

KELSEN AND SCHOLTEN ON REASON AND EMOTION IN SOLVING CASES

RAZÃO E EMOÇÃO NA DECISÃO JURÍDICA EM KELSEN E SCHOLTEN

Nuno M. M. S. Coelho¹

Sebastião Trogo²

ABSTRACT

This paper compares two accounts of legal methodology: Kelsen's and Scholten's. It focuses on the relationship of the different psychic faculties (specially reason and emotion) in solving legal cases.

Keywords: Kelsen. Scholten. Finding-law process. Reason. Emotion.

RESUMO

Neste artigo, contrastam-se as concepções de realização do direito na solução de casos concretos de dois autores europeus: Hans Kelsen e Paul Scholten. Interessa especialmente entender como a razão e as outras faculdades da vida psíquica participam da construção da decisão jurídica.

Palavras-Chave: Kelsen. Scholten. Metodologia jurídica. Razão. Emoção.

¹ Nuno M. M. S. Coelho é professor do programa de pós-graduação em Direito da Universidade de Ribeirão Preto (UNAERP) e da Universidade de São Paulo (USP). Livre-Docente, Doutor e Mestre em Teoria do Direito, é autor, entre outros, de "Direito, Filosofia e a Humanidade como Tarefa".

² Sebastião Trogo é professor aposentado do Departamento de Filosofia da Universidade Federal de Minas Gerais (UFMG) e integrante do Programa de Mestrado da Universidade Presidente Antônio Carlos (UNIPAC). Mestre e Doutor em Filosofia, é autor, entre outros, de "O Impasse da Má-Fé na Moral de J.P. Sartre".

1. EMOTION AND CONTEMPORARY THEORIES OF LAW

Some theories want to exclude emotions from finding-law process in particular cases. These theories assume that understanding is a purely intellectual faculty whose success depends on the isolation of the scientist's preferences and passions. Being neutral, as intended here, it means undressing observer's desires and feelings, to leave reason alone work. This way, one could better understand the object of study without distorting it, and thus achieve an objective knowledge.

This claim has been attacked from many approaches, in Humanities and beyond. The history of hermeneutics is a great dialogue about the limits of cognitivism. One cannot understand anything without emotion and desire, taught Dilthey, who fought for the autonomy of human sciences.

There is an important movement in contemporary legal theory that draws attention to the positive participation of emotions in judgment. "Law and Emotions" Scholars contribute to it especially.

However, despite strong criticisms against it, the self-description that most jurists keep about their activity obeys to a rationalist-cognitive schema. Somehow, a kind of vulgar legal positivism remains valid as description of what authorities do when implementing legal norms and solving cases.

I mean by a "vulgar legal positivism" a set of opinions that comprises:

- that judging is applying positive laws;
- which are logically and chronologically prior to the case and to the sentence;
- whose relation (between sentence and laws) is a syllogism-type;
- what turns application a primarily (or exclusively) rational thing;
- largely incompatible with emotional grounding and argumentation.

Many times this vulgar opinion is labeled as Kelsenian. Nevertheless, it is far from true.

Let us recall Kelsen's Pure Theory of Law, and its description of rules' application process. We will see that it provides an important recognition of emotions in the process of finding law.

2. KELSEN'S THEORY OF INTERPRETATION.

2.1) Some topics in Kelsen's account of legal interpretation deserve stressing.

a) It takes seriously the hermeneutical nature of law. Norm is not text, but meaning.

Moreover, the task of grasping normative meanings encompasses the entire experience of law. Making laws involves the interpretation of the Constitution; establishing administrative decisions involves the interpretation of Constitution and laws; and the same for judging particular cases, making contracts etc... Interpretation is required in all phases of dynamical process of creating norms from other (superior) norms, and every norm needs to be interpreted. Law as a scale-type system is unthinkable without interpretation. "Interpretation (...) accompanies the process of law application in its advance from a higher to a lower level" (*Reine...*, cap. VIII, 45). The judge's task of finding law, which is especially interesting to me now, is just a particular case of the general schema of applying superior norms – and it involves, inevitably, interpretation.

b) Interpretation is inevitable because the writing of the superior norm (which grounds the validity of the decision to take) necessarily tolerates more than one meaning. The simple fact that there is difference between the intelligence the lawgiver had about his words (*voluntas legislatoris*), and the objective meaning of these same words (*voluntas legis*), leads to a plurality of hermeneutical possibilities. There may exist intentional plurality of meanings (as when there is indefiniteness about the conditioning facts or about the conditioned consequences) – but even when the lawgiver wants to be precise, his/her wording has more than one meaning, for it belongs to the very nature of language. As "the linguistic expression

of the norm is ambiguous, different interpretations of the words are possible” (*Reine...*, cap. VIII, 45 c). They are always possible, I would stress.

The authority is never totally constrained in his/her decision by the superior norm. “The higher norm cannot bind in every direction the act by which it is applied.” (*Reine...*, cap. VIII, 45 a). Inevitable impreciseness of language opens some “room for discretion”, the famous frame to be filled by the authority in applying-law:

“If ‘interpretation’ is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame”. (*Reine...*, cap. VIII, 45 d).³

2.2) Interpretation is inevitable, but it is not everything that is implied in law-applying. It is just a part of the task of establishing the rule for the particular case.

Kelsen has a very strict rational-cognitive account of interpretation. Maybe this can be argued against his theory, but not that it reduces law-applying to an intellectual one-sized activity.

Interpretation is “an intellectual activity” which “must determine the meaning of the norms to be applied” (*Reine...*, cap. VIII, 45), but this is not the whole story. As interpretation leads always to a plurality of meanings of the norm’s wording, it does not encompass the entire process of deciding. More than intellect, applying-law mobilizes other mental faculties. It is not just intellect but also wishing, desiring. Kelsen takes very seriously the decisional nature of applying-law, and recognizes that it is not reducible to a logical schema. In every experience of law, there is room for deciding, and it is always more than logically subsuming.

³ „Versteht man unter ‘Interpretation’ die erkenntnismäßige Feststellung des Sinnes des zu interpretierenden Objektes, so kann das Ergebnis einer Rechtsinterpretation nur die Feststellung des Rahmens sein, den das zu interpretierende Recht darstellt, und damit die Erkenntnis mehrerer Möglichkeiten, die innerhalb dieses Rahmens gegeben sind. Dann muß die Interpretation eines Gesetzes nicht notwendig zu einer einzigen Entscheidung als der allein richtigen, sondern möglicherweise zu mehreren führen, die alle – sofern sie nur an dem anzuwendenden Gesetz gemessen werden – gleichwertig sind, wenn auch nur eine einzige von ihnen im Akt des rechtsanwendenden Organs, insbesondere des Gerichtes, positives Recht wird.” P. 349.

This is one of the many differences between his and (some of) the theories he calls “traditional”: it is not possible to deduce the inferior norm from the higher. It is not syllogism.

Such theories describe

“the interpretative procedure as if it consisted merely in an intellectual act of clarifying or understanding; as if the law-applying organ had to use only his reason but not his will, and as if by a purely intellectual activity, among the various existing possibilities only one choice could be made in accordance with positive law.” (*Reine...*, cap. VIII, 45 d).⁴

2.3) Up to here, we especially learned that, according to Kelsen, cognition is never enough for applying-law. But what from here? How does legal thinking choose among the various possible meanings inside the frame? Kelsen is sharp: It simply does not work inside it.

“In the application of law by a legal organ, the cognitive interpretation of the law to be applied is combined with an act of will by which the law-applying organ chooses between the possibilities shown by cognitive interpretation.” (*Reine...*, cap. VIII, 46).⁵

Kelsen strongly states that the role of legal reasoning goes just to the point of establishing the frame. Juridical rationality plays absolutely no role inside it: all meanings inside the frame are equivalent, from the legal point of view. Of course the judge has to decide, but then he/she is free to follow other rationalities, choosing according to his/her moral, religious or ideological convictions:

“it is not positive law, but of other norms that may flow here into the process of law-creation – such as norms of morals, of justice, constituting social values which are usually designated by catch words

⁴„Sie stellt den Vorgang dieser Interpretation so dar, als ob es sich dabei nur einen intellektuellen Akt des Klärens oder Verstehens handelte, als ob das rechtsanwendende Organ nur seinen Verstand, nicht aber seinen Willen in Bewegung zu setzen hätte und als ob durch eine reine Verstandestätigkeit unter den vorhandenen Möglichkeiten eine dem positiven Recht entsprechende, im Sinne des positiven Rechts richtige Auswahl getroffen werden könnte“. (p. 349).

⁵„In der Anwendung des Rechtes durch ein Rechtsorgan verbindet sich die erkenntnismäßige Interpretation des anzuwendenden Rechtes mit einem Willensakt, in dem das rechtsanwendende Organ eine Wahl trifft zwischen den durch die erkenntnismäßige Interpretation aufgezeigten Möglichkeiten. Mit diesem Akt wird entweder eine Norm niederer Stufe erzeugt oder ein in der anzuwendenden Rechtsnorm statuerter Zwangsakt vollstreckt.“ (p. 351)

such as “the good of the people”, “interest of the state”, “progress”, and the like.” (*Reine...*, cap. VIII, 46).⁶

Anything may work there to guide the judge inside the frame:

“from the point of view of positive law nothing can be said about their validity. Seen from the point of view of positive law, all these norms can be characterized only negatively: they are norms that are not positive law”. (*Reine...*, cap. VIII, 46).⁷

At this point, we reach the bounders of legal theory. If one wants to know what guides judges to choose among the possible meanings of a statute, one does not exercise legal rationality: that would be studying another subject, not law but politics.

3. WHY NOT TO FOLLOW Kelsen IN LEGAL METHODOLOGY...

I think this is a bad picture of what we, lawyers and judges, actually do.

I think his theory's weakness lies on the way the intellectual and the other psychic faculties relate. Kelsen's concern about the objectivity of law leads him to differentiate strongly law from politics, ethics and other fields wherein there is no objective truth but opinion, in his view. He tries to guarantee the objectivity of legal thought through the clear delimitation of its scope: it runs just until the definition of the frame, and has to stop right there. To get objectivity, Kelsen turns the judge's decision something impossible to understand in legal terms. More than this, his frame theory prevents any attempt of legal theory to understand the legal decision in legal terms:

“Jurisprudential interpretation can do no more than exhibit all possible meanings of a legal norm. Jurisprudence as cognition of law cannot decide between the possibilities exhibited by it, but must leave the

⁶„(...) ist es nicht eine Erkenntnis des positiven Rechts, sondern anderer Normen, die hier in den Prozeß der Rechtserzeugung einmünden können; Normen der Moral, der Gerechtigkeit, soziale Werturteile, die man mit den Schlarworten Volkswohl, Staatinteresse, Fortschritt usw. Zu bezeichnen pflegt.“ (p. 351).

⁷„Über deren Geltung und Feststellbarkeit läßt sich vom Standpunkt des positiven Rechts nichts aussagen. Von hier aus gesehen, lassen sich alle derartigen Bestimmungen nur negativ charakterisieren: es sind Bestimmungen, die nicht vom positiven Recht selbst ausgehen.“ (p. 351).

decision to legal organ who, according to the legal order, is authorized to apply the law". (*Reine...*, cap. VIII, 47).⁸

Every legal authority receives his/her competence from a higher standard, a superior norm that establishes the framework within which authority is exercised. Based on this higher standard, the authority is allowed to act – and this way he/she creates a new standard.

This way, the authority exercises two clearly distinct activities, one rational and other not.

Only one of them can be considered an exercise of legal reasoning.

Kelsen is concerned about distinguishing the autonomy of legal thought from other mental functionings. Legal thought is interpretation, and interpretation is rational-type.

It is only legal – and therefore of any interest to legal science – the rational activity of determining the meaning of the statute to be applied. Choosing is not a matter of intelligence. However, the work of the legal authority does not cease there: he/she needs to create a new rule, from those possibilities, and thus resolve the case.

From here on, the decision has a different nature, it is politics, or “legal policy”, as Kelsen says. Within the framework constructed by rational interpretation, the judge will find the decision without using reason – but any other road. That does not matter to the science of law. At this stage, run the religious, political and moral convictions of the judge, and emotions – and no legal justification may be required from the judge.

Is this what actually happens in courts? The legal reasoning does not seem to reduce to the discovery of a set of possible decisions, among which it is legally indifferent to choose. Contemporary legal systems do not allow such a large field to the personal preferences of the legal authority. Instead of it, they expressly establish the duty to rationally and legally justify any decision.

⁸ „Rechtswissenschaftliche Interpretation kann nichts anderes als die möglichen Bedeutungen einer Rechtsnorm herausstellen. Sie kann als Erkenntnis ihres Gegenstandes keine Entscheidung zwischen den von ihr aufgezeigten Möglichkeiten treffen, sie muß diese Entscheidung dem Rechtsorgan überlassen, das nach der Rechtsordnung zuständig ist, Recht anzuwenden.“ (p. 353)

We need a theory that helps us understand, more realistically, how legal authorities reach legal decisions. Kelsen helps understanding that legal decision is not only rational. It is convincing in showing that intellectual grounding does not suffice. However, his account of the relationship between rationality and the other activities of mind has not to do with our every-day experience of law.

4. PAUL SCHOLTEN'S *GENERAL METHOD OF PRIVATE LAW*.

Kelsen fights traditional theories in their efforts to find the unique correct solution for the case:

“Traditional theory will have us believe that the statute, applied to the concrete case, can always supply only one correct decision and that the positive-legal “correctness” of this decision is based on the statute itself”. (*Reine...*, cap. VIII, 46, d).⁹

He is skeptical about the strength of juridical methods to offer a safe model for applying-law. This gives a good idea of what he means for “traditional Jurisprudence” – probably the conceptions which, from Savigny on, have disputed about how legal decisions are built.

For they do not lead to a clear answer, Kelsen simply throw them aside. This way, he overlooks almost all crucial questions of legal theory, as whether interpretation is grasping the genetic sense of law or whether the actual one (which opposes subjectivists and objectivists in hermeneutics), or the dispute about the elements, ends or paths of interpretation (which rises the diverse methods– literal, systematic, teleological, logical, sociological, historical – and their divergent results).

“Despite all efforts of traditional jurisprudence it has not been possible so far to solve in as objectively valid fashion the conflict between will and expression in favour of the one or the other. All methods of interpretation developed so far lead only to a possible, not a

⁹ „Theorie der Interpretation will glauben machen, daß das Gesetz, auf den konkreten Fall angewendet, stets nur eine richtige Entscheidung liefern könne und daß die positivrechtliche „Richtigkeit“ dieser Entscheidung im Gesetz selbst begründet ist.“ (p. 349)

necessary, result, never to one which is alone correct.” (*Reine...*, cap. VIII, 46, e).¹⁰

From his perspective, Paul Scholten would be a perfect representative of traditional Jurisprudence.

Scholten's *General Method of Private Law* is an elegant and intense tentative of explaining how judges think when they try to find the correct answer to the cases they have to solve. The book covers decisive topics and the complex problems they rise: analogy and legal refinement, the various methods of legal interpretation, authentic interpretation, the sources of law, fictions and presumptions, *voluntas legis* and *voluntas legislatoris*, legal lacunas, extensive interpretation, syllogism, facts and norms relationship, different statutes classifications, objective and subjective law, public and private law, common and state's law and so on.

Scholten takes seriously the tradition of legal philosophy, theory of law and legal methodology, proposing a deep dialogue to them in order to understand the finding of law process. The Book has to be read in its totality (4), for all these topics are brought together to answer a very difficult question: what does determine the judge's decision?

Very differently from Kelsen, Scholten does not ignore the primary duty to justify the sentence. It is mandatory that the “reasons which really persuaded the judge are mentioned in the judicial decree.” (513).

However, this does not mean that the sentence's foundations are simply logic.

Scholten's criticism of traditional jurisprudence drives him to the conclusion that there is no decision without reason, emotion and will. Like Kelsen, Scholten refuses any one-sized account of legal decision-making. But they have very unlike accounts of reason, will and emotion, and also of the way they relate to each other.

¹⁰ „Es ist trotz aller Bemühungen der traditionellen Jurisprudenz bisher nicht gelungen, den Konflikt zwischen Wille und Ausdruck in einer objektiv gültigen Weise zugunsten des einen oder des anderen zu entscheiden. Alle bisher entwickelten Interpretationsmethoden führen stets nur zu einem möglichen, niemals zu einem einzig richtigen Resultat.“ (p. 349-350).

4.1) According to Scholten, deciding involves reason, intellect and logic in different ways. Reason is not something individual that the judge uses to grasp the meanings of a statute. It structures the law in its very process of historical development. Legal tradition is not blind, nor works any legislator without the help from concepts forged by legal knowledge conceived as construction.

“The legislator is bound by the categories, which are studied by legal theory. It is simply *impossible* for him to put them aside, just as it is impossible that somebody could choose not to use the forms of our thought which logic uncovers, or those of the language which are studied by the philosophy of language.” (234)

Legal reason engrains language, and it is impossible speaking or listening, creating or applying law, but using it.

Reason’s partaking in legal experience is quite deeper in Scholten than it is in Kelsen.

Scholten addresses his criticism to Kelsen exactly at this point¹¹:

“People sometime make a sharp separation between law and the science of law. Kelsen (...) even goes as far as stating that the law comprises an “alogical material” and that it is the science of law which turns this into judgments and [legal propositions].” (225)

There is no rationality in the normative material itself, thinks Kelsen, but in the way the legal science perceives it. Scholten instead thinks that legislative outcomes and legal science’s construction is one “an extension of the other”. I think Scholten is obviously right in showing that “A modern Code is full of constructions, and cannot be understood without knowledge of the science of law.” (225).

There are many examples and arguments in Scholten’s Book to show how rationality integrates history and legal tradition.

That leads to another conception about the so-called sources of law, and to a new view of the authority of doctrine, costumes and judges’ law.

¹¹ Other references to Kelsen in Scholten’s book: 302, 380, 48 and 58.

At the moment, I just want to highlight his vivid conception of reason and notice that reason is not something divorced from emotions in Scholten. I choose now just one argument in this direction: reason's cooperation to a good moral understanding of law. According to Scholten, it is "one of the most important functions of legal science to trace the legal principle in the positive law" (253). Legal principle is nothing but "the *moral* element in law" (252). Legal principles "are the orientations which our moral judgment requires from the law" (252). Nevertheless, they cannot be found without reason, for they are recognized from the work of systematization of legal materials. When "looking for the *ratio legis*", we get to the point where it is not possible to reduce a norm from any other:

"we can't go further (...). We have come to that point here, when we formulate a statement, which is for us — people of a certain time living in a certain country with a certain system of law — immediately evident." (251).

This moral requirement relates to the legal system, but at the same time we can just see it if we can recognize it, for "we can only indicate something which is ethically accepted by us." (252). Principles of law function in every law application. "Each time we hark back to the legal principle." (253). Although it is "not law", "no law can be understood without" it (252).

"The search for the principle is an activity of the intellect and the most important work done by the science of law." (261). From the rational activity of rebuilding law in more and more abstract concepts, we are driven to a feeling-type element, essential for understanding law:

"Although we find it *in* the positive law, in the system of rules, decisions and institutions in their totality, it transcends the positive law by pointing to the moral judgment, the division between good and evil, in which the law is founded." (260).

4.2) There is much more than intellect and logic in finding law, and involves desire and emotions: "decision has an autonomous meaning in face of the rule, because it owes its origin partly to this element of finding law. This intuitive choice is also an integral part of the decision." (46). These faculties do not work separately.

The non-rational ingredient of finding law appears in all criticisms Scholten points to traditional opinions in legal theory. I cannot recall all them now. I rather would like to focus on conscience of law, a very problematic concept in legal methodology that can help us understand Scholten's account of emotions in finding law.

Conscience of law is

“the active awareness in every human being of what law is and should be, a specific category of our spiritual life, by which we distinguish with immediate evidence between right and wrong, independently from the (way one finds this expressed in existing institutions)” (481).

Scholten is skeptical about this. Grounding decisions on legal conscience is problematic, he thinks, because it could never be reached by “intellectual inquiry”, as its holders believe. This would mean “an intellectualist and rationalist conception of life”, which Scholten strongly rejects (484).

Legal conscience is open to dispute and hardly keeps apart from ideological views that people and groups support. Legal experience shows exactly that decisions continuously change, expressing the prevalence of different principles in the formation of law (489).

When we reach the moral limit of legal experience – as we do when we talk about conscience of law and principles of law – we do not find a unique norm, but “a plurality of principles”.

Judges have to face the task to deal with this situation. Morality is not homogeneous. However, differently from Kelsen, the judges are not dismissed from the task of finding law – and especially from doing this *as judges*.

How is it possible to there exist a correct answer on these grounds?

This is a chief point: the judge has to face this task as a judge, not as a politician. Kelsen leaves the authority free to choose among possibilities inside the frame, from his/her own religious, moral or political convictions. Scholten does not. Despite the acknowledgement that the moral grounds of legal decision are plural, they are still binding. Judging is weighing arguments, in a context of dispute between opposed claims.

The judge is not allowed to just let his/her feeling, will or even worse, prejudices decide. He/she has to give reasons of decision – even of the non-logical part of it.

How can it be done and justified?

Judging requires “knowledge of all circumstances, a weighing of all factors which point in the one or the other direction (...) after mature deliberation” (493). That is not as the same as to let one’s or one’s social class “legal conscience” decide. Instead of it, that gives a room for criticism of prejudices.

Neither it is simply letting particular views work, as the judge does not decide in his/her own name. The judge is an authority, and he/she must act in the name of the community. “The judge is always an agent of the community — his decision is not an individual moral judgment, but a statement given by somebody with power that binds the community.” (500).

I think here we have the decisive point of his theory. There is no guarantee of objectivity in finding law but the judge’s commitment, both rational and non-rational, to the act of judging. He/she is not an observer: he/she acts. The decision is a deed, an expression of moral agency, with both internal and external bonds – which rests, however, dependent of his own commitment.

Judging is not making a scientific statement, but deciding from intertwined reason and emotion. It does not appeal just to intelligence, but to the entire mind of the judge – who does not act just as a particular individual but as representative of community.

There is much more than intellect and logic in finding law, which is not the same as “applying law” (31) and is not reducible to an interpretative task:

“every decision, also those which are so-called done according to the wording of the law, are at the same time application and creation; there is always the judgment of the person who decides, that co-determines the decision. This follows already from the nature of the application itself.” (299)

Finding law is both applying and creating law, and the point is exactly understanding how these dimensions of the very same activity relate. It is deciding, what involves desire and emotions.

“To find law is always at once an intellectual and an intuitively moral job. It is a decision about what *is* and what *should* be at once, and precisely because of this it is distinguished from the moral as well as from the scientific judgment.” (520)

The requirement that legal theory addresses to the judge – of finding the correct answer – is not founded on the existence of established and peremptory criteria to solve the case. It is founded on the convocation of his/her human responsibility for the act of judging (525). Deciding seriously means not stopping investigating before finding the conclusion which becomes moral and intellectually unavoidable to the judge. Judges act and this way they assume themselves as links between past and future, getting aware of his/her own responsibility in this.

Of course, there is always the risk of arbitrariness. However, no legal methodology could knock out this risk.

Summoning responsibility and making clear everything that is involved in finding law. That is everything that legal theory, as a practical science, can do for helping us decide correctly.

5. ON SCHOLTEN AND ARISTOTLE – A VERY SHORT REMARK

It is worth noting that the paradigm of the good judge is the wise. This has to do with Scholten's conception of theory of law as a practical science, with many consequences I cannot explore here. It can be illuminated from the recall of Aristotle's *phronesis* – the intellectual virtue which enables one to acting and deciding well.

But you are probably tired, and so am I. May we leave this to another talk?

(This is just an unconcluded research, and just a draft. I thank very much for comments and criticism!)

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