

CONTRACT LAW AND ECONOMICS: CYCLES AND EQUILIBRIUM IN THE CANNON OF NORTH AMERICAN LEGAL THOUGHT*

PABLO MÁRQUEZ-ESCOBAR**

ABSTRACT

The dynamics of law and economics in the cannon of American legal thought was initially characterized by a denial of the independence of contract law, tailored by judicial decisions and the realist revolution. This paper shows that this denial begets the rebirth of contract law based on policy doctrines that asked for the turn to economics, by giving a new linguistic framework and foundation to contracts. After such process, an inconspicuous doctrine of contract law was built by the Critical Legal Studies (CLS) doctrine. Its effect was not constructive but deconstructive, but purposeless and proposeless. After the failure of CLS, law and economics consolidated as the actual base of US contract law.

Key words author: Contract Law, Law and Economics, Legal Theory, Legal Thought.

Key word plus: Contract, Law and Economics, Law-Theory.

JEL Classification: K, K12, K1.

Fecha de recepción: 4 de agosto de 2009
Fecha de aceptación: 30 de septiembre de 2009

* Review article on the economic analysis of contract law pursuant to the guidelines established of the Centro de Estudios en Derecho y Economía (CEDE), which belongs to the Economic Law research group of the Pontificia Universidad Javeriana.

** Ph.D. candidate in Law at Oxford University, Master of Laws from Harvard University, Lawyer and Master of Economics and Bachelor of Philosophy from the Pontificia Universidad Javeriana. Professor in financial law, economic law and economic analysis of law from the Pontificia Universidad Javeriana, Rosario and Externado universities, respectively. Contacto: carlos.marquez@law.ox.ac.uk

DERECHO DE LOS CONTRATOS Y ECONOMÍA: CICLOS Y EQUILIBRIO EN EL CAÑÓN DEL PENSAMIENTO LEGAL NORTEAMERICANO

RESUMEN

La dinámica del análisis económico en el cañón del pensamiento legal americano se fundó en una negación del derecho contractual, adaptada por decisiones judiciales y la revolución realista. Este artículo muestra que esta negación genera un renacimiento, y es la política pública la que permite el giro a la economía, dando un nuevo marco lingüístico al derecho de los contratos. Después de tal proceso, la doctrina del los estudios críticos legales (CLS), desarrolló una perspectiva deconstructiva, minando el ciclo con observaciones sin objetivo y ni propósito. Así se consolida el análisis económico legal como marco lingüístico del derecho de los contratos.

Palabras clave autor: derecho de los contratos, derecho y economía, teoría legal, pensamiento legal.

Palabras clave descriptor: contratos, derecho y economía, teoría del derecho.

Clasificación JEL: K, K12, K1.

DROIT DES CONTRATS ET D'ÉCONOMIE: CYCLES ET ÉQUILIBRE DANS LA LIGNÉE DE LA PENSÉE LÉGALE DE L'AMÉRIQUE DU NORD

RÉSUMÉ

La dynamique de l'analyse économique dans la lignée de la pensée légale américaine a été fondée dans une négation du droit des contrats, adaptée par des décisions judiciaires et la révolution réaliste. Cet article montre que cette négation produit une renaissance, et que c'est la politique publique qui permet le virement vers l'économie, en donnant un nouveau cadre linguistique au droit des contrats. Après un tel processus, la doctrine des études critiques légales (CLS), a développé une perspective non-constructive, en minant le cycle avec des observations sans objectif et sans but. On consolide ainsi l'analyse économique légale en tant que cadre linguistique du droit des contrats.

Mots clés auteur: Droit des contrats, le droit et l'économie, théorie légale, pensée légale.

Mots clés descripteur: Contrats, droit et économie, théorie du droit.

Classification JEL: K, K12, K1.

Summary: Introduction. 1. Realism and Contract Law: A first Distinctive Linguistic Pattern. 2. From Realism to Law and Economics. 3. From L & E to CFLS and Backwards. Conclusions. Bibliography.

INTRODUCTION

Langdell's first contract law casebook stated: "Law... consists of certain principles or doctrines. To have such mastery of these as to be able to apply them with facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer"¹. Systematization of a set of cases that reveal the principles governing the legal system is close to the scientific and deontological pretension and conceptualization of Civil Law legal systems.

However, what has been remarkable about the dynamics of the American Legal Thought (ALT) is its close attention to contract law. Certainly during this century contract law is almost omnipresent in the ALT cannon. The dynamics of the discussion inside the cannon shows, in a first instance, a linguistic denial of contract law. This denial was tailored by judicial decisions and the *realist* revolution, with the use of negligence and tort like language to refer to contract law. As in every *cycle*, the denial begets a rebirth, and that is what policy doctrines –asked for– and what the turn to economics did by giving a new linguistic framework to contract law. After such process, an eclectic, or probably not eclectic but inconspicuous, linguistic of contract law was stopped by the Critical Legal Studies (CLS). In fact, the effect of CLS was not constructive but de-constructive, undermining the cycle with its purposeless and proposeless bi-polar observations, impeding new propositions in contract law adjudication and giving an open way to the consolidation of Law and Economics (L&E) as the actual linguistic framework of contract law.

My purpose in this short paper is present the aforementioned dynamic in the Cannon. The goal is to describe the tension between the schools and the synthesis that L&E brought to ALT, and to show that, although, the CLS is strong in its reasoning, the lack of proposition make their statements meaningless for contract law.

1 C.C. Langdell, *Selection of cases on the law of contracts*. Preface to the 1st. Edition. (1879)

1. REALISM AND CONTRACT LAW: A FIRST DISTINCTIVE LINGUISTIC PATTERN

1.1. FULLER'S REACTION IN CONSIDERATION AND FORM

Fuller's reaction to realist's appreciation of contract law is clear when he stated: "if the development of our society continues along the line it is now following, we may expect...that private *contract as an instrument of exchange will decrease in importance*"². His reaction is not entirely contrary to the ideas of realism, he extracts from them several reasons to affirm the *terminal ill*, but he mainly assures that the real problem with contract law and consideration is not that the doctrine of consideration should be voided but that the legal method must evolve with "reference to the ends it serves"³. This is a frontal critic to realists⁴ but owed a great deal to realism in the manner he attacked formalistic enforceability⁵.

Studying the importance of the promotion of "private autonomy", Fuller says that "... the principle of private autonomy may be translated into terms of the theory of the will by saying that this principle merely means that the will of the parties sets their legal relations"⁶. And also states that "the need for investing a particular transaction with some legal formality will depend on the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises"⁷. So, form was not understood as a way to determine legal relations, and therefore, consideration was not a formal structure deduced from the law. But, form is a method to achieve legal *ends*, and therefore, to define policy. In this way, Fuller explains how formalities are designed to make the parties *think* about what they are doing.

The linguistic approach used by Fuller to refer to contracts, is just reasoning about *form* and its implications in *public policy*. Of course, his study and the realist backgrounds leads him to find that there are several ways to avoid consideration in contract law and then, as an instrument of bargaining, contract law is *now* understood as an instrument of liability thought the concept of reliance⁸. These statements are not isolated, but are a synthesis from the previous opinions of the realists that Fuller, despite criticizing, followed in several aspects of their thought.

2 L, Fuller, *Consideration and Form*, 41 *Columbia Law Review* 799 (1941), at 823, §23.

3 *Ibid.*, at 824.

4 Except Cohen who also relies on the positive effects of a new methodology.

5 L, Fuller, *American Legal Realism* LXXVI, 191-235, (2 Proceedings of the American Philosophical Society, 1936).

6 L, Fuller, *Consideration and Form*, 41 *Columbia Law Review*, *supra* note 2, at 806. (1941).

7 *Ibid.*, at 803.

8 *Ibid.*, at 823.

1.2. HOLMES' PATH OF THE LAW AND THE REJECTION OF THE CLT

Since Holmes' *Path of the Law*, we can find traces of Fuller's conclusions. Holmes notes the dangers of conceptualism in Langdell's theory of Law and the classical legal thought. Conceptualism and abstract application had the pretension of certainty and predictability that many civil law countries still have. Holmes shows that certainty in such systems is simply an illusion and conceptualism probably was just an apparatus to avoid or exclude the new socialist revolution out of the picture⁹. In fact, Holmes states his disagreement with theory of contract saying that "no one will understand the true theory...or be able to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract, depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs"¹⁰. Further more, "law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated... in words"¹¹, this means, in Holmes words, that the practical importance for the decision of actual cases is not concepts but understanding "the reasons of the law"¹².

1.3. FROM HOHFELD, FACTS AND CONCEPTS TO COHEN'S TELEOLOGY OF FUNCTION AND POLICY

On the other hand, Hohfeld displayed the same attack against abstractionism while saying, among other statements, that "whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression"¹³. In fact, the main concern of Hohfeld is conceptualism and the fallacies within; to ask if a party had a contract right was meaningless since such concepts were *dependent* on factual relationships¹⁴. A right is empty unless the law provides a remedy, a remedy is only available if there is a duty to support it. So, only the facts determine if a duty is owed and therefore a remedy.¹⁵ Cohen, also criticized conceptualism in the Classical Legal Thought, rejecting formalism and claiming for a functional approach, saying that "functionalism represents an assault upon all dogmas and devices¹⁶ that cannot be translated into terms of actual experience"¹⁷. This seems to explain that concepts are

9 L, Di Matteo, *The contextualist turn*. (2002).

10 O, Wendell Holmes, *The Path of the Law*, 10 *Harvard Law Review*, 457, at 178. (1897).

11 *Ibid.*, at 186.

12 *Ibid.*, at 198.

13 W, Hohfeld, *Some Fundamental Legal Conceptions as Applied to Legal Reasoning*, 23 *Yale Law Journal*, 16, at. 29. (1913).

14 *Ibid.*, at. 24-25.

15 Di Matteo, *Op.*, cit at 58-59, (*supra* note 9, at 24, 2002)

16 This, again, means conceptualism and form.

17 F, Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Columbia Law Review*, 809, at 822. (1935).

a “function of actual experience”, and not the opposite. Therefore he says that, when a realist asks “Is there a contract?” the realist is concerned with the “actual behavior of the courts”¹⁸ and that is why the “contractual relationship like law in general, is a function of legal decisions”¹⁹. Llewellyn well understood that law, and especially contract law, was inherently attached to concepts and rules²⁰. However, he said that “like rules, concepts are not to be eliminated...behavior is too heterogeneous to be dealt with except after some artificial ordering”²¹. But, “a realistic approach to any new problem would begin by skepticism as to the adequacy of the received categories for ordering the phenomena effectively toward a solution of the new problem”²². Thus, substance of contract law is just the remedy, contrary to “typical or the current acceptance of a paper rule or statute as meaning something simply because it has paper authority”²³.

1.4. HALE’S COERCION AND FORM, COHEN’S FUNCTIONALISM AND DEWEY’S PHILOSOPHY OF INDUCTIVE REASONING

Hale followed the same way of reasoning, attacking form and conceptualism, through the concept of coercion, but guided by a different linguistic approach: *policy*. The problem of enforcement is a problem of *coercion*, and the governmental enforcement of *freedom of contract* is inherently *coercive*, then, even “the systems advocated by professed upholders of the *laissez-faire* are in reality permeated with coercive restrictions on individual freedom”²⁴. Then, contract law is an act of coercion not an act of freedom. In fact, as a matter of policy, “the channels into which industry shall follow, then, as well as the appointment of the community wealth, depend upon the coercive arrangements”²⁵. Therefore, policy and the imposition of duties or coercive arrangements –formalities–, is as distributive as normative. That is not necessarily bad –according to Hale–, but requires policy analysis, not deductive logic.

The latter was Dewey’s approach. He defined the philosophical grounds of the realist movement, thought the philosophical defense of *inductive reasoning* and the rise of factual analysis, which was one of the gaps in Holmes’ and Hohfeld’s thought. As he says, “logic is ultimately an empirical and concrete discipline. Men first employ certain ways of investigating and collecting, recording and using data in reaching conclusions,

18 Ibid., at 839.

19 Ibid., at 839.

20 L, Dimatteo, Op. cit., at 57.

21 K, Llewellyn, *A Realistic Jurisprudence – The Next Stop*, 30 *Columbia L. Rev.*, 431, at 27. (1930)..

22 Ibid., at 27.

23 Ibid., at 11.

24 R, Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 *Political Science Quarterly*, 470, at 470. (1923).

25 Ibid., at 493.

in making decisions”²⁶. Rules according to Dewey should be open and therefore, “conceived as tools to be adapted to the conditions in which they are employed rather than as absolute and intrinsic principles”²⁷.

Cohen, also criticized conceptualism in the Classical Legal Thought, rejecting formalism and claiming for a functional approach, saying that “functionalism represents an assault upon all dogmas and devices²⁸ that cannot be translated into terms of actual experience”²⁹. This seems to explain that concepts are a “function of actual experience”, and not the opposite. Therefore he says that, when a realist asks “is there a contract?” the realist is concerned with the “actual behavior of the courts”³⁰ and that is why the “contractual relationship like law in general, is a function of legal decisions”³¹.

1.5. CLOSING THE FIRST CYCLE: LLEWELYN’S RULES AND SUBSTANCE

Llewellyn well understood that law, and especially CL, was inherently attached to concepts and rules³². However, he said that “like rules, concepts are not to be eliminated. . . behavior is too heterogeneous to be dealt with except after some artificial ordering”³³. But, “a realistic approach to any new problem would begin by skepticism as to the adequacy of the received categories for ordering the phenomena effectively toward a solution of the new problem”³⁴. Thus, substance of CL is just the remedy, contrary to “typical or the current acceptance of a paper rule or statute as meaning something simply because it has paper authority”³⁵.

2. FROM REALISM TO LAW AND ECONOMICS

As we can see, realism brought contract law to a different linguistic pattern. A contract is not any more a concept is just remedies, this is what the judge looks for in a contract. With this approach, the law of contracts lost its scope, applicability and its functionality as an institution regulating trade and became a mechanism to regulate liability. This is parallel with the judicialization of freedom of contract, consideration

26 J, Dewey, *Logical Method and Law*, 10 *Cornell Law Quarterly*, 17, at 19. (1924).

27 *Ibid.*, at 27.

28 This, again, means conceptualism and form.

29 F, Cohen, *Op. cit.*, at 822.

30 *Ibid.*, at 839.

31 *Ibid.*, at 839.

32 L, Dimatteo, at 57.

33 K, Llewellyn, *Op. cit.*, at 27.

34 *Ibid.*, at 27.

35 *Ibid.*, at 11.

and so on and so forth, where the framework of analysis is negligence, liability and, the “concept” stressed by Llewellyn, remedies. Some authors argue that realism was not a reactionary but a conservative stage in ALT, realism was the way to preserve the traditions of the common law³⁶.

2.1. FULLER ON REALISM: NOT REAL ENOUGH

Fuller seems to be conscious about this problem and realizes that the absence of a linguistic and a conceptual framework to contract law becomes form its judicialization and the judicialization of legal theory. In fact, it is evident that policy is under every judicial decision, and as he states, consideration is a problem of substance not a problem of form. But, anyway, the path of contract law is its decline as a mechanism of bargain as in Fuller’s quotation. The reaction to this new way to understand the realist objections and the judicialization of legal theory was founded in the concept of policy that Fuller and Cohen had developed a long time ago. What was important in Fuller and Hart and Sacks is that they realized that there is a need in legal theory to go beyond the judiciary, and recall that the law is not just what the judge says the law is. The law goes beyond the judiciary in a set of non-judicial legal relations³⁷.

2.2. COASE: PROPERTY, TRANSACTION COSTS AND CONTRACTS

Chronologically, the first step in this rebirth of contract law in the *Cannon* was given by Coase. As there was a linguistic turn in philosophy, this is the economics turn in the analysis of legal issues. Indeed, with the use of economic language to explain the same phenomena studied in the law, Coase changes the perspective; he understands that a legal problems do not start with “trouble”, or, as Holfeld said, “with the duty and its remedy”³⁸, but with bargaining³⁹. Contracts, then are not the cause of harm but the solution to it⁴⁰. This view starts with the non-judicial approach to contract law, highlighted by Hart and Sacks⁴¹, in which the main point is the use transactions costs (TC) and property rights, as the principal concept to explain contractual relationships and the process of contracting⁴².

Coase turns down the judicial analysis of contract law, showing that the solutions to such issues are given, *ex ante*, by contract theory (CT). Indeed, the problem of contract

36 B, Ackerman, *Reconstructing American Law*. (1984).

37 H, Melvin., A, Martin., W, Eskridge & P, Fricke., *The Legal Process: Basic Problems in the Making and Application of Law*, (Problem No. 1, 1958).

38 *Ibid.*, *Supra* note 15.

39 R, Coase, *The Problem of Social Cost*, 3 *Journal of Law and Economics*, 1, at 4. (1960).

40 *Ibid.*, at 43.

41 Hart & Sacks, *Op. cit.*, at. 12.

42 R, Coase, *Op cit.*, 4.

law and Tort Law (TL) comes from a misunderstanding related with the framework of analysis both in economics and jurisprudence⁴³. Contract law cannot be a branch of the legal system defined *ex post* by the judiciary, requires Government design and therefore, an efficient allocation of property rights and diminution of TC⁴⁴ by default rules, and maximization of the value of production and bargaining⁴⁵.

This two ends depart from the assumption that the “the government is, in a sense, a super-firm”⁴⁶ and then, is the director of the policy. In Coase’s view, this policy is simply an occasional institutionalized (governmental) plan of allocation of property titles and regulation that can lead to a diminution of TC⁴⁷. Occasional because definition of property titles and regulation is costly and not necessary leads to better outcomes than the market, but in certain circumstances is less costly for the government than for the market to diminish TC via regulation and property rights⁴⁸. So, contract law may be seen as a framework to diminish transaction costs, and increase social welfare.

Transaction costs beget incentives and internalize the costs of action, but with a certain default CL, contract negotiation will be as deep as costs allow it. The legal issues suggested by Coase, come from the recognition of “market imperfection”, the impossibility of perfect solutions, and then, the new linguistic framework, or rhetoric, to explain the probable responses of agents to legal intervention⁴⁹. In Coase’s view, the story starts with the definition of the “parable” of the farmer and the rancher, in which there is a negative externality. This analysis opens the door to new concepts that help interpret the constrains of contractual transactions and contract law, and therefore the new ways of legal intervention and judicial policy. In a way, from the tortification of contract law, Coase brings a *functional* approximation to view every problem of TL as an *ex ante* contractual problem. This *functional* or *causal* interpretation of the facts in economic concepts, leads to a rebirth of contract law as a new set of concepts and abstractions in contract law and adjudication. As Fuller, this new perspective takes some of the realists, some of the policy and some of the sociology. With the construction of a new set of *categories*, voluntary bargaining, free will and the recognition of the transaction limits of contracts, contract law rebirths.

This Coasean (re)construction of contract theory also is a critic of Classical Legal Thought (CLT), the abstract and hard-to-find conceptualizations of mistake, impossibility,

43 *Ibid.*, at 4.

44 *Ibid.*, at 16-19.

45 *Ibid.*, at 16-19.

46 *Ibid.*, at 16.

47 *Ibid.*, at 18.

48 *Ibid.*

49 B, Ackerman, *Op. cit.*, at 56.

duress, etc, are not longer the main categories, nor the main issues in contracts drafting and litigation. Now, transaction costs, least cost avoider and other economic terms appear in the determination of the language to talk about contract law.

Contract law, after the L&E, is seen as the mechanism to smooth legal commitments, coordination and property rights transfers. So contract law is not a mechanism to enforce litigation or wrongful actions, but a mechanism to ameliorate conflict. The biggest effect of this re-birth of contract law is the changes that such switch has in the emphasis of legal thought in non judicial behavior, which, under the judicially-oriented scholarship, was underemphasized. In addition, L&E became a suitable theoretical structure to analyze judicial decisions, as Coase shows⁵⁰. This is then a transactional theory of contract law⁵¹, focused not in the judge's construction but in the parties' intentions; focused not in the remedy but in the clauses.

2.3. MACULAY AND GALANTER: NON-JUDICIAL LEGAL RELATIONS AND POWER WITHIN THE JUDICIAL SYSTEM

The reaction to the realists' frame/rhetoric of contract law was not isolated in Coases' words. Macaulay also showed that contracts framed as the judge's interpretation and the judges' remedies were not the rule but the exception⁵². In Llewelyn's words, Macaulay showed that contracts are a "social event"⁵³. The title of the article shows the confusion that realism brought. During the whole article, Macaulay showed non-judicial enforcement of contracts by contractual practices⁵⁴, but his mind, apparently, probably ironically, calls this contractual terms as non-contractual, presenting contract law as a default to litigation. His article is empirical, completely empirical and his conclusions go straight to the point: contract law is not the judge rule, but the parties *agreement*. He finds that reputation and other "kind" of incentives induce contractual relations and contract law, and then, contract law and bargaining are a part of a transactional world not a judicially managed world.

In Galanter's article there is also a way to see why contract law and contracts have a way to "come out ahead" of the realist not-really-realistic tradition. In fact, he finds that litigation by repeated player can influence the outcome of judicial decision; in a world where power and "the law" are correlated, evidently, the "haves" in contracts,

50 R, Coase, Op. cit., at 19-28.

51 E, Rubin, *Nonjudicial life of contract law*, (Nw.U.L.Rev.).

52 S, Macaulay, *Non Contractual Relations in Business: A Preliminary Study*, 28 *American Sociological Review*, 55, (1963).

53 Ibid., at

54 Ibid., at

have an advantage in the outcome of adjudication and redistribution⁵⁵. His pessimistic view of litigation was full of game theory and strategy analysis, but indicated that, only with legal change, it would be able to diminish the asymmetries in power and distribution mediated by interpretation in favor of the repeated players-haves⁵⁶.

3. FROM L&E TO CLS AND BACKWARDS

3.1. KENNEDY'S MORAL BI-POLARISM AND THE INCOMMENSURABILITY OF CONTRACT LAW THEORY

All the debate about the rhetoric is “(re)interpreted” and “(re)formulated” several years later by Duncan Kennedy. His meta-linguistic thesis is interesting, provocative and eye-opener, but also, purposeless, proposeless and empty. Kennedy insists that the legal system is in a constant tension among two different and incommensurable⁵⁷ “visions of the universe” in the law and the moral, making a relationship between rules and standards and the morals of *self-interest* and *altruism*. In terms of contract law, there are some that favor the use of rules and then the interests of self-reliance, and those that advocate for standards, are more in favor of the morality of altruism⁵⁸. Then, the debate is a debate about the meaning of morality by itself, which I will call bi-polar morality. This bi-polar morality then is, in a positive pole, attracts standards to altruism, repealing the negative pole, rules.

The problem with Kennedy's bi-polar morality is that he finds that such tension, as in a magnet, is not dialectic. When he says: “The opposed rhetorical models lawyers use reflect a deeper level of contradiction. At this deeper level, we are divided among ourselves, between radically different visions of humanity and society, and between radically different visions of our common future”⁵⁹. This means that such tension between the opposite views of the world will not end in a synthesis, but will sustain in an irremediable cycle between formalism and altruism. This approach to the law, despite of critical and assertive, is useless and hopeless. He is setting “the Law” and contract law in a *repulsive* institutional setting where distribution and altruism is at the side of the positive pole, and self-reliance (individualism) and free trade at the opposite.

55 M. Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law and Society Review*, 95, (1974)

56 *Ibid.*, at 151.

57 Not in the Kuhn's way.

58 Kaplow and Shavell, make an outstanding defense of the altruism in self-reliance morals in *Fairness vs. Welfare* (2004). Also, see Kaplow's *Rules vs. Standards* (1994).

59 D. Kennedy, *Form and Substance in Private Law Adjudication*, 88 *Harvard Law Review* 1685, at 1685, (1976).

What's the problem with his view? Well, he is avoiding consequentialism and deontology as the guide of the legal system evolution. Indeed, if the law is intended to be a social institution to attain *development* or if the law has a function, from a consequentialist point of view, Kennedy's arguments have no value since he only "points" but do not propose. In fact, he asserts that there is no way to balance any of those encountered policies since "the imagery of balancing presupposes exactly the kind of more abstract unit to measurement that the sense of contradiction excludes"⁶⁰. This point is assertive, since the principle for balancing could be imbibed with the bipolar of self-reliance or altruism. However, such distinction is tautologic and useless. If the purpose of law is distributive, a way to balance self-reliance and altruism must be a way to balance the aim of the law.

Form a deontologist point of view, Kennedy's argument is hopeless and empty. He says: "The meaning of contradiction at the level of abstraction is that there is no meta-system that would, if only we could find it, key us into one mode or the other as circumstances 'required'"⁶¹. Then, he does not find the "metaprinciples" that are behind the law, nor the principles behind the pervasive counter visions of the world that could lead to a deduction of the roots of such conflict.

Even more pessimistic is his appeal to the impossibility of the existence of a "logic" of legal systems as the one stated by Langdell⁶², highly criticized by Holmes and Dewey. It is true that he finds an "order" in adjudication, and such rhetoric of "order", contract law is given in the poles of "policy", altruism and self-interest or self-reliance⁶³. But, again, such rhetorical order of contract law is not related with something different in the legal system than judicial and legislative relations; and, as we saw, "the law" and the contractual practices within the law go beyond the judicial and legislative process.

On the other hand, Kennedy finds, not explicitly, a problem of in the linguistics of the law, and then creates/follows a meta-approach to legal relations and legal analysis of judicial behavior. This meta-language about the law has a simple goal: it seems to avoid the functional approach to the law, and helps Kennedy to avoid the aforementioned issue about the purpose of a legal system. This kind of Foucaultian approach does not refer to the language about the law, and therefore focuses in the rhetoric of lawyers and scholars but not in the meaning, purpose and visions of the legal system. By doing this he shares only one thing with the L&E tradition, that the previous way to "refer" about law was "a chaotic mass of policies"⁶⁴ that

60 *Ibid.*, at 1775.

61 *Ibid.*, at 1775.

62 *Supra* note 1.

63 D, Kennedy, *Op. cit.*, at. 1724.

64 At 1685.

required a new language or linguistic framework to explain the meaning/scope/purpose of contractual policies.

CONCLUSIONS: L&E AND THE REBIRTH OF CL

The main conclusion of L&E is that CL is not a mechanism to enforce litigation or wrongful actions, but a mechanism to ameliorate conflict. The biggest effects of this re-birth of CL are the changes that such switch has in the emphasis of legal thought in non-judicial behavior, which, under the judicially-oriented scholarship, was underemphasized. In addition, L&E became *steady state* theoretical structure to analyze judicial decisions, giving “eclecticism” to legal theory since economics can be malleable to any side of the bipolar construction of the morals.

BIBLIOGRAPHY

- D, Kennedy, *Form and Substance in Private Law Adjudication*, 88 *Harvard Law Review* 1685. (1976).
- F, Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Columbia Law Review* 809. (1935).
- G, Calabresi & D, Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 *Harvard Law Review* 1089. (1972).
- H, Melvin, A, Martin., W, Eskridge & P, Fricke, *The Legal Process: Basic Problems in the Making and Application of Law*, (Problem No. 1, 1958).
- J, Dewey, *Logical Method and Law*, 10 *Cornell Law Quarterly*, 17. (1924).
- K, Llewellyn, *A Realistic Jurisprudence – The Next Stop*, 30 *Columbia L. Rev.* 43. (1930).
- K, Llewellyn, *On the Good, the True, The Beautiful, In Law*, 9 *University of Chicago Law Review*, 224. (1941).
- L, Fuller, *American Legal Realism*, LXXVI 2, (Proceedings of the American Philosophical Society, 191-236, 1936).
- L, Fuller, *Consideration and Form*, 41 *Columbia Law Review*, 799. (1941).
- M, Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law and Society Review*, 95. (1974).
- O.W, Holmes, *The Path of the Law*, 10 *Harvard Law Review*, 457. (1897).
- R, Coase, *The Problem of Social Cost*, 3 *Journal of Law and Economics*, 1. (1960).

- R, Dworkin, *Hard Cases*, 88 *Harvard Law Review*, 1057. (1975).
- R, Dworkin, *Law As Interpretation*, 60 *Texas Law Review*, 3, 527-550. (1982).
- R, Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 *Political Science Quarterly*, 470. (1923).
- R. A, Posner, *A Theory of Negligence*, 1 *Journal of Legal Studies*, 29. (1972).
- S, Macaulay, *Non Contractual Relations in Business: A Preliminary Study*, 28 *American Sociological Review*, 55. (1963).
- W, Hohfeld, *Some Fundamental Legal Conceptions as Applied to Legal Reasoning*, 23 *Yale Law Journal*, 16. (1913).

