessarily involve moral reasoning (Shapiro, 2013, p. 233).

With this in mind, the author adopts the moral *aim thesis*, according to which the central foundation of legal activity is precisely to remedy the moral deficiencies of the circumstances of legality (Shapiro, 2013, p. 213). However, the author argues that normative planning encompasses the regulation of moral issues (Shapiro, 2013, p. 163). More than that, in his view, it is an essential truth that law has the function of solving problems about morality (Shapiro, 2013, p. 216 and 391).

According to this thesis, then, the scope of the law consists of resolving the problems arising from the divergence regarding the incidence of values in the social context, providing objective criteria in the selection of normative preferences, through the instrument of legal planning. From this perspective, the legal system is a more efficient mechanism than tradition, customs, the search for consensus and individual persuasion for organization and social pacification.

More precisely, the usefulness of legal systems lies in their potential to compensate for the deficiencies of non-legal forms of conflict resolution, precisely through correct legal weightings, that is, by adopting morally sensitive plans in a morally legitimate way (repetition follows the original wording) (Shapiro, 2013, p. 171).

On the other hand, despite declaring his juspositivist position, the author also argues that the analysis of legal judgments in social life makes it difficult to sustain the thesis that they are composed only of legal concepts and terms, given that they also incorporate moral expressions (Shapiro, 2013, p. 115). In fact, in this regard, it is worth reiterating that, in his understanding, law is an answer to the problem of how to resolve moral issues in society (Shapiro, 2013, p. 173).

However, the author recalls that the legal system does not necessarily correspond to an idealized set of evaluative postulates (metaphysical morality), but rather to socially established axiological options (factual or cultural morality). Nothing prevents the legally planned options from contradicting certain ethical standards, since the debatable values of the majority in the exercise of power prevail, for example (Shapiro, 2013, p. 214). Even so, on these bases, it is possible to establish a difference between a crime syndicate and a

democratic state of law, precisely in the fact that the latter, unlike the former, aims to be morally correct (Shapiro, 2013, p. 215-216).

Despite this argument around the description of the legal phenomenon loaded with moral elements, the author argues that his view expresses a version of legal positivism of the exclusive type, rejecting the inclusive version. However, the author understands that legal positivism of the inclusive type adopts the thesis of supremacy (*ultimacy thesis*), according to which legal norms are, ultimately, defined only by social facts (Shapiro, 2013, p. 269). According to this thesis, morality can be used as a criterion for judgment, as long as this practice, in the last degree, is supported by the fundamental norm of the system (Shapiro, 2013, p. 268). This is a version of legal positivism generally attributed to Hart (Hart, 2009, p. 323).

On the other hand, in his perspective, legal positivism can adopt the *exclusivity thesis*, in the sense that legal norms are determined only by social facts (Shapiro, 2013, p. 269). According to this version, it cannot be denied that interpreters (such as judges) apply judgment criteria different from the positive rules to resolve judicial cases, notably the most controversial ones. But, unlike the version exposed above, the explanation offered is in the sense that, in doing so, judgment criteria external to the system (*extra-legal standards*) are applied, albeit frequently (Shapiro, 2013, p. 272).

For this reason, the author adheres to this exclusivist version, generally attributed to Kelsen, in the sense that legal norms continue to be defined only by social facts, even if the activity of producing law, by legislators and judges, involves judgment criteria extracted from moral speculations or are based on custom, politics or even interdisciplinary elements (Kelsen, 1986, p. 148). By following the second path referred to (of legal positivism of the exclusive type), the author argues that, when there is no norm planning the solution to be given to a given concrete case, it is up to the judge to bridge the system, even if by resorting to factors of external judgments, such as morality, thus continuing in the function of social planning (Shapiro, 2013, p. 276-277).

Regarding the *concept of norm,* the author understands that it refers to any general or individualized standard aimed at guiding conduct and serving as an evaluation or criticism scheme. It encompasses all normative species, including rules, principles, guides, recipes, orders, recommendations and plans, of legal, moral, religious, institutional, rational, logical or family origin (Shapiro, 2013, p. 41).

According to the theory in question, plans are a kind of positive norm, created through incremental processes and aimed at resolving questions about what should be done (Shapiro, 2013, p. 129). A plan is, more precisely, a positive and abstract proposition that requires, allows or authorizes people to act or omit themselves, in a certain way, under certain conditions (Shapiro, 2013, p. 127).

According to the author, there are several types of plans that serve as legal norms, and it is necessary to specify directives, permissions, stipulations, authorizations and instructions. The directives correspond to the most basic normative type and refer to the command for people to act or not to act in a certain way, possibly within certain circumstances, harboring both requirements and prohibitions (Shapiro, 2013, p. 226). Permissions are a normative provision that explicitly does not direct the person to act in a certain way (Shapiro, 2013, p. 226). The stipulations, on the other hand, specify how another plan (or norm) is applied in particular contexts (Shapiro, 2013, p. 227). Authorizations do not determine actions, but rather confer the ability for others to plan them (Shapiro, 2013, p. 228). And finally, the instructions are prescriptions that accompany the authorizations, specifying how people can exercise the powers conferred on them (Shapiro, 2013, p. 228). These normative modalities are often combined in the construction of planning for each situation, to enable the desired stimuli.

Regarding *the application of norms*, the author states that it is an exercise in judgment, which consists of a mental faculty that is not strictly governed by explicit, specific and quantifiable rules or methods (Shapiro, 2013, p. 237). Furthermore, the author detaches himself from the traditional reference to the logical syllogism between the legal rule (major premise) and the facts (minor premises), proposed, among others, by the Juspositivists Kelsen (Kelsen, 1986, p. 339-340) and Ferrajoli (Ferrajoli, 2011, p. 538). In a different way, the visualization of the application of the plans is referred to as a sequence of three stages, which are, first, the content of the plan is determined, second, its context of application is understood and, third, the plan is conformed to the respective context (Shapiro, 2013, p. 126).

In this task, it is important to refer to the argument of simple *logic of planning* (*SLOP),* according to which the existence and content of a plan (i.e., of a positive rule) cannot be determined by the facts that the planning function seeks to resolve (Shapiro, 2013, p. 257). From this stems the general logic *of planning argument* (*GLOP),* according to which the interpretation conducted by any member of the system of plans cannot be determined by facts whose existence the members of that system aim to resolve (Shapiro, 2013, p. 311).

In the author's view, these theoretical guidelines imply that, when applying the law, the magistrate should avoid reviewing issues that have already been determined by the authorities in charge of building the planning, under penalty of subverting the legitimacy established in the legal system. Despite this, the application of a norm, as occurs in all levels, is likely to be set aside when rational arguments to the contrary suggest the reconsideration of its merits, provided that the conditions previously planned for this are observed (Shapiro, 2013, p. 202). This argument represents some degree of adherence to the theory of normative defeatability in specific situations, previously developed by Hart (Hart, 1948a, 1949b; Gavião Filho; Prevedello, 2019). Continuing on the subject, it should be noted that, by denying a formalist view of legal positivism, the author points out that magistrates are not restricted to

invoking normative texts, but often resort to moral arguments for the resolution of disputes (Shapiro, 2013, p. 239). More precisely, legal argumentation of a moral nature is visible in the *common law* when judges differentiate binding grounds from merely lateral ones (i.e., they separate the *holding* company from *the dicta*), adopt restrictive or expansive positions, interpret indeterminate concepts (such as reasonable, public interest, obscene, etc.), fix the interpretation of dubious texts, and even, when it comes to following, distinguishing or overcoming a certain (Shapiro, 2013, p. 245-246). Taking this reality into account, the author rejects a formalist view of legal positivism, which simply disregard this description of the reality of the legal phenomenon (Shapiro, 2013, p. 246-247).

It is interesting to note that the author rejects Dworkin's theory of the only correct answer, albeit indirectly, by arguing that some degree of indeterminacy is an important characteristic of legal systems, and should not be viewed as a defect. The argument is in the sense that the absolute certainty of the law, first, is not feasible, given the limitations of natural language, and, second, even if it were feasible, it could generate arbitrariness and even chaos, contrary to what is apparently assumed, as it would prevent magistrates from equating the relevant specificities for the resolution of concrete cases not foreseen (Shapiro, 2013, p. 257). From this perspective, a reasonable legal system needs to observe a balance between, on the one hand, clarity, predictability, and constriction and, on the other, correctness, flexibility, and discretion (Shapiro, 2013, p. 258).

In seeking this balance in the interpretation and application of the rules, it is necessary to observe the methodology of meta-interpretation based on the *economy of trust*, according to which the scheme of attributions of decision-making powers established by the legal system must be respected, in order to ensure greater effectiveness to the deliberations of the branch of the organizational structure that, in the context of social planning, it enjoys greater respectability (Shapiro, 2013, p. 335). Following this logic, the more respectable the interpreter is, from the perspective of the powers established by the legal system, the greater discretion he enjoys, proportionally to the other agents, in the planned organizational scheme (Shapiro, 2013, p. 342-343).

Thus, in order to define the degree of interpretative discretion to be granted to each interpreter, it is recommended to observe three logical parameters of meta-interpretation, consisting of: (1) specification of the competence and character necessary to implement each interpretative procedure; (2) extraction of the reasons that the planners employed to (2.1) define the degree of trust in each actor when receiving their tasks and (2.2) set the systemic objectives that they reserved for each actor; and, (3) evaluation of the best procedures to implement the systemic objectives assigned to each actor, considering that they have competence and character (Shapiro, 2013, p. 359).

Regarding the *concept of legal system*, the author adopts the thesis of shared

action (*shared agency thesis*), according to which the recognition of a norm's belonging to the system depends on its linking to the institutional action of planning a given community (Shapiro, 2013, p. 204). This thesis follows the logical line that the legal system is represented by the activity of planning, organization and social structuring, which results in a set of several guidelines for resolving any conflicts.

Thus, the unity of a system of norms depends on configuring the set of elements of institutional planning of a given social group. In this regard, the author visualizes the possibility of the existence of a higher master plane in each system, but this also demands framing in the shared sociability of the planes (Shapiro, 2013, p. 208). This argument differs, to a certain extent, from the traditional juspositivist proposition, which establishes the unity of the system primarily based on the linking of the partial rules to a higher legal norm, as proposed by Kelsen (hypothetical fundamental norm) (Kelsen, 2006, p. 9 and 217), Hart (supreme rule of recognition) (Hart, 2009, p. 126) and Bobbio (constituent power) (Bobbio, 2009, p. 126) 2010, p. 220).

At dusk, in line with the content exposed above, the author *conceptualizes law* as an organization of institutional, compulsory and self-certified planning, whose objective is to solve those moral problems that cannot be solved, or so well solved, through alternative social orders (Shapiro, 2013, p. 225). As can be seen through the explanation of the category exposed above, in the author's understanding, the establishment of sanctions is not a necessary element of the concept of law (Shapiro, 2013, p. 169).

3 Conclusions

This text presented the central characteristics of Scott J. Shapiro's theory proposition, developed in the work *Legality*, entitled Theory of Normative Planning.

In conclusion, as proposed as a reference of the present research, it was necessary to identify the central aspects of Shapiro's theory that may deserve a more in-depth discussion, in later specific texts, in order to argue whether it remains with the descriptive and prescriptive flaws attributed to the previous positivist models or, alternatively, if it presents a sustainable version of the juspositivist model, without forgetting the possibility that his theory presents points of identity with propositions of a natural law or post-positivist nature, especially with regard to the thesis of the necessary connection between law and morality.

The first and most prominent aspect of the theoretical proposition exposed is, precisely, the focus on the planning function of legal systems. According to the author, coexistence in societies with a mass population depends on the development of law as an instrument for planning the relevant criteria to establish social objectives, the means to achieve them, and also the parameters to resolve any conflicts. The legal instrument would represent the most appropriate technology to resolve different moral preferences, than alternatives such

as customs and tradition, among others, since it pre-establishes the circumstances of legality, in order to reduce the risks and the time for the resolution of any emerging issues in society.

In this regard, it is reasonable to state that the social planning function of legal systems was not unknown to legal theorists, but it was no longer focused as a central characteristic, in the way it was worked by the thinker in question. At this point, an issue that deserves to be raised for future discussions lies in the consequentialist character of the legal activity, resulting from the vision of future planning proposed by the author.

In fact, previous discussions generally observed the need for the interpreter to look at the criteria of judgment affirmed in the past, in order to solve current problems, while the proposition under analysis, alternatively, expressly proposes the visualization of law as an instrument to achieve the moral objectives of the State and society, highlighting the consequentialist perspective of the legal system. This is a controversial issue that deserves specific deepening, considering the potential criticisms regarding the prospective nature of the right.

Continuing, a second point of relevance in the theoretical proposition presented consists in the revision, to some extent, of the classic thesis of the separation between law and morality, which demarcates the theoretical lines of the juspositivists. The authors of legal positivism present similar arguments, but not totally convergent, in relation to the aforementioned thesis, allowing, at least, the division into the two branches pointed out (inclusive or exclusive juspositivism). In the author's perspective, Hart's inclusive model, once considered the most accepted, does not adequately respond to natural law and post-positivist criticisms, recommending a revisited adoption of the exclusivist pattern.

In a very brief summary, for the author, the law would be composed only of positive norms (plans of various kinds), which, however, do not contemplate all the hypotheses of application (margin of indeterminacy of the law) and, therefore, the magistrate would simply be authorized to bridge the system by resorting to standards extra-legal (such as morality), which would be frequently visualized in forensic reality, because the moral objective of the State and the legal system is precisely to provide for the criteria necessary to achieve certain axiological objectives.

In view of this form of presentation of the thesis between law and morals, numerous and important discussions would be recommended in future studies, and it is worth pointing out two central points to be debated.

First, it is important to deepen the theme of the concept of morality adopted by the author, referring to a metaphysical set of idealized standards of conduct. In fact, for some authors, this visualization of morality only closes the discussion between natural law and legal positivism, the first accepting and the second denying the invocation of metaphysical moral standards as norms impacting the validity of law. However, it would not resolve the discussion

of a culturalist nature, based on interpretations of post-positivist authors, who also view morality as a social fact, that is, as an artificial product of society, based on the relativistic arguments previously proposed by Kelsen. By chance, based on this perspective, the thesis of the separation between law and morality proposed by the author (based only on social origin) would be faded and, thus, could shift the classification of the proposal from juspositivist to post-positivist (or, at least, non-positivist), with relevant consequences.

And, second, the various points of connection between legality and morality presented by the author, based on the realistic description of the forensic scenario regarding the effective and frequent use of factors different from legal and jurisprudential texts as criteria for judgment, imply a potential overthrow of the thesis of separation between law and morality, by revealing an effective connection between both. This issue also deserves a separate confrontation.

On these two points, in fact, Thomas da Rosa Bustamente argued that the moral *aim thesis* has moral roots, as it embodies a political argument about the value of legality (Bustamante, 2012, p. 9). This characteristic allows us to consider that the theory in question is a modality of legal positivism of a normative nature, not just a descriptive one (Bustamante, 2012, p. 11). In addition, the aforementioned critic questions the methodology of legal interpretation proposed by Shapiro, mainly considering the admission that judges employ moral reasoning (Bustamante, 2012, p. 13-15).

Going further, Robert Alexy presented arguments to the effect that Shapiro's Theory of Normative Planning, instead of recovering the exclusivist version of legal positivism, presents itself as a non-positivist proposition in improvement (Alexy, 2016).

The arguments exposed in the Complex Theory of Law, referring to the construction of a theoretical model that is more than positivist, also deserve to be temporized, equally when pointing out the maintenance of the legacy of the theory of social facts and, simultaneously, pointing to morality (considered as a social fact) as a legal source, given its frequent use in the legal activities of positivization and judicial adjudication (Zanon Junior, 2019b). In fact, the author's argument that the magistrate would simply be authorized to frequently apply extralegal criteria, not only in controversial cases, but also for everyday activities (such as identifying the *holding company*, interpreting indeterminate concepts, etc.), would eventually imply the counterpoint that the law would be only one among several valid decision-making inputs, in addition to potentially obscuring the difference between the theses of supremacy and exclusivity, which mark the models of positivism.

In addition to the two points above, which reflect the subjects for more stormy discussions, two other questions may recommend relevant deepening of the theoretical proposition examined. One of them would be the definition of the contours and effectiveness of the so-called maximum plan of the legal system, which would correspond, to a certain extent,

to the concept of fundamental norm worked by the classical authors of legal positivism, but which does not represent the defining point of belonging to the system (this is reserved for the planning of social purposes). The other would consist of the controversial assertion that the coerciveness of legal norms would not be a necessary element in the concept of law. Thus, both statements represent a considerable degree of divergence from the classical authors of legal positivism and would deserve further study in specific texts.

Furthermore, the present research ends with the completion of the effort to achieve its two goals, consisting of the presentation of the central aspects of the Theory of Normative Planning to, in the end, point out controversial elements that demand future developments, in specific texts.

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